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ON THE ACTIVATION OF ICC JURISDICTION OVER THE CRIME OF AGGRESSION[2]

ABSTRACT

In the early hours of 15 December 2017, the Assembly of States Parties to the Rome Statute made the decision to activate the International Criminal Court's jurisdiction over the crime of aggression from 17 July 2018 onwards. The activation resolution was adopted after intense negotiations about one aspect of the jurisdictional regime, which had remained controversial since the adoption of the Kampala amendments on the crime of aggression. The New York breakthrough completes the work of the Rome and Kampala conferences and marks the culmination of a fascinating century-long journey. With all its imperfections, the consensus reached at the United Nations headquarters sends a timely appeal to the conscience of mankind about the fundamental importance of the prohibition of the use of force in any international legal order aimed towards the preservation of world peace.

1. VERSAILLES, NUREMBERG, TOKYO, AND ROME: INITIAL MILESTONES OF A LONG JOURNEY

In a speech during an electoral campaign event in November 1918, the British Prime Minister, David Lloyd George, declared: 'Somebody […] has been responsible for this war that has taken the lives of millions of the best young men in Europe. Is not one to be made re-

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sponsible for that? All I can say is that if that is the case there is one justice for the poor and wretched criminal, and another for kings and emperors.'[3]

While the Prime Minister's message provoked applause from his audience, the response of the diplomats of the time was less than enthusiastic. In its report of 29 March 1919 to the Preliminary Peace Conference, the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties reached the following conclusion:

> The premeditation of a war of aggression, dissimulated under a peaceful pretence, then suddenly declared under false pretexts, is conduct which the public conscience reproves and which history will condemn, but by reason of the purely optional character of the institutions at The Hague for the maintenance of peace … a war of aggression may not be considered as an act directly contrary to positive law, or one which can be successfully brought before a tribunal such as the Commission is authorized to consider under its terms of reference.

This confirmation of the predominant view of nineteenth century international law on the use of force by states foreshadowed the failure of the first attempt to set a precedent for the international criminalization of aggressive warfare.[4] This failure, however, also was a prologue. The Commission on Responsibilities had already complemented its rather dry conclusion with a hint that pointed to a possible change of direction: 'It is desirable that for the future penal sanctions should be provided for such grave outrages against the elementary principles of international law.'

In the inter-war period, this 'desire' was taken up by a movement of scholars which made a pioneering contribution to the formation of the discipline of international criminal law. In particular, the proposal for a crime of aggression held a prominent place in Vespasian Pella's 1935 *Plan d'un code répressif mondial*. But, as Pella himself observed in retrospect, 'States did almost nothing between the two wars to bring about an international system of justice'.

By this time, the United Kingdom had also joined the ranks of the sceptics. In 1927, the British Foreign Minister Austen Chamberlain informed the House of Commons of his view that a definition of aggression would amount to 'a trap to the innocent and a signpost for the guilty'.[5] Yet, at the more traditional inter-state level of international law, the 1928 Kellogg-Briand Pact (which is the centrepiece of the fascinating and currently much-debated book

[3] The first part of this essay follows parts of C. Kreß, 'Introduction: The Crime of Aggression and the International Legal Order', in C. Kreß and S. Barriga (eds), *The Crime of Aggression: A Commentary* (2 vols, Cambridge University Press, 2017) 1–18. This earlier part of the international conversation about the subject has received a magnificent monographic treatment in K. Sellars, *'Crimes Against Peace' and International Law* (Cambridge University Press, 2013).

[4] For a colourful account of this 'first attenpt', see K. Sellars, 'The First World War, Wilhelm II and Article 227: The Origin of the Idea of "Aggression" in International Criminal Law', in Kreß and Barriga (eds), *supra* note 3, 19–48.

[5] This famous citation is taken up by Martti Koskenniemi in his reflections 'A Trap for the Innocent …', in Kreß Barriga (eds), *supra* note 3, 1359–1385.

'The Internationalists' by Oona A. Hathaway and Scott J. Shapiro[6]) marked the transition in positive international law from a *ius ad bellum* to a *ius contra bellum*. The Pact went even further and opposed the idea that the enforcement of a legal obligation could, as such, constitute a 'just cause' for war. The Pact was well received and entered into force as early as 1929. And when the decision was made at the end of the Second World War to make Germany's aggressive wars the subject matter of criminal proceedings, the Pact became the legal document of reference. The fact that the Pact lacked a penal sanction was of course well known. But now the world's political leaders were determined to set a creative precedent. At the Nuremberg trial, the British Chief Prosecutor Hartley Shawcross translated that determination into the following words: 'If this be an innovation, it is an innovation which we are prepared to defend and justify.' And Robert Jackson, the charismatic United States Chief Prosecutor, who was one of the most important driving forces behind the creative precedent that was to be set, made this famous promise: 'And let me make clear that while this is first applied against German aggressors, the law includes, if it is to serve a useful purpose it must condemn, aggression by other nations, including those which sit here now in judgment.'

The British delegation at Nuremberg, which was advised by Hersch Lauterpacht, then in the process of establishing himself as a leading authority in international law, could feel itself emboldened by the powerful statement that Lauterpacht had made a few years prior to the Nuremberg trial: 'The law of any international society worthy of the name must reject with reprobation the view that between nations there can be no aggression calling for punishment.' The defence replied by placing reliance on the legality principle. Not without eloquence, Hermann Jahrreiß, professor at the University of Cologne, pleaded:

> [T]he regulations of the [London] Charter negate the basis of international law, they anticipate the law of a world state. They are revolutionary. Perhaps in the hopes and longings of the nations the future is theirs. The lawyer, and only as such may I speak here, has only to establish that they are new, revolutionarily new. The laws regarding war and peace between states had no place for them — *could* not have any place for them. Thus they are criminal laws with retroactive force.

But, as was perhaps to be expected, the 1946 Nuremberg Judgment essentially endorsed the case for the Prosecution. It emphatically stated: 'To initiate a war of aggression … is not only an international crime; it is the supreme international crime …'.[7]

While Nuremberg and the subsequent Tokyo judgment,[8] together with the United Nations (UN) General Assembly's confirmation of the Nuremberg principles, crystallized the con-

[6] O.A. Hathaway and S.J. Shapiro, *The Internationalists. How a Radical Plan to Outlaw War Remade the World* (Simon & Schuster, 2017).

[7] For a comprehensive analysis of the Nuremberg judgment on 'crimes against peace', see C. McDougall, 'The Crimes against Peace Precedent', in Kreß and Barriga (eds), *supra* note 3, 49–112.

[8] It should not be forgotten that the Tokyo Judgment, unlike Nuremberg, was not unanimous and that the 'Tokyo Dissents' form part of the long debate about the crime of aggression. For a comprehensive analysis, see K. Sellars, 'The Legacy of the Tokyo Dissents on "Crimes against Peace", Kreß and Barriga (eds), *supra* note 3, 113–141.

cept of the crime under international law of waging a war of aggression, developments over the next few decades would continue to bear greater resemblance to the state of affairs in the inter-war period. The 1945 UN Charter had transformed the prohibition of war into a prohibition of the use of force. The Charter sought to fortify that latter prohibition through a system of collective security, which aimed higher than its forerunner in the 1919 Covenant of the League of Nations. But while these precedents had given birth to the idea of possible penal sanction for the unlawful use of force, the enforcement of this sanction — either through an international criminal court or at the national level — was to remain a vain hope for the time being. In the 1950s, Bert Röling, the Dutch member of the Tokyo Tribunal, articulated the pessimism of the time: 'It would be a remarkable and astonishing thing: to find a generally acceptable definition of aggression.'

The year 1974 did not prove Röling's scepticism wrong, although, on 14 December that year, the General Assembly succeeded in adopting its Resolution 3314[9] by consensus. But on somewhat closer inspection, the 'Definition of Aggression', as contained in the annex to that resolution, turns out to be replete with constructive ambiguity.[10] Most importantly for our purposes, the consensus text distinguished between 'act of aggression' (within the meaning of Article 39 of the UN Charter) and 'war of aggression'. Only the latter concept was directly related to the idea of individual criminal responsibility under international law (*cf.* the first sentence of Article 5(2) of the annex to 1974 GA Resolution 3314) and no attempt was made to define this concept.

And Röling's scepticism would resonate even in the 1990s when the world witnessed the revival of international criminal law *stricto sensu*. The renaissance of the idea to create a global system of international criminal justice did not encompass the Nuremberg and Tokyo legacy on 'crimes against peace'. The Statutes of the international criminal tribunals for the former Yugoslavia and for Rwanda did not even list such a crime. Due to a last minute compromise resulting from a proposal submitted by the Movement[11] of Non-Aligned Countries,[12] Article 5(1)(d) of the Rome Statute of the newly created International Criminal Court (ICC) did include the 'crime of aggression', as it is now named. But the second paragraph of this provision made plain that the ICC was yet to be empowered to exercise its jurisdiction

[9] General Assembly, 'Definition of Aggression', GA Res. 3314 (XXIX), 14 December 1974.

[10] For a detailed account, see T. Bruha, 'The General Assembly's Definition of the Act of Aggression', in Kreß and Barriga (eds), *supra* note 3, 142–177.

[11] A group of states (also called Non-Aligned Movement) not formally associated with any major power bloc. One of the main goals of creating this group was to struggle against big power and bloc politics (editor's note).

[12] 'Amendments Submitted by the Movement of Non-Aligned Countries to the Bureau Proposal (A/CONF.183/C.1/L.59)', 14 July 1998, UN Doc. A/CONF.183/C.1/L.75, as repr. in S. Barriga and C. Kreß, *The Travaux Prépartoires of the Crime of Aggression* (Cambridge University Press, 2012) 315. It bears recalling that Arab States (and among their distinguished delegates, Professor Mohammed Aziz Shukri from the University of Damascus deserves a special mention) have been particularly active in support of this last minute, and very important, diplomatic activity. And now Arab States will hopefully remember that they have repeatedly stated that the absence of the Court's power to exercise its jurisdiction over the crime of aggression constitutes an important obstacle for them to ratify the ICC Statute. For a detailed analysis of the policy positions of Arab States, see M.M. El Zeidy, 'The Arab World', in Kreß and Barriga (eds), *supra* note 3, 960–992.

over this crime.[13] Once again, it had proven impossible to agree on a definition of the crime.[14]

2. LIECHTENSTEIN'S APPEARANCE: PRINCETON AND KAMPALA

An overwhelming majority of states, however, have not been prepared to accept that the crime of aggression is, for all practical purposes, not part of the *corpus* of crimes under international law. Since 2003,[15] Liechtenstein's Permanent Representative to the United Nations, Ambassador Christian Wenaweser, and his chief legal advisor Stefan Barriga, with the support of a number of eminent personalities, including perhaps most notably the charismatic Nuremberg prosecutor Benjamin Ferencz,[16] and Jordan's[17] not less charismatic diplomat (and since 2014 UN High Commissioner for Human Rights) Ambassador Prince Zeid Ra'ad Al Hussein from Jordan have worked tirelessly to give voice to this sentiment and to create a momentum for change that has ultimately proved irresistible.[18]

By the year 2009, a consensus on a draft substantive definition of the crime had emerged within the Special Working Group on the Crime of Aggression, a sub-organ of the ICC's

[13] In addition, Paragraph 7 of the Final Act of the Rome Conference (UN Doc. A/CONF.183/13, 17 July 1998, as repr. in Barriga and Kreß, *supra* note 12, 331) entrusted the Preparatory Commission with the mandate to prepare 'an acceptable provision on the crime of aggression for inclusion in this Statute'.

[14] For a detailed account of the negotiations at the Rome conference, see R.S. Clark, 'Negotiations on the Rome Statute', in Kreß and Barriga (eds), *supra* note 3, 244–270. For a documentation of the discussion and the proposals submitted between 1995 and 1998, see Barriga and Kreß, *supra* note 12, 201–331.

[15] No significant progress was achieved between 1998 and 2002. The work during these years is recounted by R.S. Clark, 'Rethinking Aggression as a Crime and Formulating Its Elements: The Final Work-Product of the Preparatory Commission for the International Criminal Court', 15 *Leiden Journal of International Law* (2002) 859–890, and it is documented in Barriga and Kreß, ibid, 334–419.

[16] B.B. Ferencz' monumental documentation *Defining International Aggression – The Search for World Peace: A Documentary History and Analysis* (2 vols, Oceana Publications, 1975) is well known. For his moving personal memoir, see B.B. Ferencz, 'Epilogue. The Long Journey to Kampala: A Personal Memoir', in Kreß and Barriga (eds), *supra* note 3, 1501–1519. It should also be noted that Ben's son, Professor Donald Ferencz, the founder of the Global Institute for the Prevention of Aggression, has carried the flame forward and made numerous dedicated contributions to the negotiations, especially in their final phase. For Don's account of the activation of the ICC's jurisdiction over the crime of aggression, see D.M. Ferencz, *Aggression Is No Longer a Crime in Limbo*, FICHL Policy Brief Series No. 88 (2018).

[17] Jordan has continued to play an active and constructive role in the negotiations, including those in New York in December 2017.

[18] The remarkably substantial (and at the same time transparent) discussions during 2003 and 2009, which, in important parts, took place in the splendid grounds of Princeton University (and have therefore often been referred to as the 'Princeton Process'), and which were greatly facilitated by the hospitality of the Liechtenstein Institute on Self-Determination at the Woodrow Wilson School, are documented in Barriga and Kreß, *supra* note 12, 422–724. For a rather critical scholarly assessment in the form of a monographic treatment, see O. Solera, *Defining the Crime of Aggression* (Cameron May, 2007); for a monographic treatment of the subject in French, see M. Kamto, *L'agression en droit international* (Editions A. Pedone, 2010).

Assembly of States Parties (ASP).[19] This consensus proved robust, even after the United States had returned to the negotiation table.[20] The definition reads as follows:

> For the purpose of this Statute, "crime of aggression" means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

The threshold requirement that the act of aggression must be in 'manifest' violation of the Charter of the United Nations constituted the key to reach agreement about the most demanding aspect of the negotiations: the formulation of the State Conduct Element. [21] The double function of this requirement is to set a quantitative ('by its gravity and scale') and a qualitative ('by its character') threshold. The qualitative dimension bears emphasizing. It reflects the fact that the undisputed core of the prohibition of the use of force is surrounded by certain grey areas which are characterized by both sophisticated legal debate and deep legal policy divide. These areas, which unfortunately are of significant practical relevance, remain outside the scope of the definition of the crime of aggression. The threshold requirement provides the definition with its necessary anchor in customary international law and, at the same time, it ensures that the ICC will not have to deal with questions, which are not only legally but also politically highly controversial.

The agreement about the substantive definition of the crime made it possible to place the crime of aggression on the agenda of the First Review Conference of the Rome Statute held in the capital of Uganda, Kampala, in 2010. Yet, due to persisting controversies about the jurisdictional regime and the role of the UN Security Council, consensus at Kampala[22] only

[19] The draft substantive definition was soon complemented by draft elements of the crime of aggression. Australia and Samoa deserve particular credit with respect to the formulation of this document in view of the submission of their 'March 2009 Montreux Draft Elements'. For a detailed account of the negotiations, see the chapter written by the Australian negotiators F. Anggadi, G. French, and J. Potter, 'Negotiating the Elements of the crime of aggression', in Barriga and Kreß, *supra* note 12, 58–80.

[20] In Kampala, the substantive definition became the subject of discussion (only) to the extent that the US delegation proposed certain 'Understandings' regarding this definition (for the formulation of the US proposal, see Barriga and Kreß, *supra* note 12, 751–752). The fact that the last open issue was resolved at the end of a conversation, which had pitted the US against Iran, is just another remarkable element in the long journey described in this essay. For a detailed account, see C. Kreß, S. Barriga, L. Grover, and L. von Holtzendorff, 'Negotiating the Understandings on the crime of aggression', in Barriga and Kreß, *supra* note 12, 81–97. For negotiators' perspectives from Iran and the US, see D. Momtaz and E.B. Hamaneh, 'Iran', in Kreß and Barriga (eds), *supra* note 3, 1174–1197, and H.H. Koh and T.F. Buchwald, 'United States', in Kreß and Barriga (eds), *supra* note 3, 1290–1299.

[21] For a detailed legal analysis of this element, see C. Kreß, 'The State Conduct Element', in Kreß and Barriga (eds), *supra* note 3, 412–564.

[22] The *Journal* devoted its 10th Anniversary Special Issue to the topic: 'Aggression: After Kampala', 10 *Journal of International Criminal Justice* (*JICJ*) (2012) 3–288 (ed. by C. Kreß and P. Webb). For an excellent monographic treatment of the Kampala outcomes, see C. McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court* (Cambridge University Press, 2013). For a collection of essays, including a number of Belgian perspectives, see G. Dive, B. Goes, and D. Vandermeersch, *From Rome to Kampala: The first 2 amendments to the Rome Statute* (Bruylant, 2012).

emerged after the conference clocks had been stopped during the night of 11 to 12 June 2010.[23] This consensus does not involve a Security Council monopoly over proceedings with respect to the crime of aggression before the ICC. But the Kampala consensus does include conditions for the Court's exercise of jurisdiction over the crime of aggression, which are significantly more restrictive than the conditions governing the Court's exercise of jurisdiction over genocide, crimes against humanity and war crimes. The essential point is that in a situation, which has not been referred to the ICC by the Security Council, the exercise of the Court's jurisdiction over the crime of aggression, pursuant to Article 15*bis* of the ICC Statute, will remain dependent on the consent of the states of the relevant territories and of the nationality of the individuals concerned.[24]

3. ONE MORE HURDLE

Even the consensus reached at Kampala did not constitute a complete breakthrough. Instead, it was decided to stipulate two additional conditions for the activation of the Court's jurisdiction over the crime. Pursuant to Articles 15*bis*(2) and (3) and 15*ter*(2) and (3) of the ICC Statute, the activation would require (i) the ratification or acceptance of the amendments by 30 States Parties, and (ii) a decision to be taken, after 1 January 2017, by the same majority of States Parties as is required for the adoption of an amendment to the Statute. The first condition already having been fulfilled,[25] the activation decision was placed on the agenda of the sixteenth session of ASP held between 4 and 14 December 2017 in New York.

Making this activation decision proved to be far more than a ceremonial act. The reason for this is a legal controversy that had surrounded one detail of its consent-based jurisdictional regime ever since the adoption of the Kampala amendments. It is undisputed that paragraphs 4 and 5 of Article 15*bis* preclude the Court from exercising its jurisdiction over an alleged crime of aggression arising out of an act of aggression allegedly committed by a state which

[23] For a detailed account of the Kampala negotiations in the *Journal*, see C. Kreß and L. von Holtzendorff, 'The Kampala Compromise on the Crime of Aggression', 8 *JICJ* (2010) 1179–1217. For a meticulous account of the negotiations from 1998 to 2010, see S. Barriga, 'Negotiating the Amendments on the Crime of Aggression', in Barriga and Kreß, *supra* note 12, 3–57.

[24] For an analysis of the jurisdictional regime established in Kampala in the *Journal*, see A. Zimmermann, 'Amending the Amendment Provisions of the Rome Statute: The Kampala Compromise on the Crime of Aggression and the Law of Treaties', 10 *JICJ* (2012) 209–227. For a comprehensive analysis of the same subject from a different perspective, see S. Barriga and N. Blokker in their three closely intertwined chapters 'Entry into Force and Conditions for the Exercise of Jurisdiction: Cross-Cutting Issues', 'Conditions for the Exercise of Jurisdiction Based on Security Council Referrals', and 'Conditions for the Exercise of Jurisdiction Based on State Referrals and *Proprio Motu* Investigations', in Kreß and Barriga (eds), *supra* note 3, 621–674.

[25] It is just another noteworthy element of the long journey described in this essay that it was Palestine that deposited the 30th instrument of ratification. One felt tempted to feel relief that more ratifications were to follow soon thereafter, so that the legal complexities surrounding the question of Palestine's statehood would not constitute a further hurdle to the activation of the ICC's jurisdiction over the crime of aggression. The distinguished Palestinian delegate Majed Bamya will be remembered by all participants in the December 2017 New York negotiations for his outstanding eloquence. For a thoughtful Israeli perspective on the overall negotiations, see R.S. Schöndorf and D. Geron, 'Israel', in Kreß and Barriga (eds), *supra* note 3, 1198–1216.

is not a party to the ICC Statute in a situation not referred to the Court by the Security Council. However, a division of legal opinions has been apparent ever since the adoption of the Kampala amendments with respect to how the state consent-based exercise of the Court's jurisdiction precisely operates between States Parties to the ICC Statute. In essence, two conflicting legal views had emerged.

According to the first position, in such a case, the Court is precluded from exercising its jurisdiction over an alleged crime of aggression if committed either on the territory or by a national of a State Party to the ICC Statute, if this state has not ratified the Kampala amendments. This 'restrictive position' is based on the second sentence of Article 121(5) of the ICC Statute, which, it is argued, has provided States Parties to the ICC Statute with a treaty right, which, under the law of treaties, cannot be taken away without their consent, as expressed by the ratification or acceptance of a treaty amendment concerning the point in question.

According to the opposite position, a State Party, by ratifying the Kampala amendments, provides the Court with the jurisdictional links referred to in Article 12(2) of the ICC Statute. This means that the Court may, *inter alia*, exercise its jurisdiction over a crime of aggression allegedly committed on the territory of such a State Party by the national of another State Party to the ICC Statute, even if this second state has not ratified the Kampala amendments. This state may, however, preclude the Court from exercising its jurisdiction in such a case by previously making a declaration, as referred to in Article 15*bis*(4) of the ICC Statute, that it does not accept such jurisdiction. This 'more permissive position', so it is argued, is not in conflict with the law of treaties, because Article 5(2) of the original ICC Statute empowered States Parties to adopt 'a provision … setting out the conditions under which the Court shall exercise jurisdiction with respect to' the crime of aggression, which would, in case and to the extent that it deviates from the second sentence of Article 121(5) of the ICC Statute, operate as *lex specialis*.

In a nutshell: The legal controversy in question only concerns situations not referred to the ICC by the Security Council. And for such situations it boils down as to whether a State Party that has not ratified the Kampala amendments must have made a declaration under Article 15*bis*(4) of the ICC Statute in order to preclude the Court from exercising its jurisdiction over a crime of aggression arising from an act of aggression allegedly committed by that State Party against a State Party which has ratified the Kampala amendments.

4. New York: Construction Work on a Final Bridge

During the process instituted before the ASP's December 2017 session to facilitate the activation decision, the fact that views were divided on this issue was confirmed and the con-

flicting legal arguments rehearsed.[26] Already in March 2017, Canada,[27] Colombia, France, Japan, Norway,[28] and the United Kingdom had put forward a paper in order to explain their adherence to the 'restrictive position'.[29] Liechtenstein and then Argentina,[30] Botswana,[31] Samoa, Slovenia,[32] and Switzerland,[33] responded through the submission of papers detailing the 'more permissive position'.[34]

One possible way of dealing with the situation would have been simply to activate the Court's jurisdiction and to leave it to the Court to decide the legal question if it arose. More than 30 delegations joined Switzerland in a call for such a 'simple activation approach'.[35] But many of those States Parties supporting the 'restrictive position' did not wish to take the risk that the Court might, after the activation of its jurisdiction, decide not to follow their view. They rather sought to have their position accepted and confirmed by all States Parties as part of the resolution accompanying the activation decision. Soon after the States Parties had gathered in New York on 4 December, their delegates, masterfully guided by the Austri-

[26] *Report on the Facilitation on the Activation of the Jurisdiction of the International Criminal Court over the Crime of Aggression*, ICC-ASP/16/24, 27 November 2017 ('*Report on the facilitation …*'), §§ 11–22.

[27] Canada's strong support before and in New York for the 'restrictive position' was more than a little astonishing because in Kampala this state had, after having made a proposal based on the 'restrictive position', worked together with Argentina, Brazil and Switzerland to pave the way toward a compromise; see Kreß and Von Holtzendorff, *supra* note 23, 120–124.

[28] Norway had adopted a comparatively sceptical attitude towards the negotiations on the crime of aggression more broadly; for the thoughtful reflections of the long-standing Norwegian head of delegation, Ambassador Rolf Einar Fife, on the subject, see 'Norway', in Kreß and Barriga (eds), *supra* note 3, 1242–1263.

[29] *Report on the facilitation …*, *supra* note 26, Annex II A. A few other states, including, in particular, Australia, Denmark, and Poland also went on record by adhering to the restrictive position.

[30] In New York, Argentina continued the active role that this state had already played in Kampala (on that role, see Kreß and Von Holtzendorff, *supra* note 23, 1202–1204) and before. The fact that the President of the ICC, the eminent former Argentinian diplomat Silvia Fernández de Gurmendi, was one of the early two Coordinators (the other being Tuvako Manongi from Tanzania) of the Working Group of the Crime of Aggression should not be forgotten and this includes the fact that her 'Coordinator's Discussion Paper' of 11 July 2002 (Barriga and Kreß, *supra* note 12, 412–414), was an important point of reference in the subsequent negotiations.

[31] Botswana's important role throughout the negotiations on the crime of aggression constitutes only one of many facets of this state's leading role in support of the establishment of a system of international criminal justice. In particular, Ambassador Athalia Molokomme's numerous principled (and thus powerful) interventions during the negotiations on the crime of aggression will be remembered.

[32] Slovenia's constructive role during the negotiations on the crime of aggression bears emphasizing. The distinguished Slovenian delegate Danijela Horvat will be remembered for an entire series of thoughtful, dedicated and eloquent interventions during the New York Assembly meeting in December 2017. A similar note of recognition is due to the distinguished delegates Shara Duncan Villalobos from Costa Rica, Vasiliki Krasa from Cyprus, Päivi Kaukoranta from,Finland, James Kingston from Ireland and Martha Papadopoulou from Greece for their valuable contributions to the New York December 2017 negotiations. In the case of Greece, the important role played, over many years, by the distinguished delegate Phani Dascalopoulou-Livada will be remembered.

[33] Switzerland continued the active role that this state had already played in Kampala (on that role, see Kreß and Von Holtzendorff, *supra* note 23, 1202–1204). In New York, Switzerland took a leading role in support of the 'simple activation approach'.

[34] *Report on the facilitation … supra* note 26, Annex II B and C.

[35] Letter of 7 December 2017 by the Permanent Representative of Switzerland to the United Nations to all Permanent Representatives of States Parties to the Rome Statute, on file with the author.

an facilitator Nadia Kalb, together with the country's head of delegation Konrad Bühler,[36] spent long negotiating hours and displayed a remarkable degree of creativity in attempts to build a final bridge between the two opposing approaches.

The essence of such a bridge would have consisted of allowing both camps to maintain their respective legal positions and of providing any State Party that supported the 'restrictive position', if it so desired, with a legal avenue for jurisdictional protection in the event that the Court were to embrace the 'more permissive position'. One proposed variant of such a legal avenue was to have all States Parties agree that the communication by a State Party of its 'restrictive position' to the Registrar should be treated by the Court as a declaration, as referred to in Article 15*bis*(4) of the ICC Statute, if the Court were to embrace the 'more permissive position'.[37] A second variant, as developed by Brazil,[38] Portugal and New Zealand,[39] was to allow any State Party, which so desired, to be placed on a list established by the President of the Assembly of States Parties and to be transferred to the Registrar, and to have the Assembly of States Parties decide that the Court shall not exercise its jurisdiction over the crime of aggression 'over nationals or on the territory' of any such State Party.[40]

[36] The two distinguished Austrian diplomats received knowledgeable advice from Dr Astrid Reisinger-Coracini from the University of Salzburg who had participated in the overall negotiations since 1999 and had made numerous important scholarly contributions since then.

[37] Professor Dapo Akande and this author had formulated a joint draft encapsulating this legal position. This was done in the hope that it would be considered a genuine bridge-building attempt in view of the fact that Professor Akande and this author had taken opposite views regarding the underlying legal controversy. The draft was transmitted to the Austrian Facilitator by Germany without adopting it. This proposal has occasionally been referred to as the 'Non-German Non-Paper' and, to a certain extent, it was reflected in the 'Discussion Paper, Rev. 1, 11 December 2017', as presented by the Facilitator. The revised paragraph read: 'Confirming that any statement made by a State Party, individually or collectively, that *it subscribes to the view noted in preambular paragraph 4* shall *(' when made in writing and communicated to the Registrar,*) be regarded as *also* fulfilling the conditions required for a declaration referred to in article 15*bis*, paragraph 4, *while recognizing that the issuance of any such statement would be without prejudice to that State maintaining its view that, in the absence of its own ratification or acceptance of the amendments, no declaration referred to in article 15 bis paragraph 4, is necessary to preclude the Court from exercising jurisdiction over the crime of aggression, arising from an act of aggression allegedly committed by that State Party.*' (Emphasis in the original).

[38] Brazil had already played an important role in Kampala (Kreß and von Holtzendorff, *supra* note 23, at 1202-1204). In New York, this state, through its distinguished delegate Patrick Luna, worked tirelessly to build a final bridge. For the Brazilian policy perspective on the overall negotiations, see M. Biato and M. Böhlke, 'Brazil', in Kreß and Barriga (eds), *supra* note 3, at 1117-1130.

[39] New Zealand's association with this bridge-building attempt is noteworthy for its constructiveness as this state had made it clear that it believed the 'restrictive position' to be the correct legal view. So these three delegations lent further credit to the idea that it was possible to find a bridge. Sweden, it should be noted, took a position similar to that of New Zealand. Sweden's constructiveness in New York was in line with the helpful role this country had played during the 'Princeton Process', in particular through the contributions of its distinguished delegate, Pal Wrange.

[40] See 'Additions by Brazil, Portugal and New Zealand to the discussion paper', 11 December, 13:00 (on file with the author). See also ICC-ASP/16/L.9, 13 December 2017, OP 1, and the explanations provided by the distinguished Swiss delegate Nikolas Stürchler in his blog entry, 'The Activation of the Crime of Aggression in Perspective', EJIL Talk! Blog of the European Journal of European Law, 26 January 2018, available online at http://www.ejiltalk.org/the-activation-of-the-crime-of-aggression-in-perspective/ (visited on 28 January 2018).

5. Breakthrough without a Bridge: A Memorable Night at UN Headquarters

But in the very late hours of the Assembly session, it turned out that France and the United Kingdom were not prepared to cross any such bridge. Their demand remained unchanged: All States Parties should accept the 'restrictive position' as part of the ASP resolution accompanying the activation decision. The French and British adamancy created an extremely difficult situation. Legally, it would have been possible to put a draft to a vote encapsulating either the 'simple activation approach' or a 'final bridge'. But irrespective of the uncertainties of voting[41] — would it have been wise to allow a question of such supreme political sensitivity to be overshadowed by a dispute within the ASP? In this latter regard, a great many delegations entertained the most serious doubts, as much as they had hoped that France and the United Kingdom would eventually show a spirit of compromise. Outvoting France and the United Kingdom was therefore not a real option. This meant that the fairly large group of States Parties, which believed in the correctness of the 'more permissive position', were left with the painful choice either to accept language which, from their legal perspective, strongly pointed in the direction of an 'amendment to the (Kampala) amendment', or to allow the open window for the activation of the Court's jurisdiction to close until an uncertain moment in the future.[42]

This was when, one last time, conference clocks had to be stopped in order to allow delegations to make up their minds concerning the draft resolution proposed by the two Vice-Presidents of the Assembly to whom Austria had handed over the task of making the final attempt. Crucially, the 'Draft resolution proposed by the Vice-Presidents' reflected the French and British demand[43] in the form of the following operative paragraph:

> The Assembly of States Parties …
>
> 2. *Confirms* that, in accordance with the Rome Statute, the amendments to the Statute regarding the crime of aggression adopted at the Kampala Review Conference enter into force for those States Parties which have accepted the amendments one year after the deposit of their instruments of ratification or acceptance and that in case of a State referral or *proprio motu* investigation the Court shall not exercise its jurisdiction regarding a crime of aggression when committed by a national or on the territory of a State Party that has not ratified or accepted these amendments; …

With a view to softening the 'unconditional surrender' to the demand of France and the United Kingdom, the next paragraph was drafted as follows:

> 3. Reaffirms paragraph 1 of article 40 and paragraph 1 of article 119 of the Rome Statute in relation to the judicial independence of the judges of the Court; …

[41] On those uncertainties, see Stürchler, ibid.
[42] The point is clearly articulated by Nikolas Stürchler. ibid.
[43] For the first articulation of this demand in the form of a text, see *Report on the facilitation … supra* note 26, Annex III *sub* A.

This language is no more than a statement of the obvious fact that the ASP cannot replace the Court as the judicial body charged with applying the law in complete independence. It was therefore difficult to consider the inclusion of this paragraph in the Vice-Presidents' proposal as more than a symbolic concession to those asked to give in. Yet, France was still not entirely satisfied and, with the support of the United Kingdom, it proposed to move the latter paragraph to the preamble. When Switzerland[44] disagreed, the drama in New York had peaked and the almost incredible possibility loomed large that the century long journey towards providing for an international criminal jurisdiction over the crime of aggression would ultimately derail because of the question as to whether the few words in question should be placed either in a preambular or an operative paragraph. At this absolutely critical juncture, the delegates from South Africa,[45] Samoa[46] and Portugal,[47] each of them in their own way, made valuable contributions to prevent the negotiations from collapsing. Instead, Vice-President Sergio Ugalde from Costa Rica, after finding that the French proposal had met with opposition, asked one final time whether the Vice-Presidents' proposal gathered the consensus of the room. This was followed by a dramatic moment of suspense after which it was clear that France and the United Kingdom had decided not to play hard-ball beyond the extreme, so that the proposal made by the Vice-Presidents was eventually adopted by consensus.[48]

[44] While Switzerland took the step to formally oppose the proposal, this state was certainly expressing the sentiment of a great many delegations present when it criticized the French proposal in question. This author recalls Cyprus and South Africa, in particular, voicing their lack of comprehension regarding France's move.

[45] South Africa, especially through its distinguished delegate André Stemmet, had consistently supported the idea of the Court exercising its jurisdiction over the crime of aggression (for South Africa's policy position on the overall negotiations, see A. Stemmet, 'South Africa', in Kreß and Barriga (eds), *supra* note 3, 1271–1284). It is particularly noteworthy that South Africa did not change course even at the New York 2017 Assembly of States' meeting where the same state again contemplated the possibility of leaving the community of States Parties.

[46] Samoa is another smaller state that has been making important contributions to the negotiations on the crime of aggression. In particular, the countless thoughtful (and good-humoured!) interventions by the distinguished Samoan delegate, Professor Roger S. Clark, constitute a precious part of the *travaux préparatoires*. Samoa's ultimate contribution to the success of the negotiations, expressed through its distinguished head of delegation, Ambassador Aliioaiga Feturi Elisaia, consisted of adopting a non-lawyer's perspective of a world citizen reminding delegations at a most critical juncture of the negotiations what really is at stake.

[47] Portugal has been an important voice in the negotiations from an early moment in time (see, for example, the '1999 Proposal by Greece and Portugal', as repr. in Barriga and Kreß, *supra* note 12, 343). In New York, the interventions by the distinguished Portuguese delegate Mateus Kowalski stood out for their wisdom, fairness and elegance. This author would not wish to let pass this occasion to recall the important contributions made over many years by the late Professor and Legal Advisor of the Portuguese Ministry of Foreign Affaires Paula Escarameia.

[48] The 'Draft resolution proposed by the Vice-Presidents of the Assembly. Activation of the Jurisdiction of the Court over the Crime of Aggression', ICC-ASP/16/L.10, 14 December 2017 became Resolution ICC-ASP/16/Res.5. One of the leading negotiators, Nikolas Stürchler in his blog, *supra* note 40, who recalls that consensus had emerged 'at around Friday 0:40 AM'.

6. 'IT'S BETTER TO BEND THAN TO BREAK'

By accepting operative paragraph 2 of the Activation Resolution, a large number of States Parties have made a concession, which must have felt very hard indeed after a protracted and *bona fide* attempt to build a bridge between the two conflicting legal views. These States Parties deserve praise. First, they genuinely believed in their 'more permissive position' and the very apparent fear of the opposite side that the Court might agree with this position only confirmed the strength of the arguments in support of it. Second, they had been engaging in an intensive *bona fide* bridge-building effort not only during the Assembly session, but also throughout the facilitation process all year long only to recognize at the very end that two states with a more powerful negotiation position were unprepared to respond.

Now they were being asked to give in.[49] In deciding to do so,[50] the States Parties in question demonstrated that, despite all this, they had not lost sight of the broader picture. So they were able to appreciate that the legal controversy, which had occupied so many minds for so long, almost paled to insignificance if seen in light of the historic dimension of the decision to activate the Court's jurisdiction by a consensus within the ASP.[51] This historic dimension

[49] It bears recording that, at this critical juncture of the New York 2017 negotiations, many distinguished civil society representatives made their voices heard in support of a final concession, which many of them found painful as well. This constructive role is notewhorthy in light of the fact that the 'NGO community' has been playing a less active role with respect to the negotiations on the crime of aggression than it did with respect to the ICC Statute in general (for a detailed analysis, see N. Weisbord, 'Civil Society', Kreß and Barriga (eds), *supra* note 3, 1310–1358. This author wishes to take this opportunity to pay tribute to the distinguished non-state delegates, Professor David Donat Cattin, Professor Donald Ferencz, Jutta Bertram Nothnagel, Professor Jennifer Trahan, and Professor Noah Weisbord, for the substantial contributions to the success of the negotiations they have made, in one form or the other, over the long years of the discussions.

[50] Perhaps understandably, many of those states confined their concession to what they felt was the necessary minimum and maintained their legal view in their explanations of vote. In Liechtenstein's explanation of position (on file with the author), for example, Ambassador Christian Wenaweser stated: 'we are of the firm view that the Court, in exercising its jurisdiction over the crime of aggression, must and will apply the law contained in the Kampala amendments'.

[51] In Liechtenstein's explanation of its position, Ambassador Wenaweser powerfully articulated sentiments subsequently echoed, in one way or the other, by many other delegations. In some particularly noteworthy parts, Liechtenstein's statement reads as follows:

'The historic significance of the decision we have taken today to activate the Court's jurisdiction over the crime of aggression cannot be overstated. Never has humanity had a permanent international court with the authority to hold individuals accountable for their decisions to commit aggression — the worst form of the illegal use of force. Now we do. … We are disappointed that a few States conditioned such activation on a decision that reflects a legal interpretation on the applicable jurisdictional regime over the crime of aggression that departs from the letter and spirit of the Kampala compromise, and which aims to severely restrict the jurisdiction of the Court and curtail judicial protection for States Parties. Our reasons for joining the decision are twofold: […]. Second, we believe that the importance of the activating jurisdiction has to be our overriding goal.'

In the same vein, the distinguished Swiss delegate Nikolas Stürchler, in his blog entry in EJIL Talk!, referenced *supra* note 40, wisely concludes:

'In all of this, let us not forget that the activation of the crime of aggression is meant to be a contribution to the preservation of peace and the prevention of the most serious crimes of concern to the international community as a whole. More than 70 years after the Nuremberg and Tokyo trials, the ICC has received the historic opportunity to strengthen the prohibition of the use of force as enshrined in the UN Charter and completed the Rome Statute as originally drafted. This is the perspective we should preserve.'

is all the more apparent if it is considered that Germany,[52] Japan[53] and Italy[54] had not only joined the consensus, but had, each of them in their own way, contributed to making this consensus materialise. For it had been those states in particular that, through their wars of

[52] At the Rome conference, Germany was an unequivocal supporter of the inclusion of the crime of aggression into the jurisdiction of the ICC. Germany was accordingly quick to applaud the NAM proposal which inspired the original Art. 5(2) of the ICC Statute (*supra* note 12) and Germany was then instrumental in formulating paragraph 7 of the Final Act of the Rome Conference (UN Doc. A/CONF.183/13, 17 July 1998, *supra* note 12. At this juncture, one would be remiss not to acknowledge the outstanding role that the late eminent German diplomat Hans-Peter Kaul, the first German judge at the ICC, has played also in the course of the negotiations on the crime of aggression. In a personal memoir, which this author hopes will also be published in English in due course, Judge Kaul, recalls his memory of the crucial moments of the Rome Conference (Hans-Peter Kaul, 'Der Beitrag Deutschlands zum Völkerstrafrecht', in C. Safferling and S. Kirsch (eds), *Völkerstrafrechtspolitik* Springer, 2014, 51–84, at 67−68). During the 'Princeton Process', a German delegate acted as one of the three sub-coordinators. In Kampala, Germany was designated Focal Point for the consultations on the US proposals for certain understandings. The head of the German delegation in Kampala, Ambassador Susanne Wasum-Rainer, has offered a German policy perspective on the negotiations in her chapter 'Germany', in Kreß and Barriga, (eds), *supra* note 3, at 1149-1157. Regarding the legal controversy underlying the New York negotiations, Germany had taken the position not to express a position. This was done with a view not to overemphasize the practical importance of the question and in order to be available, if need be, to serve as an 'honest broker' for a final bridge-building effort. During the final hours in New York, Germany's head of delegation, Ambassador Michael Koch, before and behind the scenes, demonstrated that his country's promise to be of assistance in making the activation of the Court's jurisdiction a reality had not been an empty one. Germany's contribution to the negotiations on the crime of aggression since the lead up of the Rome conference and until shortly after the Kampala conference is recounted and documented by this author in C. Kreß, 'Germany and the Crime of Aggression', in S. Linton, G. Simpson, and W.A. Schabas (eds), *For the Sake of Present and Future Generations. Essays on International Law, Crime and Justice in Honour of Roger S. Clark* (Brill/Nijhoff, 2015), 31–51.

[53] Japan's sceptical perspective on the historic Tokyo trial is well known and Hathaway and Shapiro, *supra* note 6, at 133 *et seq*. provide their readers with a fascinating account of the broader background to Japan's perspective. It is all the more important to state that Japan has unambiguously supported the idea that the ICC would exercise its jurisdiction over the crime of aggression. Regarding the legal controversy underlying the New York 2017 negotiations, Japan, perhaps most consistently of all states, has been defending the 'restrictive position' as the correct legal view (see the chapter 'Japan' written by the head of Japanese delegation at Kampala, the late Ambassador Ichiro Komatsu, in Kreß and Barriga (eds), *supra* note 3, 1217–1233 and, in particular, at 1231–1232). Against this background, Japan's role during the New York 2017 negotiations is particularly noteworthy. While not leaving a shadow of doubt regarding Japan's legal position, Japan's head of delegation at New York, Director-General Masahiro Mikami, displayed great sensitivity for the perspective of the opposing side and ultimately also indicated Japan's readiness to consider crossing a final bridge. The Republic of Korea is another Asian state which has continuously supported the idea that the ICC should exercise its jurisdiction over the crime of aggression (for the perspective of a scholarly advisor to various South Korean delegations, see Y.S. Kim, 'Republic of Korea (South Korea)', in Kreß and Barriga (eds), *supra* note 3, 1234–1241). During the December 2017 New York negotiations, the Republic of Korea stayed silent, however.

[54] Italy has been supportive of the process since the beginning of the negotiations (see, for example, the proposal submitted by Egypt and Italy as early as in 1997 (repr. in Barriga and Kreß, *supra* note 12, 226–227) and the contributions by the former distinguished Italian diplomat and Judge at the ICC, Mauro Politi, in the early phase of the negotiations should be remembered (for a useful collection of short comments on the negotiations by influential voices before the beginning of the Princeton Process, see M. Politi and G. Nesi (eds), *The International Criminal Court and the Crime of Aggression* (Ashgate, 2004)). While it is probably fair to say that Italy has not been playing a leading role during the 'Princeton Process' and in Kampala, the country, when the New York December 2017 negotiations had reached their final part, through its distinguished delegate Salvatore Zappalà, was among the first delegations to support the Austrian facilitation in its bridge-building effort. Eventually, and one is tempted to see a providence of destiny at work, it was an Italian Vice-President of the Assembly of States Parties, Ambassador Sebastiano Cardi, who co-presided over the consensual adoption of the activation resolution.

aggression before and during the Second World War, had also placed the 'New Legal Order' (Hathaway and Shapiro) established by the Kellogg-Briand Pact under attack.[55]

7. THE COURT TAKES THE WHEEL

Pursuant to operative paragraph 1 of the Activation Resolution, the Court's jurisdiction will be activated as of 17 July 2018. By this, States Parties have provided the Court with a final space to make the few adjustments necessary in order to enable the Pre-Trial Division of the ICC to play its unprecedented judicial role under Article 15 *bis*(8) of the ICC Statute.[56] From 17 July 2018 onwards, it will be for the Court to indicate how it will apply the law, which is now ready on the books, in practice. It may seem advisable for the Office of the Prosecutor to signal at an early moment in time that it will take seriously the core message underlying the threshold requirement contained in Article 8*bis*(1) of the ICC Statute: that the substantive definition of the crime of aggression covers only a use of force by a state which reaches a high level of intensity and which is unambiguously unlawful. Such a signal will help dispel persisting — and understandable[57] — doubts that the Court could get involved in burning

[55] The story is powerfully told by Hathaway and Shapiro, *supra* note 6, 131 *et seq*.

[56] Those in charge within the Court will wish to turn to the comprehensive analysis provided by E. Chaitidou, F. Eckelmans and B. Roche, 'The Judicial Function of the Pre-Trial Division', in Kreß and Barriga (eds), *supra* note 3, 752–815.

[57] This author does not find it easy fully to appreciate why France, led in New York by Ambassador Francois Alabrune, and the United Kingdom, led in New York by Ambassador Ian MacLeod, have remained unprepared to cross a final bridge in the 2017 December negotiations in New York. He even wonders whether those two states would not have achieved greater legal certainty to their benefit (as they perceived it) had they crossed the bridge built for them by Professor Akande and this author (for certain potential legal ambiguities surrounding operative paragraph 2 of the Activation Resolution, not to be explored in this editorial, see Stürchler, *supra* note 40). But this author does appreciate why quite a few states involved in military activities in grey legal area scenarios, instead of ratifying the Kampala amendments, appear to have adopted a position of 'wait and see' how the Court will interpret the substantive definition of the crime. This author also believes that it should be acknowledged that France and the United Kingdom are the only permanent members of the Security Council that have, until now, ratified the ICC Statute and that those two states have eventually accepted a jurisdictional regime that does not provide the Security Council with a monopoly over proceedings regarding the crime of aggression before the ICC. This author wishes to take this opportunity to acknowledge the important contribution made by the eminent former British diplomat Elizabeth Wilmshurst to the negotiations. In a number of very noteworthy statements (for some references, see C. Kreß, *supra* note 21, 515–516, citations accompanying note 570), Ms Wilmshurst had reminded the negotiators of the need to ground firmly the substantive definition of the crime of aggression in customary international law. For British and French negotiators' perspectives on the Kampala amendments, see E. Belliard, 'France', and C. Whomersley, 'United Kingdom', both in Kreß and Barriga (eds), *supra* note 3, 1143–1148, and 1285–1289. The intensity of the controversy over the proper role to be attributed to the Security Council when it comes to proceedings before the ICC involving the crime of aggression, gives any observer a vivid idea of how much constructive spirit had to be shown to make the ultimate breakthrough possible. Just compare the vigorous pleading for a Security Council monopoly by the eminent Chinese diplomat L. Zhou, 'China', in Kreß and Barriga (eds), *supra* note 3, 1133–1138, with India's fierce opposition to a strong Security Council role, as recounted and documented by the eminent Indian diplomat N. Singh, 'India', in Kreß and Barriga (eds), *supra* note 3, 1164, 1165–1168, 1171.

legal controversies about anticipatory self-defence,[58] self-defence against a non-state armed attack,[59] and humanitarian intervention.[60] Once states can be confident that the Court will not exercise its jurisdiction over the crime of aggression in these grey legal areas, it may be hoped that the number of ratifications will increase significantly as it will become extremely difficult for any victorious power whose judges sat in judgment at Nuremberg and Tokyo to explain why they still do not wish fully to embrace the legacy of their own pioneering course of action after the Second World War.

8. Epilogue: An Imperfect Though Timely Appeal to the Conscience of Mankind

There can be no doubt that the substantive definition of the crime of aggression is (as) narrow (as a definition of a crime under international law should be) and that the jurisdictional threshold for the Court's exercise of jurisdiction over the crime is (more) stringent (than desirable). But it would be fallacious therefore to belittle the December 2017 breakthrough in New York. Russia has recently crossed the red line and forcibly annexed foreign territory.[61] North Korea and the United States have long been exchanging martial threats of nuclear

[58] For the increasingly intensive debate, see, most notably, the recent speeches delivered, first, by the UK and, subsequently, by the Australian Attorney-General, as repr. in EJIL Talk! Blog of the European Journal of International Law, available online at, respectively: http://www.ejiltalk.org/the-modern-law-of-self-defence/ and in http://www.ejiltalk.org/the-right-of-self-defence-against-imminent-armed-attack-in-international-law/#more-15255 (visited 28 January 2018). For an analysis of 'anticipatory self-defence' in the context of the State Conduct Element of the crime of aggression, see C. Kreß, 'The State Conduct Element', in Kreß and Barriga (eds), *supra* note 3, 473–479.

[59] For example, the legal intricacies with respect to the use of force against the 'Islamic State' that many states have been carrying out in Syria at Iraq's request, were very much in the minds of decision makers when the crime of aggression has been discussed recently. For an analysis of 'The Use of Force in Response to an Armed Attack by Non-State Actors Emanating from the Territory of Another State' in the context of the State Conduct Element of the crime of aggression, see C. Kreß, 'The State Conduct Element', in Kreß and Barriga (eds), *supra* note 3, 462–467.

[60] The intriguing question of the use of force in a case of dire need to avert a humanitarian catastrophe, but without a Security Council authorization, has loomed large in the background to all the negotiations. For an analysis of 'The Use of Force to Avert a Humanitarian Catastrophe' in the context of the State Conduct Element of the crime of aggression, see C. Kreß, 'The State Conduct Element', in Kreß and Barriga (eds), *supra* note 3, 489–502, and 524–526.

[61] If seen in the context of Russia's important role in the long journey described in this essay, one cannot be but even more saddened by this state's manifest violation of the prohibition of the use of force in the case of Crimea. The fact that politics and law have always been inextricably intertwined in Russia's contributions to the century-long conversation is no distinctive feature of Russia's approach to the subject and does not constitute a reason not to acknowledge that Russia has made noteworthy text proposals from 1933 on, when Maxim Litvinov submitted a Soviet 'Definition of "Aggressor": Draft Declaration' to the Disarmament Conference (repr. in Barriga and Kreß, *supra* note 12, 126-127). Russia's role before Nuremberg is usefully recalled by Hathaway and Shapiro, *supra* note 6, at 257. Stalin had supported a trial at a critical juncture and, in that respect, he formed 'an odd couple' together with Stimson. (The meeting of minds of Stalin and Stimson did not go much further, though, in light of Stalin's preference for a show trial). In this historic context, it bears recalling that it was the Russian professor A.N. Trainin, who coined the Nuremberg and Tokyo term 'crime against peace' (in A.Y. Vishinsky (ed.), *Hitlerite Responsibility Under Criminal Law*, transl. by A. Rothstein

war. At the time of writing, Turkey has started a major military invasion in Syria without any concession to the idea that the prohibition of the use of force mattered a great deal.[62] At such a juncture, the signal that has been sent to the conscience of mankind by activating the ICC's jurisdiction over the crime of aggression is timely.

(Hutchinson & Co., 1945), at 37). For Russia's active role during the Cold War, see, for example, Sellars, *supra* note 6, 119–126, 130–138, and Bruha, *supra* note 10, 150–154). The '1999 Proposal of the Russian Federation' (repr. in Barriga and Kreß, *supra* note 12, at 339) is as succinct as it has been incapable of securing a consensus in its insistence on both the old Nuremberg and Tokyo language of 'war of aggression' and the idea of a Security Council monopoly. Yet, it is as noteworthy as it is promising, that the two distinguished Russian diplomats Gennady Kuzmin and Igor Panin state (in 'Russia', in Kreß and Barriga, *supra* note 3, 1264), that 'Russia is satisfied with the outcome of the Review Conference with regard to the definition of the crime of aggression'.

[62] The identical Turkish letters addressed to the Secretary-General and to the President of the Security Council (S/2018/53) makes reference to the right of self-defence as recognized in Art. 51 UN Charter, but does almost nothing to present facts in order to substantiate this legal claim. Instead, the letters make a dangerously vague reference to the 'responsibility attributed to Member States in the fight against terrorism' as if such a 'responsibility' could serve as a legal basis for a use of force on foreign territory without the consent of the territorial state and absent a Security Council mandate.

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CONSTITUTION-MAKING AND VIOLENCE[2]

ABSTRACT

Contrary to a traditional view, constitutions are rarely written in calm and reflective moments. Rather, because they tend to be written in period of social unrest, constituent moments induce strong emotions and, frequently, violence. The paper examines two such cases: the Federal Convention of 1787 and the French Assembleé Constituante of 1789–1791. These involved state violence as well as popular violence. In the USA, the unequal political representation of the backcountry explains both the violent events leading to the Convention and its outcome. In France, the dismissal of the King's Minister Necker explains the subsequent urban and rural violence, and ultimately the abolition of feudalism and the fall of the monarchy.

L'anarchie est un passage effrayant, mais nécessaire, et c'est le seul moment où l'on peut arriver à un nouvel ordre des choses. Ce n'est pas dans des temps de calme qu'on prendrait des mesures uniformes. ("Anarchy is a frightening but necessary passage, and the only moment when one can establish a new order of things. It is not in calm times that one can adopt uniform measures".) (Comte de Clermont-Tonnerre, AR 9, 461)

1. INTRODUCTION

This is an essay in macro-historical sociology. I am not an historian, but I read historians and some of their primary sources. On the basis of my readings about the American and French constitution-making processes in the late eighteenth century, I shall try to distill some ideas

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that may have general application. Specifically, I shall consider the role of violence in the making of the two constitutions: *actual* violence, *threats* of violence, *warnings* of violence, *fear* of violence, and even *hope of violence*. In a broader perspective, we should also include acts of *resistance* or *disobedience* to authorities.

I shall also distinguish between visceral or emotional fear of violence and prudential or rational fear. Whereas the former is a genuine emotion, caused by the belief in an imminent danger to the agent, the latter does not amount to more than a simple belief–desire complex (Gordon 1987, 77 and *passim*). As an example, "I fear that it will rain" *means* "I believe it will rain and I do not want it to rain". When de Montaigne (1991, 83) wrote that "it is fear I am most afraid of" and FDR said that "the only thing we have to fear is fear itself", they were referring to prudential fear of visceral fear (thanks to Ken Shepsle for this observation).

We should not be surprised that constitution-making goes together with violence. According to a cliché to which I have unfortunately contributed (Elster 1984, ch. II.7), constitutions are typically written in a calm and reflective moment that enables sober and public-spirited framers to design institutions that will prevent the interests and passions of future actors from acting against the general interest. The reality is different. "No liberal democratic state has accomplished comprehensive constitutional change outside the context of some cataclysmic situation such as revolution, world war, the withdrawal of empire, civil war, or the threat of imminent breakup" (Russell 1993, 106). In these settings, strong passions are inevitable and violence is likely.

The American and French cases certainly confirm this expectation. Before I discuss them, I shall mention a few other cases. The work of the Frankfurt constituent assembly of 1848 was "threatened by the hunt of the crowd for unpopular members of the assembly" (Eyck 1968, 312). One member of the Right Center was beaten up, and two were killed. If we compare the two drafts made by the Committee of Constitution of the French constituent assembly of 1848, before and after the June insurrection of the Parisian workers, the second was considerably less radical than the first, by abolishing the right to work and substituting proportional for progressive taxation. The constitution of the Fifth French Republic was adopted when the parliamentarians of the Fourth Republic granted full powers to the Gaulle under the pressure of events in Algeria. In his inimitable telescoping, "In 1958 I had a problem of conscience. I could just let things take their course: the paratroopers in Paris, the parliamentarians in the Seine, the general strike, the government of the Americans: it was written on the wall. Finally a moment would have arrived when everybody would have come looking for de Gaulle, but at what price? Thus I decided to intervene in time to prevent the drama" (Peyrefitte 1995, 262). It makes sense to assume that some parliamentarians feared for their lives and that their visceral fear affected their decision to abdicate from power.

Among the many differences between the two eighteenth-century processes, some can be traced back to the fact that they represent different stages in the frequently occurring revolutionary pattern of "two steps forward, one step backward", first observed in seventeenth-century England. In that country, the abolition of the monarchy in 1649 constituted the two steps forward, and the creation of a constitutional monarchy in 1660 and more definitively in

1688 marked one step backward. In 1787, America took one step backward. The process may be seen—and was seen by some contemporaries—as a "counter-revolution against popular democratic ideals" (Bouton 2007, 4). In 1789, France took two steps forward, leaving it to Napoleon and more definitively to Louis XVIII to take the one step backward. This contrast between the counterrevolutionary thrust in America and the revolutionary impulse in France provides one key to the differences between the two processes. Needless to say, the vast differences in social and economic structure also had repercussions at the political level. America was largely a country of freeholders, France a country of peasants under a feudal regime.

Popular violence was a driving force in the calling of a constituent assembly (America) or in the shaping of the document it produced (both countries). In America, the violence was predominantly rural; in France it was both rural and urban. In both countries, it was triggered by a potent combination of objective hardships and subjective beliefs about the malevolent intentions that produced those hardships. In both countries, beliefs about speculators were important, as a direct causal force in America and as a background factor in France.

State violence also shaped the constitution-making in crucial ways. In the USA, the defeat of Shays' Rebellion by the army raised by the governor of Massachusetts was a close thing. Only lack of coordination prevented the rebels from seizing the federal arsenal at Springfield. Had they succeeded, they might have marched on Boston (Richards 2002, 29–30). Some clauses in the 1787 Constitution can be traced back to the desire of the framers to have a more robust repressive machinery at their disposal. In France, state violence was seen as an option on two occasions. In July 1789, the King's failed attempt to repress the National Assembly contributed immeasurably to its radicalization. In August, the Assembly briefly considered repressing the peasant insurrections in the provinces before choosing instead the path of concession.

Emotions were both causes and effects of popular and state violence. Anger, resentment, and fear caused violence; violence caused fear. A debatable question is whether the American framers were subject to *visceral* fear (as the French certainly were) or to prudential fear only. I certainly cannot claim to resolve this question, but my inclination is to believe that an element of visceral fear was present and that, as Jefferson suggested, it caused the Founders to overreact to Shays' rebellion.

2. AMERICA: FARMERS AND FRAMERS

Since a major line in my argument will address state politics in the 1780s, I should first state the inevitable limitations of my analysis. In a short treatment, even a summary discussion of events in all thirteen states is impossible. I shall focus on Massachusetts and Pennsylvania, with occasional remarks on other states.

My account of the run-up to the Federal Convention is very much influenced by the neo-Progressive analyses of Bouton (1996, 2007) and Holton (2007). Although these are mainly

works of social history, they also deal with the economic causes of the class struggles and their political continuations. On the economic and especially the financial side, the classical study by Ferguson (1961) is invaluable, while Brown (1993) provides a useful state-by-state breakdown. On the political side, I draw on the equally classical work by Pole (1966) on representation in the American colonies and states.

I shall organize my discussion as follows. I first summarize some aspects of the conflicts between the backcountry and the seaboard in the colonies and at the Convention. Second, I summarize the relevant forms of paper money and debt certificates issued by the American Confederation. Third, I describe the class struggles arising from the redemption of these instruments and the political responses from the state legislatures. Finally, I link these issues to the calling of the Convention and to the document it proposed for ratification.

2.1. The (Doubly) Neglected Backcountry

In 1775, probably around 25 percent of Americans lived in what was called "the backcountry" (Jensen 1968, 9). In Pennsylvania and the Carolinas, people living in these areas amounted to 40 or 50 percent of the population (ibid.). The western counties were neglected at the time, in the sense that they often faced larger burdens and had weaker rights than those closer to the seaboard. This difference is also neglected—often mentioned but rarely highlighted—in scholarly discussions of the period. Whereas economic qualifications for voting and eligibility are frequently cited as sources of bias in representation, the geographical bias in apportionment has received less attention. With respect to the backcountry, this distinction matters. "The property qualification for voting meant little in the backcountry, where land was easy to acquire. Those areas could gain political influence only if they could gain representation in the legislatures, and these most colonial legislatures were unwilling to give them" (*id*. 26).

In the colonial period, "legislators saw that granting equal representation to newly created communities meant diminishing their own power. To preserve their superiority, some legislatures withheld representation completely or assigned new regions fewer representatives than the older areas had" (Zagarri 1987, 43). The underrepresentation continued well beyond the colonial period. By 1787, Maryland, both Carolinas and Virginia used regional representation to both houses that, in the last three of these states, entailed very poor representation of the backcountry (Gazell 1970). In 1785, South Carolina blatantly ignored its own constitution when it failed to reapportion the assembly (Zagarri 1987, 48). Georgia, Connecticut, and New Jersey had proportional representation for one house and regional representation for the other, the remaining six states using proportional representation for both houses (Gazell 1970).

Yet even when the state constitutions did not stipulate unequal influence of eastern and western counties, geography and money often conspired to produce the same effect. The case of Massachusetts is emblematic in this regard. Although several members of the Convention that drafted the 1780 Constitution demanded that the state assume all costs of the delegates,

> [the] Constitution as drafted and adopted provided that each town should pay the expenses of its own representatives incurred in attending the session. […] The point about payment was of very great consequence and of greater practical signification, in all probability, than the question of the precise basis of representation. Interior towns, especially those at more than a day's journey from Boston, very frequently failed to send a member at all. The cost of maintaining a representative in the capital through the legislative session as a heavy burden to which the frugal farmers saw little reason to subject themselves; were it necessary to be represented, in order to put the town's view in some dispute, a single member would be cheaper than two. For the seaboard towns the capital was relatively accessible. Their greater wealth also made it easier for them to maintain representatives. *All the normal circumstances of economic and political life therefore tended to give the advantages to the east coast* (Pole 1966, 204; emphasis added).

In addition, the low quorum — 60 out of 228 representatives — ensured that attendance from country districts was not required. "Some fifteen town meetings had the foresight to raise objections against permitting so small a number when attendance from country districts was likely to be dangerously thin […]. These interior towns hoped to ensure that some of their members were always present, to counter the danger that a small minority from the eastern towns might push through social interest legislation" (*id.* 199–200). Some of the measures to be discussed below owed their origin to the low quorum and the location of the assembly: "During Shays' Rebellion a Hampshire County writer charged that a recent tax relief proposal had been 'spun out and put off till July just at the close of the session, when many of the country members [were] under a necessity of returning to their farms'" (Holton 2007, 169). Below I discuss other, emotionally based reasons for the low attendance of the backcountry.

In Virginia, according to Jefferson (1784, Query XIII), "nineteen thousand men, living below the falls of the rivers, possess half the senate, and want four members only of possessing a majority of the house of delegates; a want more than supplied by the vicinity of their situation to the seat of government, and of course the greater degree of convenience and punctuality with which their members may and will attend in the legislature. These nineteen thousand, therefore, living in one part of the country, give law to upwards of thirty thousand, living in another, and appoint all their chief officers executive and judiciary". Jefferson's "analysis grew constantly more correct as time went on and population moved into the western sections" (Pole 1966, 297).

In Pennsylvania, the 1776 constitution substituted proportional for regional representation and thus did away with the underrepresentation of the western counties. These areas were, however, disadvantaged in other respects. "Farmers struggling to get from under a load of unpaid debts and taxes could not afford to leave the plow to spend months in Philadelphia debating laws" (Bouton 2007, 129). To obtain legal title to land on the frontier, poor settlers had to make the expensive trip to Philadelphia (*id*. 121–122). Without the title, they could not vote.

The state delegations to the Federal Convention were elected by the legislatures, and reflected the geographical biases of the latter. The average distance of the county of a framer to navigable water was 16 miles, the maximal distance being 200 (McGuire 2003, 69). The distance is highly correlated with the votes on prohibiting the issuance of paper money by the states—framers from the most isolated areas being highly likely to vote against a ban (*id*. 73). According to McDonald (1982, 37), delegates at the Convention represented thirty-nine out of fifty-five major geographical areas in the nation. Unrepresented were the six major areas in the mountain and transmontane regions of Pennsylvania, Virginia, and South Carolina, as well as the Berkshire areas in Massachusetts and Connecticut.

At the Convention itself, there were many references to the western lands and to future western states. The always outspoken Gouverneur Morris claimed that the experience from Pennsylvania showed that it would be dangerous to let future western states accede to the Union on equal terms with the original ones: "they would not be able to furnish men equally enlightened, to share in the administration of our common interests. The Busy haunts of men not the remote wilderness, was the proper school of political Talents. If the Western people get the power into their hands they will ruin the Atlantic interests. The Back members are always most averse to the best measures. He mentioned the case of [Pennsylvania] formerly. The lower part of the State had ye. power in the first instance" (Farrand 1966, vol. I, 583). John Rutledge also expressed skepticism towards equal representation of the Western states (*id*. 534). Nathaniel Gorham, claiming to speak for the committee on representation that he had chaired, asserted that "the Atlantic States having ye. Govt. in their own hands, may take care of their own interest, by dealing out the right of Representation in safe proportions to the Western States" (*id*. 560). Although Madison and George Mason spoke out in favor of equal, impartial representation of the future Western states (*id*. 584, 579), we cannot rule out that their arguments, or at least Mason's, were motivated by the belief that slavery would expand in these states (Amar 2005, 90).

It is likely, or at least highly possible, that the Constitution would have been rejected if all districts had been equally represented in the state ratifying conventions. In South Carolina, "coastal areas […] overwhelmingly favored the Constitution. Up-country areas just as overwhelmingly opposed it. The less populated coastal areas, however, had 151 delegates to the up-country's eighty-six" (Roll 1969, 30). In the chain reaction of ratifications, the "psychological effect of the South Carolina ratification on the key state of Virginia [which ratified in a close vote of 89 to 79] was all the more important because it eliminated the possibility of an attractive alternative [a southern confederacy]" (*id.* 32). In the New York State convention, the pro-Federalism majority that emerged after the ratification by Virginia represented a minority of the population (*id*, 32–33). Overall, the agrarian opposition to the Constitution "tended to lose out in their pursuit of 'widely-dispersed, strictly-limited powers, located close to the people', largely because of unfairly diminished representation at the ratifying conventions" (*id*. 40, citing Benson 1960, 219).

2.2. Paper Money and Debts

The "most distinctively Madisonian provisions" (Amar 2005, 123) were the prohibitions in Art I.10: "No state shall [...] coin money; emit bills of credit; make any things but gold and silver a tender in payment of debts; pass any law [...] impairing the obligation of contracts". James Wilson and Benjamin Rush both said that if the constitution consisted only of a ban on paper money, it would be worth adopting it (cited in Bouton 2007, 179, 301). Although the Convention at one point voted to strike out a clause authorizing the creation of federal paper money (Farrand 1966, vol. II, 310), the practice is not explicitly banned in the Constitution.

In peacetime, before 1776, many colonies had routinely and successfully used paper money, careful to secure collateral in land or in future taxes (Ferguson 1961, ch. 1; Grubb 2006). During the Revolutionary War, paper money and other instruments issued to fund the war effort depreciated very rapidly. In theory, the states could have levied heavy taxes and, by withdrawing money for tax payment, preserved its value by reducing the amount in circulation. This option was, however, politically impossible: "Having so recently opposed taxation by Parliament, the American people were sensitive on the subject" (Ferguson 1961, 30). Instead, the Continental Congress first let Continental bills depreciate to a few percent of their face value and then turned to other instruments, notably federal bonds, certificates issued by the states or the federal government as payment for goods, and military certificates issued by the states as payment to soldiers. The states, too, issued paper money and bonds. Some of these instruments carried interest, others did not. Except for the federal bonds, which were mainly used as an investment, they circulated as a medium of exchange and were often used to pay state taxes. Speculators also bought up large quantities of certificates at bargain-basement rates from the original recipients.

Once the end of the war was in sight, many holders of these instruments — Continental dollars, bonds, and certificates — demanded redemption in specie at face value and, when appropriate, with interest. Because the Continental Congress could not get enough states to agree on a federal impost (a tariff on imports) to fund the redemption, the states had to decide how to meet the demands. Most of them enacted legislation calling for heavy taxes in specie. Although some of these were to come from imposts and excise taxes (consumption taxes), the bulk of taxation was usually in the form of poll and property taxes. As gold and silver were scarce and prices (in specie) therefore subject to heavy deflation, farmers found it difficult or impossible to sell their products at prices that would allow them to pay their taxes. (On the other hand, deflation brought a windfall gain to state officials such as the governors, who lived on fixed salaries.) These decisions by state assemblies triggered strong reactions in several states. "Attempting to force the common people to pay hard money, the governments of Pennsylvania, South Carolina, Rhode Island, and Massachusetts threatened property sales on a wide scale. Resistance, then retreat, invariably followed […] Maryland, Virginia, New Hampshire, New Jersey and, and possibly Delaware [also] fit the pressure-resistance retreat model" (Brown 1993, 122). The remaining four states did not attempt to collect taxes in specie (*id*.).

Because Massachusetts saw the most violent form of resistance, I shall focus on that state. The conservative recovery of power in 1780 led to "an arbitrary state program for consolidating and paying war debts" that was "the most expensive possible under the circumstances, for the wartime currency was given preferred status" (Ferguson 1961, 245). Between 1780 and 1786, the state legislature enacted nine direct taxes variably payable in Continental currency, specie, Bank of America notes, notes issued by Robert Morris, army certificates, federal indents (certificates of interest on federal bonds) and in beef (Brown 1993, 247). In 1781 and in 1786, the legislature levied heavy taxes in specie. The amount of specie required by the 1786 tax underestimates the actual amount needed, since one-third of the tax was to be paid in indents, which most people had to buy from bondholders with hard money (Holton 2007, 66).

The efficiency of tax collection diminished with the distance of the counties from the coast. In Middlesex, the arrears of taxes for 1780–1782 was 33 percent of the levies, in Berkshire it was 74 percent (Brown 1993, 101). The efficiency also diminished with time. In the state as a whole, arrears increased from 12 percent to 84 percent (*id*. 102) in the period 1782–1786. At the same time, the scarcity of specie often made it difficult to repay private creditors. "Many farmers had gone into debt before the war when money was abundant and prices were high; now, as money became scarce, prices dropped and farmers could not sell their crops and livestock for enough to cover their debt" (Bouton 2007, 23). Even when farmers could bear one of these charges — taxes and debt repayments — the combined burden was often beyond their means.

2.3. Resistance, Repression, and Retreat

Although taxes and debts might be equally burdensome in an objective sense, they appeared quite different from a subjective point of view. The relation between debtor and creditor was not intrinsically hostile. The claims "that procurrency farmers were simply seeking to defraud their private creditors" is a myth (Holton 2007, 61). Farmers and artisans knew quite well that they would need credit later, which would not be forthcoming if they did not service their current loans. In contrast, the relation between taxpayers and bondholders was deeply antagonistic. If bondholders had been mostly war veterans still in possession of their original bonds, taxpayers would have seen the strength of their moral claim. They might still have resisted the demand for tax payment in hard money, but less virulently. This was far from being the case however. "Although a host of farmers and soldiers had held on to their bonds, the majority had not, and *by value* most of the debt had concentrated in the hands of a few" (Bouton 2007, 37). In Massachusetts, "nearly 80 percent of the state debt made its way into the hands of speculators who lived in or near Boston, and nearly 40 percent into the hands of just thirty-five men" (Richards 2002, 75). On the one hand, "Americans were acutely aware that most of the tribute that public officials exacted from them went to bondholders" (Bouton 2007, 32) and "resented the sacrifices their assemblymen exacted on behalf of bond speculators" (*id*. 38). They did not "accept the legislative argument that the chief beneficiaries were 'worthy patriots' who had come to the aid of the state in its time of need"

(Richards 2002, 79). Understandably, veterans who had sold their bonds to speculators out of necessity were "especially angry" (*id*.).

On the other hand, "Bondholders were acutely aware that the value of their investments hinged on the willingness of the state legislatures to impose taxes" (Bouton 2007, 40). As a consequence, "Many bondholders, recognizing that political events determined the value of their investments, made efforts to influence politics" (*id*. 41). Of "the thirty-five men who held over 40 percent of the state debt, all of them during the 1780s either served in the state house themselves or had a close relative in the state house" (Richards 2002, 78). Although we cannot determine the actual influence of the speculators on the legislators, "in the eyes of their countrymen [their] influence was enormous" (Bouton 2007, 41). In Philadelphia, Pelatiah Webster (1785, 303) proposed that in decisions concerning the public debt, assembly members who were "directly or indirectly *possessed, interested*, or *concerned*, otherwise than as an original holder, in any *public securities*" should not be allowed to vote, any more than "a *judge* or *juryman* should sit in judgment in a cause, in the event of which he is *personally interested*" (*id*. 302).

To address the issues arising from taxes and debts, the farmers had the choice between political action and private resistance. In April 1786, voters in Rhode Island elected an assembly of "Reliefers" that issued paper money and made it legal tender for all debts, private and public. In Massachusetts, the session that began in May 1786 could, in principle, have enacted pro-relief measures, had not the western counties been underrepresented compared with the eastern ones. The farmers were caught in a classical collective action dilemma. "The very factors which made representation urgent also made it more burdensome. The harder the times, the more inducement to the towns to cut their costs. That anyone town's one or two representatives would be able to make an effective impression on the general policies of the [State assembly] or on the condition of the [State] always seemed improbable" (Pole 1966, 234–235). In addition to this rational calculation, the abstention from the assembly also had an emotional root. "Even though numerous New Hampshire and Massachusetts towns defeated their antirelief assemblymen in the in the spring 1786 elections, their action was cancelled out by other towns that expressed their anger at the legislature's harsh fiscal and monetary policies by withdrawing their representatives altogether" (Holton 2007, 134).

Later, the farmers of Massachusetts got their way in the assembly. They did so because they had undertaken widespread private resistance, which escalated into collective violence with Shays' rebellion. Taken as a whole, the states demonstrated a remarkable variety of forms of resistance. Like their near-contemporaries in France, farmers in Virginia used arson to destroy property records that were needed to execute the law (Holton 2007, 146). In New Jersey, "taxpayers formed groups that purchased the office of excise collector – all with the express purpose of not making anyone pay" (*id*. 147). In a remarkable analysis, Bouton (2007, 146) explains that in Pennsylvania,

> [Ordinary folk] built a series of concentric rings of protection […] around their communities. […] Working from the outermost rings to the inner ones, the first was formed by county revenue officials who tried to thwart tax collection. The second

> ring was composed of county justices of the peace who refused to prosecute delinquent taxpayers and tax collectors. The third ring was formed by juries who acquitted those accused of not paying their taxes. The fourth ring was composed of sheriffs and constables who would not arrest non-paying citizens. The fifth ring involved ordinary folk attempting to stop tax collection and property foreclosures through nonviolent protest. Ring six was people trying to achieve those same goals through violent crowd action. Ring seven as composed of self-directed country militias that refused to follow orders to stop any of this protest.

In Massachusetts, Shays' rebellion produced three effects. First, the governor raised an army from private sources to defeat the rebels. Of the 153 contributors, more than half were speculators (Richards 2002, 78). Although the Continental Congress had requested $530 000 from the states to suppress the rebellion, only Virginia complied. In the eyes of many Nationalists, the failure to take collective action on this occasion provided the clinching proof of the weakness of the Confederation and of the need for a stronger central government (Dougherty 2001, 128).

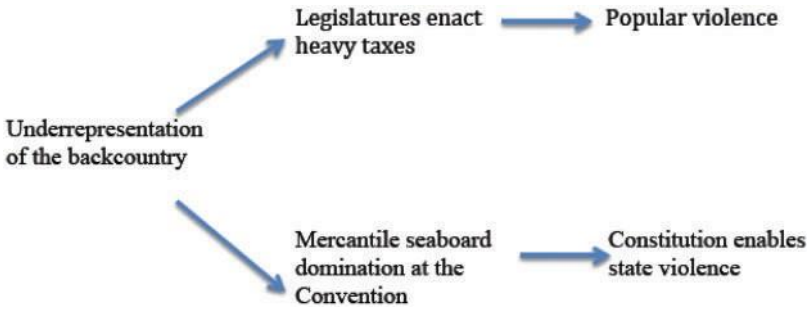
Second, the legislature in Massachusetts caved in. In the fall of 1786, "the same legislators who had adopted the punishing taxes that provoked the rebellion - and who had voted down several relief measures during the spring and summer - now granted farmers a broad range of tax and debt reliefs" (Holton 2007, 155).

Third, in the 1787 elections town meetings replaced two-thirds of the assemblymen and defeated the governor. "What made the April-May 1787 elections different from those held a year earlier was that by that time, anger at the government was such a common topic of conversation that farmers became convinced that like-minded individuals throughout the state were going to show up at their town meetings determined to replace the assembly majority" (*id*. 156). On this analysis, the collective action problem of the farmers was not (as assumed by Pole 1966, 234–235) a Prisoner's Dilemma, but rather an Assurance Game. Lack of information rather than lack of solidarity was the main cause of noncooperation in the 1786 elections (see also Bouton 2007, 130 for similar observations on Pennsylvania).

Faced with actual or anticipated violence and resistance, other state legislatures that were not replaced (as they were in Rhode Island and Pennsylvania) also caved in. In South Carolina, the government backed down in 1785 when it seemed "likely that a resort to coercion by low-country leaders would have forfeited their up-country and back-country support, and with it their precarious control of the assembly" (Brown 1993, 80). In Maryland, a "divided government retreated from the brink and eased the pressure" (*id*. 128). In Virginia, Madison wrote to Jefferson on December 4, 1786, "the specie part of the tax under collection is made payable in [tobacco]. This indulgence to the people as it is called & considered was so warmly wished for out of doors, and so strenuously pressed within that it could not be rejected without danger of exciting some worse project of a popular cast".

2.4. The Convention and the Constitution

The events in Massachusetts and in the other states had almost certainly an important impact both on the calling of the Federal Convention and on the substance of the Constitution. Schematically,



The call for a Convention to revise the constitution issued by the five states that had sent delegates to the meeting at Annapolis in September 1786 might not have gotten very far but for Shays' rebellion, which encouraged merchants, politicians, and generals who desired a stronger national government. The merchant Stephen Higginson who had for many years wished for a crisis that might trigger the establishment of a stronger union, wrote to his friend Henry Knox (Secretary of War) that the rebellion "must be used as a stock upon which the best fruits are to be ingrafted" (Brynner 1993, ch. 5). Knox, in his turn wrote alarmist, exaggerated, and persuasive letters to his friend George Washington (*id*. ch. 6). Logically enough, some Nationalists hoped that the violence would not be crushed too quickly. "As long as the insurrection was eventually crushed [General John] Brooks was happy to see it continue. He saw nothing but good coming from it. He even hoped that that the rebels would become more audacious. 'Should the insurgents begin to plunder,' wrote Brooks, 'I think it will have a good effect.' It would provide good propaganda for the cause of a stronger national government" (Richards 2002, 128).

Although there is only indirect evidence that Shays' Rebellion had a decisive impact on the decision of Congress to propose the Federal Convention and on the decision of all the states expect Rhode Island to send delegates, the evidence that Washington would not have attended but for that event seems compelling. It is also plausible—although hard to prove—that the Convention would not have managed to keep the vital secrecy of its proceedings if Washington had not been President (Rossiter 1987, 167–168), and that the document would not have been ratified by the states if he had not lent his prestige to it.

These issues are secondary, however, to the impact of the Rebellion on the debates in the Convention and on the final document. Madison's notes from the Convention contain dozens of direct and indirect references to the events in Massachusetts, often coupled with denunciations of "the turbulence" of democracy (e.g. Farrand 1966, vol. I, 51 (Randolph), 299 (Hamilton), 430 (Madison)). Here is a representative statement by Elbridge Gerry, a delegate from Massachusetts of "gerrymandering" fame:

> The evils we experience flow from the excess of democracy. The people do not want [lack] virtue, but are the dupes of pretended patriots. In Massts it had been fully con-

> firmed by experience that they are daily misled into the most baneful measures and opinions by the false reports circulated by designing men, and which no one on the spot can refute. One principal evil arises from the want of due provision for those employed in the administration of Governnt. It would seem to be a maxim of democracy to starve the public servants. He mentioned the popular clamour in Massts. for the reduction of salaries and the attack made on that of the Govr. though secured by the spirit of the Constitution itself. He had he said been too republican heretofore: he was still however republican, but had been taught by experience the danger of the leveling spirit. (Gerry in Farrand, *Records* I, 48).

It is worth mentioning that the attacks on the salary of the governor was due to the fact, mentioned above, that he had benefited from the general deflation, and not to any "leveling spirit".

The Preamble to the Constitution affirms the intention to "establish domestic justice" and "insure domestic tranquility". These aims can be unpacked, in part at least, as protecting creditors and bondholders and as authorizing the federal government to crack down on Shays-like uprisings. As noted, for some observers, the most valuable part of the constitution was the prohibition in Art. I.10. For others, it was the authorization in Art. I.8: "Congress shall have power […] to provide for calling forth the militia to execute the laws of the union, suppress insurrections, and repel invasions", the affirmation in Art. IV.4 that "The United States shall […] protect [every state] against invasion; and on application of the legislature, or the executive (when the legislature cannot be convened) against domestic violence", or the affirmation in Art. I.9 that "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it". These clauses go far beyond anything found in the Articles of Confederation.

The intention to protect bondholders in the future must be distinguished from the desire to protect existing bondholders and possessors of paper money issued during the war. On the latter point, the Convention offered some but not full protection. The constitution does not explicitly affirm that the new government would redeem federal debts at face value. A proposal to that effect was made at the Convention, but rejected as liable to "beget speculations" (Farrand 1966 II, 413). Instead, the more neutrally phrased Art. VI.1 of the Constitution was adopted with the understanding that it would in fact ensure redemption. Proposals to give Congress either the power or the duty to redeem state debts were rejected. Ellsworth later claimed that Gerry had proposed that "Continental *money* be placed upon the footing with other liquidated securities of the United States" (Farrand 1966 III, 171; emphasis added), and that Gerry, who "was supposed to be possessed of large quantities of this species of paper", refused to sign the Constitution because the Convention rejected the proposal. Gerry violently rejected this explanation of his behavior (*id*. 240).

Gerry also held federal securities, and repeatedly urged for writing an explicit duty to redeem them in the constitution. Three other framers (Sherman, King, and Ellsworth) also argued for assumption of the very kinds of debt (and *only* those kinds) that they possessed themselves (McDonald 1982, 105–106). Overall, however, and contrary to the "Beard thesis" as com-

monly—and wrongly—understood, it is unlikely that the decisions of the framers were shaped by their personal economic interests. They may, to be sure, have been shaped by the interests of their constituencies and by the belief that redemption would facilitate ratification.

I believe that the framers overreacted to Shays' rebellion. In a letter to William Smith on November 13, 1787, Jefferson wrote that "Our Convention has been too much impressed by the insurrection of Massachusetts: and in the spur of the moment they are setting up a kite [a hawk] to keep the hen-yard in order. I hope in God this article will be rectified before the new constitution is accepted". I do not know which of the articles citing "rebellion" (Art. I.9), "domestic violence" (Art. IV.4), or "insurrection" (Art. I.8) Jefferson had in mind. It is clear, however, that he thought the framers had adopted the article in question under a sudden emotional impulse, "in the spur of the moment".

It is impossible to prove, to be sure, that their fear was visceral rather than prudential. My grounds for believing it was in fact visceral can be summarized in the first half of a verse by La Fontaine: "Each *believes easily what he fears* and what he hopes". The facts do not confirm the claim—made over and over again at the time—that farmers were "levelers" and demanded "agrarian laws". As noted above, the demand for a reduction of the salary of the Massachusetts governor was merely a claim to adjust his salary for deflation. Nor is there any evidence that farmers were trying to "avoid" or "evade" debt repayment. There was no particular reason why the scarcity of specie that led farmers to bankruptcy could not be remedied by the emission of paper money, as it had been before 1776. After the war, the country would not incur the extraordinary expenditures that had led to the emission of unsecured paper money.

The Constitution—or rather the Hamilton plan that it made possible—did defuse class warfare. It satisfied the landed as well as the mercantile interests by allowing the imposition of federal tariffs and excises and using the proceeds to redeem the state and federal bonds at face value. The Constitution achieved this result, however, by overcoming the *inefficiency* due to the decentralized nature of the Confederation (Dougherty 2001), not the alleged injustice of state legislation.

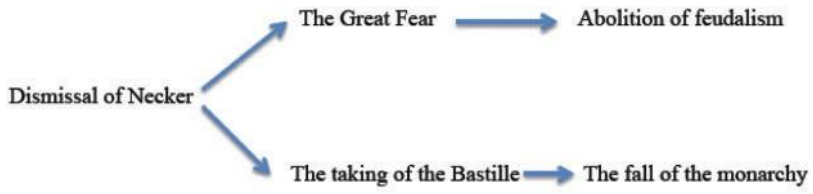
3. FRANCE: PEASANTS AND DEPUTIES, SOLDIERS AND CROWDS

In France, the link between violence and constitution-making took different forms. Violence in the countryside or in the towns had no role in the *calling* of the Estates-General, which later transformed itself into a constituent National Assembly. Louis XVI summoned the Estates-General because the state had run out of money, in part because of his financial assistance to the American revolutionaries, and he needed the nation's agreement to his tax proposals. In contrast, violence in the countryside as well as in Paris had a decisive influence on the *constitution* itself.

Lefebvre (1973) and Markoff (1996) offer the outstanding syntheses of violence in the countryside in the spring and summer of 1789. (In quoting from the imperfect English edition of

the former book I often modify the text.) With regard to state violence and popular violence in Paris over the summer of 1789, Caron (1906–1907) and Godechot (1989) contain perhaps the most complete discussions. Kessel (1969) is the best monograph on the events on August 4, 1789, when the constituent assembly literally abolished feudalism overnight.

I shall discuss these events in the following steps, bypassing chronology for the sake of causal coherence. First, I consider the "Great Fear" of 1789. Second, I discuss the direct causal impact of actions in the provinces inspired by the Great Fear on the decisions the Assembly took on the night of August 4. Third, I retrace the steps of the attempted counterrevolution by Louis XVI and his entourage in late June and early July, how the assembly and the people of Paris thwarted this attempt, and some of the consequences of their actions. The violence in the provinces and in Paris is linked by a common cause, the dismissal of the King's Minister Necker in July 11. Schematically:



3.1. The Great Fear

The origin of the Great Fear was the belief of the peasantry that bandits in the pay of the nobility were out to ruin their crops and starve them, to create a state of anarchy that would prepare the terrain for counterrevolution. This—totally unfounded—fear—led them, among other things, to attack castles, burn property records, and to kill nobles. In the following, I flesh out some details of these events, with focus on the flow of information from Paris to the provinces. In the next subsection, I consider the information flow in the opposite direction, as well as a subsequent return flow.

If the main class conflict in America was between farmers and bondholders, the French situation was characterized by the struggle between tenants and their feudal lords. The relations between the peasantry and their seigneurs were intensely personal. De Tocqueville (2011, 38) has a vivid description of the daily frustrations and humiliations that the French peasant suffered in his encounters with his noble neighbors:

> These neighbors [the agents of the seigneur] arrive to take him away from his field and force him to work elsewhere for no pay. When he tries to protect his seedlings from the animals they hunt, they prevent him; they lie in wait for him at river crossings to exact a toll. At the market there they are again, to make him pay for the right to sell the produce of his land, and when on his return home he wants to use the rest of the grain for his own consumption […], he has to take it to their mill

> and have the bread baked in their oven. […] Whatever he sets out to do, he finds these tiresome neighbors barring his path, interfering in his pleasures and his work and consuming the produce of his toil.

Over the centuries, this predatory behavior triggered a constant stream of local peasant "émeutes" (Nicolas 2008). At the same time, harsh and arbitrary taxation caused numerous tax rebellions (*id.*), with an equally local character. Markoff (1996, 261–252) lists the following as the main forms of resistance:

- Seizure or destruction of power-giving documents (the titles of lords, tax rolls, conscription lists).
- Sacking the residence of wrongdoers (the lord, the tax official, the official in charge of food supply, the merchant, the peasant withholding grain from the market).
- The rescue of one's fellow who might have been conscripted or seized in the wake of a resistance movement.
- Redistribution of grain or of money taken from lord or cleric.
- Imposing costs on violators of communal solidarity by threatening or attacking peasants who might make payments to church or lord despite a boycott; who might work as laborers at unacceptable wages; who might be hauling grain to market at unacceptable prices.

As one would expect, these are all local targets. Since the peasantry could not identify grain speculators, they could not direct their attacks against them. *Mutatis mutandis*, the following observation on Paris bread riots probably also applied to the countryside: "consumers would be inclined to discharge much of their venom on the baker – the immediate oppressor – rather than on the far more olympian speculators" (Kaplan 1982, 8). Nor could the peasant easily march on Paris to attack the counterrevolutionary nobles at the court who were thought to pay brigands to cut the grain while still green. Instead, they diverted their anger to the local elites.

The actions had local targets and were local in their origin. Yet they were to some extent coordinated in their timing by common external causes, such as inclement weather leading to a bad harvest and, in 1789, news from Paris. "The targets of peasants actions may have been very much local ones, but the causes of peasant actions […] included the decisions on national policies of revolutionary elites" (Markoff 1996, 331). As in America, there were also effects of diffusion and contagion. In France, these took three forms: "one revolt stimulates another as the repressive forces appear weaker than previously known, as those forces are actually weakened by failure, and as organizational possibilities and tactics are debated and knowledge of successful organizational models and tactics becomes widely diffused" (*id.* 369). The first two mechanisms were unlikely to be observed in America: weakness of repression in one state could neither signal nor cause weakness in other states. Although in theory the failure of the Confederation to raise troops against the insurrection in Massachusetts might have served as a signal to rebels in other states, this Bayesian mechanism does not seem to have operated.

The Great Fear was not one movement, but many. According to its foremost historian, Georges Lefebvre (1973), it originated simultaneously and independently in six regions of France in mid-July 1789. Later research has identified a seventh current (Ramsay 1991). Although Lefebvre carefully distinguishes the July Fear and the actions it inspired from effects of the hunger in March through June 1789 (no region saw the occurrence of both), the two movements exhibited many of the same mechanisms.

In the spring, the dearth of grain after a bad harvest in 1788 increased the number of vagabonds, beggars, and "brigands" in the countryside. Whereas individual wanderers and beggars had always been a regular (and often intimidating) presence, the famine increased their numbers to form larger bands. Their actions against the peasantry took different forms, from simple protection rackets to cutting the grain before harvest time. The farmer refused to sell grain to the day laborers on the grounds that he was obliged to sell it in the market of the local town. Since as nonresidents these laborers were not admitted into the towns, "there was only one course left to them – to stop the wagons in transit and seize the sacks of corn and flour, paying either the appropriate price or none at all" (Lefebvre 1973, 26). At the same time, the peasants feared the "sudden and apparently spontaneous expeditions which came out from the towns and went from farm to farm buying corn – or, more accurately, forcing the farmers to sell their stocks" (*id.* 28). The effect of these actions was to create a climate of generalized fear and suspicion, where not only town and countryside were in a state of reciprocal terror, but "peasants in rebellion became objects of fear for one another. Those who revolted rarely accepted a refusal to join them. […] Every revolt made the peasant want to join it, while at the same time scaring him. The people frightened itself (*se faisait peur à lui-même*)" (*id*. 55–56).

The dearth of grain in the spring triggered suspicions that it was a result of hoarding by speculators. "The people were never willing to admit that the forces of nature alone might be responsible for their poverty and distress" (Lefebvre 1973, 24). In eighteenth century France, every famine triggered conspiratorial explanations. Although these rumors might be false in any given case, they were often justified (Kaplan 1982). The suspicions might take one of two forms. In its less virulent and more rational version, the peasantry believed that the conspirators were profit-seekers who were merely indifferent to their welfare. In a more extreme form, they believed that the main goal of the conspirators was to reduce them to starvation. In the spring of 1789, the first form seems to have predominated, which may explain why "subsistence events" dominated "anti-seigneurial events" in this period (Markoff 1996, 276). The fear of brigands was endemic but local: there was no thought that the plundering was orchestrated at a national level. Also, the assumption was that the brigands were acting, like the peasants themselves, out of hunger. In July, the second form of suspicion emerged. The peasants feared that the aristocrats had enlisted the brigands to cut the unripe corn, for the purpose of creating chaos and anarchy that would undermine the Revolution. Mixed with this was a fear of foreign invasion, supposedly organized by the King's reactionary brother Comte d'Artois from his exile in Savoie. As noted, this fear was completely groundless. There was no conspiracy to ruin the countryside.

Although irrational, the Great Fear was intelligible. To understand it, we can cite motivational as well as cognitive mechanisms. On the motivational side, we can go back to the convocation of the Estates-General at the end of 1788. The peasantry tended to interpret this event as a promise that the King was going to alleviate their misery. Great hopes were raised. When the Estates met and remained completely inactive for six weeks in May–June, the hope was replaced by a growing suspicion that the privileged orders were sabotaging the will of the King. When news about the dismissal of the King's liberal minister Necker on July 11, the fall of the Bastille on July 14, and the flight of Comte d'Artois on July 17 reached the provinces, the suspicion of an aristocratic conspiracy against the people hardened into a certainty.

On the cognitive side, many peasants were probably afraid of expressing their disbelief in the rumors, thereby creating a situation of pluralistic ignorance (few people believe that p but most people believe that most people believe that p). Also, "there was a risk in revealing one's skepticism. Those who made too obviously a play of it and refused to take defensive measures might perhaps be seeking to lull the people's suspicion. […] The danger arose all the more rapidly because the people who brought the news felt their amour-propre damaged if they were not taken seriously and they were very likely to spread malignant gossip about those who refused to believe them." (Lefebvre 1973, 153.). Refugees tended to exaggerate the danger lest they be accused of cowardice for having run away (*id*. 148). In many towns "authorities were delighted to be able to shift the blame [for violence] from local people to unknown brigands […]; the intendants accepted these versions without batting an eyelid and contributed to spread them" (*id*. 128). Misinterpretations of accidents and natural phenomena also contributed to the general panic (*id*. 94, 131, 144, 145, 164, 166, 168, 189). As in the spring, the people frightened itself (*id*. 116, 123).

The Great Fear inspired a great number of "anti-seigneurial events", including violence against persons or property, invasion of castles with varying degrees of damage, destruction (rather than seizure) of food sources, coerced renunciation of rights, seizures of land charters, damage to seigneurial mills, ovens and winepresses, refusal to pay rent, and numerous others (Markoff 1996, 221). Lefebvre (1973, ch. II.5) also cites refusal to pay rent, destruction of seigneurial pigeon houses, burning of archives, sacking or looting of castles, arson, and many others. Personal violence against the lords, on some occasions resulting in their death, occurred in 3 percent of antiseigneurial events, as against 53 percent that involved property damage (Markoff 1996, 221). Although small in relative terms, the number and gruesome detail of the massacres were large enough to focus the attention of contemporaries (Ferrières 1880, 120–121).

The anger towards the seigneurs had, as explained earlier, deep historical roots. It was strengthened by fear of the (nonexistent) brigands that they believed the lords had organized against them. Hence anything that could strengthen the fear would strengthen the anger. The peasant belief that the aristocrats had enlisted the brigands to cut their unripe grain would simultaneously trigger *fear of the proximate cause* of destruction and *anger towards the ultimate cause*; the greater the fear, the greater the anger.

3.2. The Night of August 4th

The abolition of feudalism on the night of August 4th (confirmed by the decrees one week later) was triggered by information from the provinces to Paris. Taking account of the time pattern of antiseigneurial actions and of the time lag, Markoff (1996, 437) calculates that the reception of bad news from the provinces had two sharp spikes around July 28 and August 2. Many of the deputies were personally affected or threatened. In addition to the nobles, many members of the third estate held important landed properties (Kessel 1966, 19–21; Tackett 1996, 38–39). It took the deputies a few days to absorb the shock and start debating and enacting countermeasures.

Generally speaking, in the face of actual or potential rebellion a government has the choice of four responses: preemption, concession, moderate repression, and severe repression. Wisdom dictates preemption—meeting popular demands before they are formulated, or granting more than is demanded. After July 14, 1789, that option was not on the table. Jaurès (1968, 443) was probably right in asserting that "one had the choice between organizing a very difficult and very dangerous repression throughout the countryside, and giving in to the demands from the rebellious peasantry". Moderate repression was unlikely to work. Although the government had used this strategy in the decades prior to the Revolution, its targets "were subjected to enough restraint to provoke resistance but not the heavy yoke that might quell it" (de Tocqueville 2011, 139).

Severe repression might seem more promising, and in fact "the first motions made in the Assembly all went in the direction of repression" (Jaurès 1968, 443). This statement refers to a motion that the deputy Solomon presented on August 3, on behalf of the Committee on Reports (AP 8, p. 336). The first paragraph of the motion describes the violence in the countryside; the second affirms that the Assembly cannot take time off from its main task to deal with particular matters; and the third states in intransigent terms that no pretext whatsoever could justify the refusal to pay taxes or feudal dues. The proposal was sent to another committee, which reported back in almost equally intransigent terms the next evening.

After the second report had been read, the first speaker, the Vicomte de Noailles, argued that the peasantry had to be met with concessions, not with repression. His speech was the first event in "the night of August 4" (see Elster 2007 for a narrative). Other speakers followed, and at the end of the night the Assembly had abolished not only the feudal regime, but virtually the whole system of privileges and exemptions that constituted the ancien régime, the courts (parlements), and the guilds (jurandes) being the only, and temporary, exceptions. The assembly caved in.

Some deputies probably made up their mind because they feared a return to the absolute monarchy and the fear of a civil war. In terms of the distinction made above, these are prudential fears, not — or not necessarily — visceral fears. Some deputies may indeed have viewed the situation in this detached perspective. They may have *believed* that a repression would cause a return to the absolute monarchy or a civil war, and they did not *want* any of these outcomes to happen.

In contrast, deputies who believed that their property and family were under an imminent threat from the peasantry could easily experience visceral fear. Although they would not themselves be targets of attacks by the peasantry, personal danger is not a necessary condition for the triggering of visceral fear (as any parent knows). In several letters from August 7 onwards by the noble deputy Comte de Ferrières (1932, 109 seq.) to his wife, one can easily read his anxiety between the lines. The first letter contains very detailed instructions that she is to sell his sheep and his oxen, at any price, for cash; to gather all the money and documents in his castle in Mirebeau and transfer them to their house in Poitiers, making sure nobody observes her doing so; to ship their mattresses, bed covers and sheet to Poitiers ("in case of an event, at least something will be saved"). Three days later, he tells her to go with their daughters to Poitiers, even if the harvest should suffer: "do not consider the costs, and do not ask for [the protection of] soldiers, which would cause alarm in the countryside". He does not care if after these precautions his castle is burned, as he is never going to live there again.

His fears also affected his political behavior, as shown by a letter from August 7 addressed both to his constituency and to his friend Rabreuil:

> [To his constituency:] It would have been dangerous even for you if I had expressed opposition to the general wish of the nation. It would have been to designate you and your possessions to the fury of the multitude, and to have exposed you to seeing your houses burned down.
>
> [To Rabreuil:] Mme de Ferrières tells me that you would like me to get into the newspapers; that would be the means to lose the little credit I have in the third estate, for, at this moment, I could only speak out in opposition to what is being done; at least in great part; that would be pointless. Thus I keep silent, as do M. de Clermont., M. de Sulli, Mounier, and wise people. If I alienated the third estate in questions touching on the interests of my electoral districts, I would experience difficulties, if only because of the spirit of revenge (*id*. 118– 119).

In a letter of August 12 he also asserts that "the inhabitants of Mirebeau, who had so many good reasons to treat me well and who even, because of the way I have always behaved towards them, ought to have special consideration for me, have acted with such insolence and fury that I cannot count on their good will". His fear may, then, have spurred him to act on two fronts: to reduce his *vulnerability to invasion* of his castle by transferring or selling his most valuable possessions, and to reduce the *likelihood of an invasion* by voting for measures that might satisfy and pacify the peasantry. His example was not an isolated one.

Tocqueville (2011, 157) claimed that concession, like moderate repression, is likely to be ineffective in quelling rebellion. "The evil that one endures patiently because it appears inevitable becomes unbearable the moment its elimination becomes conceivable." Lefebvre (1973, 38) offered a similar argument: "as hope sprang in the people's breast, so did hatred for the nobility: in the certainty of royal support, the peasants, invited to speak their minds [in the grievance books], reiterated with growing bitterness their *present* miseries and from the

depths of their memory the stifled remembrance of *past* injuries" (emphasis added). Along similar lines, Jaurès (1968, 469) wrote that

> Not only did the nobles think that the abolition of the tithe without compensation would increase their income from land, but they believed above all that this immediate satisfaction obtained at the expense of the clergy would make the peasantry less eager to pursue the abolition of the feudal dues: they hoped to divert the storm towards the goods of the church. What a poor calculation! Quite to the contrary, the peasants were all the more unlikely to accept the need for compensation with regard to the feudal dues as they had been dispensed with compensation for the tithe.

From these arguments it follows that when news about the decrees adopted on August 4th reached the provinces, antiseigneurial actions ought to become *more* rather than less frequent. This consequence was in fact asserted by contemporaries such as Rivarol (1824, 152) and Dumont (1832, 104). Markoff (1996, 443) claims, however, that the opposite effect was observed: "No sooner did [the deputies] complete their legislative work on the eleventh [of August] than the countryside, almost instantly, subsided into something which if not quite peace was at least far less dramatically threatening than for a long several weeks. Their own words must have seemed to possess magical powers". They would indeed have needed magical retroactive powers, as the diagram on page 437 of Markoff (1996) shows that the troubles subsided *before* news about the decrees of the 4th and a fortiori those of the 11th could possibly have reached the provinces. Nevertheless, they did not resume when the news arrived. In a longer time perspective, however, it seems clear that the effect of the measures of August 1789 was to inflame rather than to pacify the peasant furies.

3.3. A Counterrevolution that Triggered a Revolution

At the outset, nobody expected the Estates-General to take very radical measures. The main demand from the third estate was for the abolition of the privileges of the nobility, in particular their exemption from most taxes and their exclusive right to higher military office. In addition, many demanded reform of the many arbitrary features of the regime. There was no demand for the abolition of the feudal property system or even for a constitutional monarchy. Although the events I shall describe shortly are commonly referred to as an attempted counterrevolution, this label is in fact somewhat misleading. It was rather the other way around: it was the failed attempt by the King to intimidate the assembly by gathering troops to Paris that triggered the revolution, both in Paris and in the provinces (see above).

On June 17, after six weeks of bickering over procedure, the Estates-General finally constituted themselves as a National Assembly in a single chamber, rather than as three separate estates. The King took this decision as a direct attack on his authority, since he had ordered the estates to deliberately separately and to vote by order, except if they all agreed to merge and to vote by head. His initial reaction was to close the assembly hall to the deputies, but they reassembled in an indoor tennis court and swore to remain together until the constitution had been adopted. On June 23, the King spoke to the assembly, promised some

reforms, and again ordered the deputies to deliberate separately by estate. When they refused, he backed down on June 27, but began to prepare a military operation against the assembly.

In this "counterrevolutionary" effort, the King was largely a passive tool in the hands of a small coterie that included his wife, his youngest brother Comte d'Artois, and some nobles. On June 26 and on July 1 the King issued orders for troops to converge on Paris, probably amounting to a total of 20 000 (Caron 1906–1907, 14). Rumors of their imminent arrival began in late June, and triggered what an historian has called, with reference to the events described above, a "Great Fear" among many deputies (*id*. 22).

The precise intentions of the conspirators remain unclear to this day. Because of the indecisive nature of the King, plans vacillated constantly. It is likely that some scheme of either arresting the most radical deputies or of moving the whole assembly to a location more remote from Paris was envisaged. Many deputies certainly perceived the troop movements as direct threat to the assembly, and some feared being arrested. In a masterful speech, Mirabeau, addressing himself directly to the king, cleverly avoided the potentially treasonable language of *threats* and used instead the less objectionable— but equally explosive— language of *warnings* (see Elster 2000 for this distinction):

> The danger exists for the people of the provinces. Once alarms have been raised alarmed about our freedom, we do know what can retain them. The very distance makes everything appear larger, exaggerates everything, multiplies, envenoms and embitters the worries.
>
> The danger exists for the capital. How will the people – in the midst of scarcity of food and tormented by the most cruel anxieties – perceive it when a crowd of threatening soldiers are fighting over what remains of their subsistence? The presence of the troops will heat up and draw out the public opinion, and produce a universal fermentation; the first act of violence, carried out under the pretext of maintaining order, may trigger a horrible series of disasters.
>
> The danger exists for the troops. French soldiers, who are close to the center of discussions and share the passions as well as the interests of the people, may forget that a contract made them soldiers and remember that nature made them men.
>
> The danger, Sire, is threatening the efforts that are our main duty, and which can only succeed fully and durably if the people perceive them as entirely free. Passionate movements are subject to contagion; we are only men; our distrust of ourselves, the fear of appearing to be weak, may carry us beyond the goal; we will become obsessed by violent and excessive proposals (AP 8, 213).

The troops did indeed remember that they were men and citizens before they were soldiers. Although they had been called in from the provinces because they were supposedly more reliable than the French Guards in Paris, they soon melted into the population and become

utterly unreliable as an instrument of repression. The conspirators did not master the most elementary techniques of a coup d'État (Caron 1906–1907, 659):

> Instead of dispersing the troops in Paris and around Paris and exhibiting them everywhere, which had the triple disadvantage of fragmenting the forces, exciting the spirits and exposing the soldiers to demoralizing influences, one should have assembled them some distance from Paris in a compact body, fed them well, had the King visit them, ensured their cohesion, fortified their military spirit, impose – if necessary by some severe examples – a strict discipline, take them in full charge; then, once all the troops were in place, strike quickly and strongly (*id.* 657–658).

When the King dismissed his liberal minister Necker on July 11, public opinion in Paris immediately interpreted the decision as part of a scheme to attack the assembly. The troops offered no resistance to the people of Paris when they invaded the Hôtel des Invalides, in search of arms on July 13 and the Bastille in search of gunpowder on July 14. Moreover, the strong group of rentiers in Paris with large investments in state bonds supported the insurrection wholeheartedly (Caron 1906–1907, 666; Godechot 1989, 312ff.). They counted on the assembly to authorize new taxes and on Necker, a renowned financier, to work with the assembly to rescue the state finances. Conversely, during the decisive debates about the location of the Estates-General, when many of the King's advisers wanted them to be held at a safe distance from the crowds in Paris, Necker preferred Paris because he thought the proximity to the capital market in Paris would have a moderating influence on the assembly (Egret 1975, 249–250).

Louis XVI, once again, had to back down by recalling Necker on July 17.

After the failure of the counterrevolution, some moderate members of the assembly wanted to relocate it to the provinces to keep it sheltered from the crowds in Paris. Clermont-Tonnerre asked his fellow deputies, "You did not obey armed despotism; are you going to obey popular effervescence? The former commanded crimes, the latter will command vileness. You cannot deliberate in the midst of fifteen thousand armed men whose projects are unknown and whose character is in tatters" (AR 8, 513–514). The dominant group of the day—the "triumvirs" Barnave, Duport, and Alexandre Lameth— successfully resisted this motion. According to his biographer, Duport thought that "the conquests of the revolution far from being consolidated – the large judicial and administrative reforms had not yet been undertaken –were at the mercy of an aristocratic counteroffensive, and that *the moment had not yet arrived to calm the popular ardors*" (Michon 1924, 67; emphasis added). This widely shared idea that popular violence could be switched off and on according to the political goals of the day (Droz 1860, vol. II, 213) was to prove disastrous. These developments decisively undermined the efforts of the *monarchiens* in the assembly to create a constitutional monarchy on the English model (Egret 1950). The proposals to give the King an absolute veto and to create a bicameral assembly were defeated by large majorities on September 10 and 11. In producing these majorities, both the *fear of violence* and the *hope of violence* played a crucial role. The vote on bicameralism is particularly instructive. The supporters of unicameralism formed a coalition of the extremes. The left supported the meas-

ure because they feared that the upper house of a bicameral legislature would become a tool of the aristocracy and veto radical proposals. The right supported it because they thought a unicameral system would produce anarchy and chaos, thus preparing the grounds for a restoration of the *ancien régime.* Some supporters of bicameralism may have voted against it because the left insisted on a roll-call vote, which would expose them to popular violence if they voted sincerely (Egret 1950, 132). The second and third of these motives are clearly stated in a letter that one of the *monarchiens* wrote to his constituency:

> Some deputies from the third estate have told me, *I do not want my wife and children to have their throats cut*. The bicameralist proposal had yet another kind of adversary, those who regret the *ancien régime* and want the new one to be so bad that it cannot subsist. I have received on this topic confidential communications that I met with neither gratitude nor politeness. These are two strange bases for a constitution, the fear of being assassinated and the desire to make it collapse (Lally-Tolendal 1790, 141).

One of these communications may have come from the eloquent and reactionary Abbe´ de Maury, who repeatedly expressed the wish that things get worse so that they would eventually get better (Droz 1860, vol. II, 343; Montgaillard 1827, vol. 1, 428). Some of the votes in the night of August 4th may also have been motivated by the goal of crisis maximization, the *politique du pire* (Kessel 1969, 132). Thus although the fears of the peasants that the nobility was deliberately starving them to create anarchy were unjustified, the strategy of crisis maximization was not a mere product of their fantasy. The King himself increasingly relied on it (de Priest 1929, vol. II, 25). The decision by the assembly on May 16, 1791 to render the *constituants* ineligible to the first ordinary legislature was also due to a coalition of the two extremes. Both wanted the first legislature to be made up of inexperienced men: the right believed that they would easily be dominated by the King, and the left that they would easily be dominated by the Jacobin clubs. *Ex post*, the left proved to be right. *Ex ante*, the outcome was less obvious, since the vote was taken before the King's flight to Varennes that fatally undermined his legitimacy.

4. Conclusion: Justice And Efficiency

Both constitution-making processes had the effect of shifting the locus of decision-making from social or geographical subunits towards a centralized government. In France, the three *estates* were abolished and replaced by a national assembly. In America, the thirteen *states* lost much of their power to the Union. Historically, the decentralized forms had proved to be inefficient. Each estate or state wanted to benefit from government protection, while being reluctant to pay the taxes needed to fund it. The new constitutions made it possible to overcome this suboptimal situation.

These *consequences* of the constitutions do not, however, provide anything like a full *explanation of* their adoption. Madison's notes on "The vices of the present system" can probably be taken as representative of the views of leading members of the Convention. Although they

certainly dwell on the *inefficiency* of the Confederation, the strongest language is devoted to denouncing the *injustice* of state legislation. In France, the calling of the Estates-General was certainly motivated by the need to establish a more efficient tax system. Yet as events unfolded, that aim receded in comparisons with the demand for economic justice and political representation.

The idea of justice was in fact at the core of both processes. In America, two conceptions of justice confronted each other head-on.

On the one hand, *an elite conception of justice* held that issuing money and bonds entailed a morally binding *promise* that these instruments would keep their value. Comparisons with female chastity were common. In 1779, the Continental Congress issued a statement that a bankrupt republic would "appear among reputable nations like a common prostitute among chaste and respectable matrons" (*Journals of the Continental Congress*, vol. 15, 1060). In 1784, "Philadelphia bondholders petitioning against plans to withhold their annual interest declared that 'credit may be considered as the chastity of the state'. For the government to pick and choose among its creditors – to allow original holders' claims while denying 'an interest of 40 or 50 per cent [to] a few speculators' – would be 'as indelicate, as it would be to measure female honor by calculations in arithmetic'" (Holton 2007, 94–95). In 1786, a correspondent to a New York newspaper recalled with nostalgia the times "before the commencement of the late war, when public faith was still in the possession of vestal chastity [and paper money] circulated freely and at its full nominal value on a perfect equality with specie" (Ferguson 1961, 18).

Normative and ideological overtones are common in debates over monetary policy, inflation, and depreciation. In *A Tract on Monetary Reform*, Keynes (1923, 67–68) denounced the economists and bankers who fulminated against devaluations and capital levies "on the grounds that they infringe the untouchable sacredness of contract" and regarded it "as more consonant with their cloth, and also as economising thought, to shift public discussion of financial topics off the logical on to an alleged 'moral' plane". In a remark whose relevance to my main topic here is obvious, he added "the fact that in time of war it is easier for the State to borrow than to tax [cannot] be allowed permanently to enslave the tax-payer to the bond-holder". In a much-quoted and equally relevant phrase, he referred to "the absolutists of contract" as "the real parents of Revolution".

In the Great Depression, "the gold standard provided just such an ideology, supported by a rhetoric of morality and rectitude. Its rhetoric dominated discussions of public policy in the years leading up to the Great Depression, and it sustained central bankers and political leaders as they imposed ever greater costs on ordinary people" (Eichengreen & Temin 2000, 207). More specifically,

> Treasury Secretary Andrew Mellon advised President Hoover that the only way to restore the economy to a sustainable footing was to "liquidate labor, liquidate stocks, liquidate the farmers, liquidate real estate... purge the rottenness out of the system...". "People will work harder", Mellon insisted, and "live a more moral life".

> Those espousing the puritanical strand of gold-standard dogma grew more strident as unemployment mounted. Hoover himself regarded the gold standard as "little short of a sacred formula". Any deviation he dismissed as "collectivism", an all-embracing label for economic and social decay (*id*. 196).

In the 1780s, some Americans took a similar puritanical and moralistic point of view:

> Early in 1787, a Marylander contended that the "lax principle in our laws, and the administration of justice, ha[d] greatly tended ... to relax the natural springs of industry". "A Native of Virginia" was blunter, declaring that "the relaxation of our laws" had led to "inactivity and torpor". It followed that "accelerating the Adm[inistrat]ion of Justice" would actually relieve "the present distresses of the Countrey", as another Virginian, Edmund Pendleton, contended in a December 1786 letter to James Madison. How? By "producing Industry & Oeconomy" among debtors" (Holton 2007, 99).

These views rest on a confused amalgam of morality and causality, appealing to the sacred character of promises, the purifying effects of hard work, and to an assumption of a backward-sloping supply curve of labor. Many no doubt believed that strict adherence to the gold standard and redemption in specie of war bonds at full value were to be recommended on grounds both of justice and efficiency. Just as Hoover saw any deviation from the gold standard as collectivism, critics of paper money claimed that it was equivalent to leveling and confiscatory agrarian laws. The 1780s and the 1930s seem to have differed in one respect. Hoover was a deluded ideologue: he did not defend the gold standard because he stood to benefit from it personally. In contrast, many advocates of hard money redemption had much to gain if that policy were adopted, at least if it were restricted to domestic debts. Many Virginians, including Washington and Jefferson, tried to pay off their *British* debts in depreciated paper money (Smith 1998, 153–154).

On the other hand, *a popular conception of justice* condemned policies that caused hardships for taxpayers—farmer and veterans—for the benefit of speculators. In 1784, the son of the general who was to suppress Shays' Rebellion "said the conflict between creditors and the parallel dispute pitting 'the creditors of the public, particularly of the army', against taxpayers had both 'arisen from [a] principle of opposition, against the interests of those, whose subsistence is derived from the labours of others'" (Holton 2004, 283). A correspondent writing under the name of "Justice" "urged the Connecticut legislature to scale down the war bonds so citizens would not be 'unjustly taxed to pay more than the real value'" (*id*. 285). Another Connecticut writer said that the value of the securities when they bought them, with interest, "is all [the speculators] can justly demand" (Holton 2007, 56).

The popular sense of injustice was fueled by the belief that the speculators were behind the legislation that would enable them to reap astronomical profits. Their gains were not the fruits of productive labor, but the reward to lobbying. The elite, to be sure, disagreed. In a careful weighing of the claims of different bondholders, Madison (1790) affirmed that the profit of speculators was a just reward to *risk*: "the holders by assignment, have claims,

which I by no means wish to depreciate. They will say, that whatever pretensions others may have against the public, these cannot effect the validity of theirs. That if they gain by the risk taken upon themselves, it is but the just reward of that risk. That as they hold the public promise, they have an undeniable demand on the public faith".

To this argument, the popular conception of justice could retort that the original sales of the bonds had been bargains of desperation (Holton 2007, 90).

The sense of injustice among the French peasantry had different roots. Their three adversaries—the agents of the seigneur, the officials of the royal administration, and the speculators—did not trigger quite the same emotions. Each of the first two groups was part of a social contract with the peasantry, providing law and order, such as it was, in exchange for feudal dues and taxes. There were innumerable occasions for arbitrary and exploitative behavior that triggered *émeutes* in the people (the word signifies "riot", but has the connotation of "emotion" as well). For the period 1661–1789, Nicolas (2008, 53 and *passim*) has identified 439 antiseigneurial events and 3336 antifiscal events, an event being defined as an act of violence against person or property committed by at least four individuals (*id*. 39–40). The real numbers are certainly much higher. Yet I conjecture that in the main these events were reactions to deviations from practices that were, themselves, unquestioned.

The speculators had no redeeming features. In the *ancien régime*, "the trader remained the prototype of the liar who menaced the well-being and the bonds of solidarity of society. The grain trader was especially odious, for who but vicious men would speculate on the subsistence of their fellow citizens?" (Kaplan 1982, 63). In the abstract, speculation may have some benefits. Arrow (1982) observes that "when situations of scarcity arise, hoarding is always blamed. But the evidence for the degree and effects of hoarding is usually difficult to come by. […] If the famine is prolonged, then hoarding at the beginning means greater stores will be available later on". (Today, some economists defend short-selling and even "naked short selling" as providing a valuable social service.) Yet such notions had no grip on the popular imagination. The idea that speculators in grain might be the functional equivalent of granaries and provide an intertemporal redistribution of consumption does not seem to have crossed anyone's mind. Speculators and hoarders were hated because of their perceived indifference to the welfare of the people.

In America, the calling of the Federal Convention occurred when the elite's conception of justice was hurt by violent actions inspired by the popular conception of justice. By a small miracle—the Hamilton plan—the federal government was able to resolve the tension between these two conceptions of justice, by assuming the debts at full value without resorting to direct taxation. It is difficult to know how much one should credit the Convention or the Constitution for this result. A federal impost or excise tax made it possible to fund an army to crush insurrections, as the Whiskey Rebellion of 1794 demonstrated very effectively. It also enabled the establishment of a sinking fund to service the public debt. I conjecture that in the minds of the framers, the first effect loomed larger than the second. The American constitution created an instrument of state violence to repress popular violence.

In France, the constituent assembly abolished feudalism and effectively ended the monarchy. Popular and state violence had a crucial role in bringing about both effects. The assembly acted as the American state legislatures had done a few years before, responding to rural violence with large concessions. The attempted state violence generated urban countervlence that fatally undermined the authority of the King. Even before the Terror, the scale of violence in France was vastly larger than anything seen in America, a fact easily explained by the depth and strength of the institutions that had to be overcome. The French constitution was born of popular violence, as a response both to secular feudal exploitation and to failed state violence.

REFERENCES

Amar, Akhil. 2005. *America's Constitution: A Biography*. New York: Random House.

AP = *Archives Parlementaires*, Serie I: 1787–1799, Paris 1875–1888.

Arrow, Kenneth. 1982. Review of A. Sen, *Poverty and Famines*. In *The New York Review of Books*, 29, pp. 24–26.

Benson, Lee. 1960. *Turner and Beard*. Glencoe IL: The Free Press.

Bouton, Terry. 1996. *Tying up the Revolution*, PhD Dissertation, Duke University.

———. 2007. *Taming Democracy*. New York: Oxford University Press.

Brown, Roger. 1993. *Redeeming the Republic*. Baltimore: John Hopkins University Press.

Brynner, Rock. 1993. *Fire Beneath our Feet: Shays's Rebellion and its Constitutional Impact*, PhD Dissertation, Columbia University, New York.

Caron, Pierre. 1906–1907. La tentative de contre-révolution de Juin-Juillet 1789. *Revue d'histoire moderne et contemporaine*. 8, 5–34, 649–678.

de Ferrières, Marquise. 1932. *Correspondance inédite*. Paris: Armand Colin.

de Montaigne, Michel. 1991. *Essays*. London: Penguin.

Dougherty, Keith. 2001. Collective Action under the Articles of Confederation. Cambridge: Cambridge University Press.

Droz, Joseph. 1860. *Histoire du règne de Louis XVI*. Paris: Renouard.

Dumont, Etienne. 1832. *Souvenirs sur Mirabeau*. London: Bull.

Egret, Jean. 1950. *La révolution des notables*. Paris: Armand Colin.

———. 1975. *Necker, Ministre de Louis XVI*. Paris: Champion.

Eichengreen, Barry, & Peter Temin. 2000. The Gold Standard and the Great Depression. *Contemp. Eur. Hist.* 9, 183–207.

Elster, Jon. 1984. *Ulysses and the Sirens*, rev. edn. Cambridge: Cambridge University Press.

———. 2000. Arguing and Bargaining in Two Constituent Assemblies. *Univ. Pennsylvania J. Constitutional Law* 2, 345–421.

———. 2007. The night of August 4, 1789. A study of social interaction in collective decision-making. *Revue Européenne des sciences sociales* 45, 71–94.

Eyck, Frank. 1968. *The Frankfurt Parliament*. London: Macmillan.

Farrand, Max. 1966. *Records of the Federal Convention*. New Haven CO: Yale University Press.

Ferguson, E. James. 1961. *The Power of the Purse*. Williamsburg VA: University of North Carolina Press.

Ferrières, Charles-Elie, & Marquise de. 1880. *Mémoires*. In M. de Lescure (*ed.*)*Bibliothèque des mémoires,* t, XXXV. Paris: Firmin-Didot.

Gazell, James. 1970. One Man, One Voice. *Western Pol. Q.* 23, 445–462.

Godechot, Jacques. 1989. *La prise de la Bastille*. Paris: Gallimard.

Grubb, Farley. 2006. The US Constitution and Monetary Powers. *J. Finan. Hist.* 13, 43–71.

Gordon, Robert. 1987. *The Structure of Emotions*. Cambridge University Press.

Holton, Woody. 2004. 'From the Labours of Others': The War Bonds Controversy and the Origins of the Constitution in New England. *William Mary Q* 61, 271–316.

———. 2007. *Unruly Americans*. New York: Hill and Wang.

Jaurès, Jean. 1968. *Histoire socialiste de la Révolution Française*, vol. I. Paris: Editions Sociales.

Jefferson, Thomas. 1784. *Notes on the State of Virginia*. Paris: Private printing. Jensen, Merrill. 1968. *The Founding of a Nation*. Indianapolis IN: Hackett.

Kaplan, Steven. 1982. The Famine-plot Persuasion in Eighteenth-century France. *Trans. Am. Phil. Soc.* 72, 1–79.

Kessel, Patrick. 1969. *La nuit du 4 août 1789*. Paris: Artaud.

Keynes, John Maynard. 1923. *A Tract on Monetary Reform*. London: Macmillan.

Lally-Tolendal, Trophime Gérard, & Comte de. 1790. *Seconde lettre à ses commettans*. Paris: Desenne.

Lefebvre, Georges. 1973. *The Great Fear of 1789*. New York: Schocken.

Madison, James. 1790. Speech on the Public Debt, February 11. In *The Writings of James Madison,* vol. 5. New York: Putnam.

Markoff, John. 1996. *The Abolition of Feudalism*. University Park PA: Pennsylvania State University Press.

McDonald, Forrest. 1982. *We the People: The Economic Origins of the Constitution*. New Brunswick NJ: Transaction Books.

McGuire, Robert. 2003. *To form a More Perfect Union*. Oxford University Press.

Michon, Georges. 1924. Essai sur l'histoire du parti feuillant: Adrien Duport. Paris: Payot.

Montgaillard, Guillaume Honoré Rocques, & Abbé de. 1827. *Histoire de France*. Paris: Moutardier.

Nicolas, Jean. 2008. *La rebellion française*. Paris: Gallimard.

Peyrefitte, Alain. 1995. *C'était de Gaulle*, vol. I. Paris: Fayard.

Pole, Jack R. 1966. Political Representation in England and the Origins of the American Republic. Berkeley: University of California Press.

Ramsay, Clay. 1991. *The Ideology of the Great Fear*. Baltimore: Johns Hopkins Press.

Richards, Leonard. 2002. *Shays's Rebellion*. Philadelphia PA: University of Pennsylvania Press.

Rivarol, Antoine. 1824. *Mémoires*. Paris: Baudoin Frères.

Roll, Charles. 1969. We, Some of the People. *J. Am. Hist.* 56, 21–40.

Rossiter, Clinton. 1987. *The Grand Convention*. New York: Norton.

Russell, Peter. 1993. *Constitutional Odyssey*. Toronto: University of Toronto Press.

Saint-Priest, François-Emanuel Guignard, & Comte de. 1929. *Mémoires*. Paris: Calmann-Lévy.

Smith, Jean Edward. 1998. *John Marshall: Definer of a Nation*. New York: Holt. Tackett, Timothy. 1996. *Becoming a Revolutionary*. University Park, PA: Penn State University Press.

Tocqueville, Alexis. 2011. The Ancien Régime and the French Revolution. Cambridge: Cambridge University Press.

Webster, Pelatiah. 1785. A Plea for the Poor Soldiers. *Political Essays* (1791), 269–305.

Zagarri, Rosemarie. 1987. *The Politics of Size*. Ithaca NY: Cornell University Press.

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PRIMACY OF REAL LAW OF THE DIVISION OF POWERS PRINCIPLE IN CONSTITUTIONAL ADJUDICATION

"Think of the word 'constitution;' it means structure."

Antonin Gregory Scalia

ABSTRACT

The idea of the Constitutional Court is essentially linked to the constitutional control of the power of state authorities. In the Constitutional judicial history, one of the most important precedents (*Marbury vs. Madison*) happened in the United States constitutional justice, which was particularly regarding the crisis of power division between state authorities. Therefore, at the modern development stage of the constitutionalism, it is important to evaluate the role and significance of the Constitutional Court's competence regarding the competence disputes. It is also necessary to evaluate the European experience in this direction and important and interesting consequences for the constitutional control and constitutional justice within such authority. Consequently, within the framework of this key instrument of constitutional control, we should talk about the primacy of the law, within which the constitutionalism should be developed. This issue has a doctrinal importance and at the same time has a special significance for the development of Georgian constitutionalism. Derived from this, the major constitutional tool for exercising the principle of division of powers should be based on the legal argumentations of the Constitutional Court and it should not be a standard political constraint – a legal instrument prevailing the balancing tools, which of course cannot be exercised without political component, however, the final decision should be made in legal context instead of a political one, ensuring the fundamental and more or less objective basis for the realization of the principle of division of powers. We should also mention that Georgia has still to achieve the political consensus, necessary for constitutionalism and realization of division of powers principle. This is why it is necessary to discuss the particular relevance of the Constitutional Court and generally the law, in direction of the foundational realization of the idea of division of powers.

1. INTRODUCTION

"It is universally recognized that the division of governmental power is one of the fundamental principles of the successful functioning of the state governmental organization and the Constitutional order. This provision, which has been repeatedly confirmed by the doctrine or practice, was reflected in the Article 16 of the 'Declaration of the Rights of the Man and of the Citizen' of France in 1789: 'The state, where there is no division of the governmental power, has no constitution'".[1]

"The well-known lawyer Steinberg correctly pointed out that 'It is an important circumstance when the constitutional reforms are implemented for the first time in the history of the state, constitutional justice is created, especially, when the former legal practice of that state did not deserve any trust.'"[2] The Constitutional Court may have a significant impact over foreign and domestic political activities through resolving competence disputes. This issue is principally related to the sense of common sovereignty, which is assigned to all the governmental branches, including the Constitutional Court.[3] This issue in principle is linked to the common sovereignty, which is attributed to all branches of power, including the constitutional court and, therefore, the court with its jurisdiction ensures the distribution of power by the principle of unity of government. "Major politics was, is and will remain a problem of the Federal Constitutional Court of Germany. From the day of its establishment, the Constitutional Court of Germany has to deal with this issue, since honest people have to make fair decisions on the verge of the politics and justice."[4] As for the Constitutional Court of Georgia, it should primarily be noted, that according to article 82 paragraph 1 of the Constitution of Georgia, judicial power is executed according to the constitutional control, judiciary and other forms determined by law, but in accordance with article 83, paragraph 1, "the Constitutional Court of Georgia is a judicial body of constitutional control."[5] The same constitutional provision is read in article 59 (2) of the amended Constitution, that the Court executes constitutional control.[6] I believe that "this notion may have a broad definition, than just being determined as a constitutional control, because the majority of scientists imply the examination of the constitutionality of the laws and normative acts (M. Nudiel, T. Nasirova, G.

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[1] Kverenchkhiladze G., *Constitutional status of the Government of Georgia* (comment on Article 78 of the Constitution), Contemporary Constitutional Law, book I (article collection), ed. Kverenchkhiladze c. Gegenava D., David Batonishvili Institute of Law, Tbilisi, 2012, 8-9.

[2] Bezhuashvili G., *The Role of Modern International Law in Implementing Georgia's Foreign Policy*, Georgia and International Law (Articles), Tbilisi, 2001, 27 .

[3] Bezhuashvili (n 1) 57.

[4] Getsadze G., 'Constitutional justice and politics?! (On the example of the Federal Republic of Germany)', Georgian Law Review, First Quarter 1999, Tbilisi 74; compared to Uwe Wesel, 'Die Zweite Kreise', die Zeit N40, 1995 j. 29 September.

[5] Constitution prior to the amendments to the Constitution of Georgia of October 13, 2017 and March 23, 2018, which is valid until when the newly elected president takes an oath after the presidential elections of 2018, available here: https://matsne.gov.ge/en/document/view/30346?publication=35 [last accessed on August 1, 2018].

[6] New version of the Constitution as a result of the amendments of the Constitution of Georgia of 13 October 2017 and 23 March 2018 which will come into force once the newly elected president takes an oath after the presidential elections of 2018, available here:
https://matsne.gov.ge/en/document/view/30346?publication=35 [last accessed on August 1, 2018].

Kakhiani). There are also different opinions that do not only refer to the constitutional control as the concept of the legal acts, but also to examine the actions (L. Lazarev), but A. Blankenagel points out that, the constitutional control is the activity directed towards division of governmental power and resolving constitutional conflicts."[7] The most important function of the constitutional control institutions is to consider competence disputes that are directly related to the principle of power separation.[8]

The Constitutional Court may be the sole constitutional body that can solve conflicts among the competent state organs. According to Carl Schmidt constitutional disputes are more political, than legal, while the supreme guarantor of the constitution cannot be the Court, but rather the President.[9] This view has been rejected for some time already; however, the president still maintains the function of the constitutional guarantor. At the same time, the task of the President is to solve the issue, related to the constitutional conflicts between the state authorities and it should be implemented through the application to the constitutional court. [10] Therefore the opinion of having a neutral institution in the system of power division, which will solve constitutional conflicts related to this division, maybe needs to be shared.[11]

So far as the Constitutional Court examines disputes between the political-constitutional authorities,[12] and the political disputes are judged in accordance with the law, it is possible to say, that the law is the only "tool" for the Constitutional Court. However, when the constitutional authorities argue about each other's competences – the legal dispute is inevitably transferred into the political dimension.[13] According to article 89 paragraph 2 of the Constitution of Georgia, it is established that, "the decision of the Constitutional Court is final. An act or a part thereof that has been recognized as unconstitutional shall cease to have legal effect as soon as the respective judgment of the Constitutional Court is made public." Essentially identical text is copied in the new version of the Constitution, however, the new edition offers some addition to the content of the regulation, according to which the normative act or its part loses force at the moment of publishing of the constitutional court decision, unless the relevant judgment envisages a later time frame for invalidating the act or a part thereof. So, it can be summarized say that in the Constitutional Law the Constitutional Court's decision is the sole and final authority, which has the power to be mandatory for everyone. Regarding this issue, the primacy of the law in constitutionalism can be discussed, which, in turn, is a constitutional guarantee of the power division and an unconditional recognition of other ideals and values of the constitution.

[7] Kakhiani G., *Institute of Constitutional Control and its Problems in Georgia: Analysis of Law and Practice*, Thesis. Scientific Supervisor A. Demetrashvili, University Press, Tbilisi, 2008, 24.
[8] ibid 20.
[9] Getsadze (n 4) 75.
[10] Nakashidze M., Peculiarities of Presidential Relations with Government Departments in Semi-Presidential Systems of Management, Scientific Research Demetrashvili Tbilisi 2010, 210.
[11] ibid 218
[12] Political-constitutional organs are meant by the authorities of the authorities directly related to the implementation of the state policy based on their constitutional status.
[13] Getsadze (n 4) 81.

2. THE ESSENCE AND THE BASIS OF THE COMPETENCE DISPUTE

The purpose and essence of the competency dispute is the article 5 paragraph 4 of the Constitution (in accordance with the Constitutional Reform of 2017-2018, the paragraph 3 of article 4 of the Constitution of Georgia envisages the principle of regulating the power separation),[14] ensuring the power separation principle and this mechanism is also one of the basic constitutional and legal guarantees to ensure the horizontal division of power between the highest state authorities.[15] Apart from resolving the conflict between the highest state authorities, the dispute at the Constitutional Court can also arise from the collision of powers between central and local authorities.[16] Despite the multilateral nature of the competence disputes, the classical competence dispute is the one between the highest authorities of the state. The grounds for the competence disputes are defined by the Constitution, particularly article 89 paragraph 1 subparagraph "b" of the Constitution of Georgia (as a result of the Constitutional Reform of 2017-2018 - the same is defined by the article 60, paragraph 4, subparagraph "d"), the Constitutional Court of Georgia consider disputes on competences, which could be in conflict with the functions and competencies attributed to the branch of government by the Constitution.[17]

The essence of the competence dispute is ensuring of the supremacy of the principle for the power division, one of the main constitutional-legal principles and the core ideas of constitutionalism. Constitutional conflicts have often arisen in countries where mixed governance model existed or still exists, more specifically, the semi-presidential model's subtype of Prime-Minister-Presidential governance model, which is currently in force in Georgia. The same political regimes also operate in Poland and Hungary and in the states of Central and Eastern Europe, where power collisions happened in the process of formation of governance systems. Some competence conflicts may arise in the presidential republics, for example the disagreement between the President of the United States and the Congress on the military powers, but the resolution of this dispute was easily accomplished in benefit of the President (Commander-in-Chief) based on the legal nature of the state governance model.[18] Specifical-

[14] The constitutional laws of October 13, 2017 and March 28, 2018, which will come into force after the newly elected president takes an oath after the presidential elections of 2018. Above mentioned reforms have transformed the model of governance-presidential model has been replaced with a mixed governance model, as the combination of the semi-presidential and semi-parliamentary models, and with farther logical transition to a classic parliamentary system.

[15] Kakhiani (n 7) 147.

[16] In Georgia, due to the current legislation, the dispute between the central and local authorities is further expected, because the regulation of this issue is not directly determined by the constitution and depends on the full restoration of the jurisdiction on the entire territory of Georgia.

[17] Competence disputes in doctrinal sources are more widely interpreted, and it includes the separation of competences in the vertical and horizontal context of the powers' division, which is considered within the competence of the Constitutional Court – ibid 146.

[18] Actually only in 1975 During the Mayaguez incident, the conflict arose about the military powers between the President of United States and the Congress, and it was the single exception to the 132 military paradigms.

ly, in Louis Fischer's opinion, the President of the United States can launch the war without the consent of the Congress.[19]

"With or without a constitution, structural conflicts have been pervasive throughout the former Soviet Bloc and, because these conflicts involved constitutional issues almost by definition, they were thrust onto the constitutional courts."[20] The landmark resolutions adopted by the Polish Tribunal includes 1) early cases of a delegation of governmental functions that deal with administrative duties; 2) amendments introduced in the Small Constitution of 1992, concerning the relationship between the Sejm and the Senate relationships; 3) the dismissal of the Chairperson of the radio-television broadcasting board in 1994, which was related to the powers of the President over the governmental bodies; 4) the case of 1994, which concerned the issue of the dissolution of the budget-Sejm, involving a conflict between the President and the Sejm.[21] The first case envisaged the relationship between the government and the cabinet of ministers, in which the government went beyond the scope of the law and settled the matter by its act, but the Constitutional Tribunal of Poland abolished it.[22] Since then, the Constitutional Tribunal has made decisions that strictly adhered to the rule of law and legalized the highest standards in this regard.[23] In Hungary and Poland, the constitutional courts, unlike the Supreme Court of the United States, have been consistently involved in disputes over economic issues; however this involvement was caused by the economic situation in those countries.[24]

Hungary dealt with an interesting case, when the conflict arose between the Prime Minister József Antall Jr. and the President Árpád Göncz. "When there was a meeting in Visegrad, Hungary, with delegations from Czechoslovakia and Poland to discuss relations with Western Europe, Prime Minister Antall sought to go instead of President Göncz, even though it was supposed to be a meeting of heads of state. This issue was smoothed over."[25] Constitutional conflicts emerged after this as well, and those were not easily resolved. The first controversy was caused by the efforts of the Defense Minister to control the armed forces, which was seriously confronted by the President Göncz and his political supporters, but the constitutional court resolved the dispute in favor of the government.[26] It is noteworthy that the Constitutional Court had authority to rule this dispute within the power of interpreting the Constitution and therefore the decision was merely of recommendation force.[27] The practice of the Hungarian Constitutional Court on competence disputes is also worth to mention, when it decided on the case of radio-television board chairman. The dispute concerned the

[19] 'Balance of U.S. War Powers' Council on Foreign Relations, available at: <http://www.cfr.org/united-states/balance-war-powers-us-president-congress/p13092> [last accessed on August 1, 2018].
[20] Schwartz H, *The Struggle for Constitutional Justice in Post-Communist Europe* (Translated by Aleksidze L., Iris, Georgia, Ed. Season, 2003) 112.
[21] ibid.
[22] ibid, p. 113.
[23] ibid, p. 114.
[24] ibid, p. 117.
[25] ibid, p. 149.
[26] ibid, p. 149.
[27] ibid, p. 415.

authority and the procedures of appointing this official and the parties were the Prime-Minister and the President, again, the decision was made in favor of the Government of Hungary.[28]

It is also possible within the introduction to the disputed functions to consider the issues of appointment of officials generally or even specifically. The mentioned belongs to the list of cases, where there is high probability of development of disputes regarding the Constitution, as we have observed the practice in Poland and Hungary. Similar cases were observed in Georgia as well, when the dispute was characterized with significant political content.[29] I believe that one of the main objectives of constitutional justice is the authority of the constitutional court to adjudicate the competence dispute between the relevant subjects and thereby facilitate the development of the idea of constitutionalism and the principle of separation of powers in the country. Therefore the Court should be equipped with all relevant tools to resolve the disputes of this category.

3. THE SCOPE OF COMPETENCE DISPUTES

A competence dispute has to be understood broadly because the formal grounds for reviewing competence disputes are inadmissible and contrary to the idea of constitutional justice. A court dispute could be conducted directly through the interpretation of and within the constitutional provisions. Although the dispute between the competent authorities may also arise in relation to matters not directly defined by the Constitution, but that carry the constitutional content. I believe that in this case the Constitutional Court must substantially examine and solve the problematic issue, through wide interpretation of the constitutional provisions, including in conformity with the specific definitions of the norms providing the model of state governance. Therefore, the Constitutional Court must be the main institution, which determines how the powers should be divided pursuant to the classifications of specific governance model, within its adjudication process. Although the definition of state

[28] See Schwartz (n 20) 120.

[29] The diplomatic content of political content was broad in Georgian political reality, including the example of which was particularly relevant to the signing of the Association Agreement between Georgia and the European Union signed on June 27, 2014. This was partially expressed in the academic circle. In this context, the following concepts were expressed: "Discussion on this issue [the issue of signing the Association Agreement] would be considered to be complete, the dispute had to be decided on the competence of the Constitutional Court and not when the Prime Minister announced the issue closely. The constitutional dispute should be initiated by the President on the competence of the competence. If such a president is judged as a manifestation of legal and political culture in the legal state, such a move in Georgia will be considered "political split" or "rising presidential ambitions.", See *Liberali* Blog <http://liberali.ge/blogs/view/5903/ra-mnishvneloba-aqvs-vin-moatsers-khels-evrokavshirtan-asotsirebis-shetankhmebas>;
There were also clearer opinions regarding this issue, the President of Georgia has the primary competence of signing the Association Agreement. This is the logic of the constitution. Nevertheless, discussion on this topic has been renewed once again." – See *Liberali* Blog <http://liberali.ge/blogs/view/5889/vin-unda-moatseros-kheli-asotsirebis-khelshekrulebas> [last accessed on August 1, 2018].
In addition to this issue, broader public opinion polls have been interviewed so much about the current political issue. See *Transparency International Georgia* Blog <https://www.transparency.ge/ge/blog/evrokavshirtan-asotsirebis-shetankhmebas-kheli-sakartvelos-prezidentma-unda-moatseros> [last accessed on August 1, 2018].

governance model should be the function of other state institutions or commissions, but in this case it is necessary that the Constitutional Court has its own position on this matter, allowing it to systematically decide the problematic cases, so that the incoherent solutions of the problems within the system do not arise new concerns. At the same time, the polemic about the essence of the governance regimes must not carry only the theoretic significance and cannot only be considered in the process of formation of the Constitution.

3.1. The Subjects of Competence Dispute

In the constitutional jurisdiction the parties of the competence dispute are those constitutional bodies and persons, who have been granted the right to bring such cases in front of the Constitutional Court of Georgia in accordance with the Organic Law and the Constitution, specifically, the articles 33-40 of the Law on Constitutional Court.[30] As for the competence disputes, this issue is regulated by article 34 of the same law, which sets out the determination of the applicant and the subjects of the claim and regulates the legal status of the respondent.

The subjects in the competence disputes are the main participants of the constitutional jurisdiction, who dispute the competences and, therefore, they represent the governmental bodies and the constitutional officials. In the Constitutional Court, the subject of the dispute can only be the authority or the official listed in article 89 of the Constitution of Georgia. The subjects, referred to in article 89 paragraph 1 of the Constitution, are: the President of Georgia, the Government of Georgia, at least 1/5 of the members of the Parliament of Georgia, t supreme representative bodies of the Autonomous Republics of Abkhazia and Ajara, self-government representative bodies - Sakrebulos, the High Council of Justice, the Public Defender.[31] Pursuant to the Constitution and the Organic Law on the Constitutional Court, the head of state is also equipped with a universal authority and, in a way a function, to appeal to the Constitutional Court and request the adjudication of the case, regardless whether the competence falls within his authorities or the authorities of other state bodies. The above mentioned stems from the function of the President as the guarantor of the Constitution, which is not literally read in the text of the Constitution, but through the oath the President undertakes the responsibility of protecting the Constitution. Additionally, the mentioned function also is derived from the catalogue of authorities of the President with regards to the constitutional adjudication. The President is entitled to submit the matter to the Court for almost all competencies of the Constitutional Court, as for other subjects, the organic law indicates towards those institutions, which are listed in article 89 and states, that these bodies are entitled to address the Court when they consider their authorities to be violated by other branches of government. The authority of universal applicant is also entrusted to the one

[30] Kakhiani (n 7) 197.
[31] The Constitution of Georgia (04.10.2013) <https://matsne.gov.ge/ka/document/view/30346>, [last accessed on August 1, 2018].

fifth of the members of the Parliament of Georgia, if they believe that the scope of the competence of the Parliament or of other state institution has been violated.[32]

The Law does not clearly define the issue of the respondent in such cases. Although the respondent in this category of disputes has to be the governmental body, which has issued a normative act (article 34, paragraph 2 of the Organic Law),[33] the matter who the respondent shall be, when there is no normative act at hand, instead the dispute covers the individual constitutional act or action, remains vague. Such instances are not unequivocally exempted and pursuant to the Constitution may even be envisaged as a subject matter of the dispute. Therefore, it can be stated that the claimant should define who the respondent should be. The Law and the Constitution is also ambiguous regarding the exhausting and comprehensive list of claimants or respondents for the disputes of this category, since, as mentioned above, the Organic Law merely indicates towards the article 89 broadly (after the new version of the Constitution comes into force, the indication will be made towards article 60) and does not precisely points to the specific subjects, which are able to address the Court within relevant authority. Article 89 lists the institutions of the highest state governance and the local self-governance, as well as the High Council of Justice, the Public Defender. It should be primarily stated that the capacity of addressing the Court of these bodies is unforeseeable, additionally, I believe, that article 89 does not envisage certain constitutional institutions which may face the need to commence competence disputes to safeguard their own authorities, including the State Audit Service,[34] the National Bank of Georgia, National Security Council and others, the competences of which are directly prescribed by the Constitution. The current practice of the Constitutional Court of Georgia also clearly demonstrates the problem related to the claimant's powers, since the case is brought not by the directly relevant subject, but another one. For instance, the Constitutional Court has decided to hear the merits of the case arisen from the complaint of a group of members of the Parliament of Georgia, disputing the constitutionality of the amendments of the Organic Law on the National Bank of Georgia, which pursuant to the claimants, was in violation of the constitutional guarantees of the independence of the National Bank, this claim has been adopted for hearing on merits by the Record Notice of the Plenum N3/6/668 of October 12, 2015, however the judgment has not yet been adopted.[35] Based on the above mentioned it is clear that the constitutional adjudication and resolution of the competence disputes cannot be made faultlessly without relevant parties, especially the claimant. This is why it is more appropriate for the constitutional bodies not to have the authority to bring claims to the Court without limitations. Therefore the provision of the new version of the Constitution, specifically article 60 paragraph 4

[32] The Organic Law of Georgia on the Constitutional Court of Georgia (29.05.2015) <https://matsne.gov.ge/ka/document/view/32944> [last accessed on August 1, 2018].

[33] By the opinion of the applicant, The defender is the state agency, whose statutory act has violated its constitutional competences-The Organic Law of Georgia on the Constitutional Court of Georgia (29.05.2015) <https://matsne.gov.ge/ka/document/view/32944> [last accessed on August 1, 2018].

[34] Within the framework of the 2013-2015 Constitutional Commission, the proposals were also considered to include such powers as an institutional formation of independent constitutional organs.

[35] By the record of N3/6/668 dated October 12, 2015 <http://constcourt.ge/ge/legal-acts/recording-notices/saqartvelos-parlamentis-wevrta-djgufi-zurab-abashidze-giorgi-baramidze-davit-baqradze-da-sxvebi-sul-39-deputati-saqartvelos-parlamentis-winaagmdeg.page> [last accessed on August 1, 2018].

subparagraph "d", stating that the Constitutional Court reviews disputes about the competences of a respective body on the basis of a claim submitted by the President of Georgia, Parliament, the Government, the High Council of Justice, the General Prosecutor, the Board of National Bank, the General Auditor, the Public Defender or the supreme representative or executive body of an autonomous republic, in conformity with the Organic Law, is valuable change.

3.2. The Object of Competence Dispute

The Constitution of Georgia defines the authorities of the Constitutional Court prescribing the scope of competencies for adjudicating the dispute within the constitutional jurisdiction. According to the Constitution, the rules for the dispute resolution at the Constitutional Court are determined by the Organic Law. The Organic Law of Georgia "On the Constitutional Court" is the document allowing us to discuss the subject of the dispute, which may become the topic of consideration for the Constitutional Court.

The constitutional claim concerning the dispute over the competence between the state authorities, pursuant to the Organic Law of Georgia on the Constitutional Court of Georgia (paragraph 2 of article 23 and paragraph 2 of article 34), has to be examined by the Constitutional Court, if the breach of competence relates to a normative act.[36] The normative act clearly represents the subject of a possible dispute, but in addition to such act, there are no other objects of the dispute envisaged by any legislation. However, if one analyses the text of the Constitution, the dispute may arise on any matter, even if it does not concern the normative act.

The President of Georgia has the ability to raise the claim at the Constitutional Court disputing the abovementioned provisions currently in force from the Law of Georgia "On the Constitutional Court of Georgia" with regards to the constitutional provision in force, arguing that the disputed provisions prohibit the President to apply to the Constitutional Court by limiting this competence with the claims on normative acts only.[37] However, the mentioned tool, which could establish the constitutional "verity" through the Court, can only be hypothetical; I believe it is more essential to carry out a dispute not only with regards to establishing the constitutionality of a normative act, but within wider and more comprehensive process, in order to apprehend the problematic topics in the constitutional practice. In this way, the dialect of constitutionalism will proceed within the established forms. There is an opinion that the constitutional court should only adjudicate on the disputes on normative acts with the legal grounds, i.e. so called "matters of law" and not the actions or legal relations. In particular, pursuant to the doctrinal opinion the "differentiation of subjects subject to

[36] The Organic Law of Georgia on the Constitutional Court of Georgia (29.05.2015) – <https://matsne.gov.ge/ka/document/view/32944> [last accessed on August 1, 2018].

[37] In this case, all such subjects, who may be the claimant of this type of dispute, are eligible to make such a request.

constitutional justice is relatively simple to be carried out not by a circle of public relations or their importance, but with a 'normative scale.'"[38] I believe, that it is not be appropriate to make such conclusions, even when the Constitutional Court examines the constitutionality of actions within other powers, including when the matter concerns the understanding of the impeachment and/or termination of the authority of the Member of Parliament. In both cases, the Court actually discusses the circumstances of the case and makes a decision thereof.

There are legal relations that can be considered neither by the general courts nor the Constitutional Court, since the current constitutional system does not allow the claim to be raised in these institutions unless it envisages the dispute over the normative act. In this instance, the existence of body, conducting the checks, is necessary; since a "specialized body"[39] in the form of the Constitutional Court exists in Georgia, it is worth for it to be the one overseeing all cases related to constitutional control. In practice of the Supreme Court of Georgia there was the case (K. Davitashvili's case), when the MP of the Parliament challenged the order N286 of the President of Georgia, issued on March 15 2003, which was a call for extraordinary session of the Parliament. The Court did not hear the case on merits, because, according to its decision, the act was not administrative-legal act, but represented the political act issued according to the Constitution, assessment of which was beyond the competence of the Court. The Supreme Court stated that if it heard and decided this issue, the Court would violate the principle of separation of powers (the Supreme Court of Georgia, May 22, 2003, Judgment N3გ-ად-440-კს-03).[40] Thus the Supreme Court did not accept for consideration the case related to the individual constitutional-legal act. Regardless of this disputable judicial assessment, one has to rely on the same opinion that the dispute arising from constitutional law should better be considered by the Constitutional Court, due its specific nature and due to the direct and high level of the competence the Court holds.

4. The Rule of Examination of Competence Dispute and The Enforcement of Decision

The Constitutional Court decides on competence disputes through the complaint-based procedure. The Constitutional Court reviews the competence disputes in accordance with the Organic Law of Georgia the Constitutional Court (paragraph 2 of article 21), usually with a collegial composition and not through the Plenum.

The satisfaction of the constitutional claim on the issue of competence disputes leads to invalidation of the disputed normative act from its enactment.[41] There may also be a multi-

[38] Khubua G 'Constitutional Court Justice and Policy', Review of the Constitutional Law, N9, 2016, 8, - available at: <http://www.constcourt.ge/uploads/other/3/3803.pdf> [last accessed on August 1, 2018].
[39] Generally there are specialized and non-specialized constitutional courts. The specialized body is the one, whose field of principal activity is constitutional control, Kakhiani (n 7) 32-33.
[40] *Decisions of the Supreme Court of Georgia on administrative and other categories of cases* Jorbenadze S (ed), (Sani, Tbilisi, July, 2003, N7) 1769-1773.
[41] The Organic Law of Georgia on the Constitutional Court of Georgia, article 23, paragraph 2.

lateral constitutional dispute in the Constitutional Court when there are several applicants and/or respondents to specific competences. Additionally, it can be said that the person involved as the respondent is not necessary to be the subject issuing/adopting the contested normative act. In this context, the constitutional conflict can be understood as a result of legal and factual relations and not only a dispute on the basis of a normative act.

The decision of the Constitutional Court of Georgia is a self-executive act and the compliance thereof is mandatory.[42] It is a legitimate definition of the constitution, where the consideration of the Constitution widely or narrowly is within the margin of appreciation of the Constitutional Court, even for the simple reason, that the Court is the sole and the highest institution, whose decision-changing mechanism remains in its hands.[43] Therefore, respecting and executing the decision of the Constitutional Court is the duty for all state institutions. However, Georgian legislation provides for certain mechanisms and important legislative safeguards in order to protect the decision of the Constitutional Court. Organic Law of Georgia on Constitutional Court, in particular, article 25 paragraph 4^1 provides, that in case the Constitutional Court determines that a disputed normative act or its part contains the same standards that have already been declared unconstitutional by the Constitutional Court, it shall deliver a ruling on the inadmissibility of the case for consideration on the merits and on the recognition as void of a disputed act or its part. In the practice of the Constitutional Court there are cases, when the Court has made such decisions.[44] However, I believe, that such legislative guarantee should be directly prescribed in the Constitution in order to protect the priority and the primary nature towards political decision making of the legal decision.

Under the three-fold division of state powers, the judiciary is, of course, involved in the division conflicts. In Poland, the relationship between Sejm and the Constitutional Tribunal have been particularly complex, as *de jure* the decisions rendered by the Tribunal on the unconstitutional nature of the law were not final.[45] The Polish Sejm did not carry out the execution of the tribunal decisions for a certain period. However, the Tribunal, by its practice, determined, that the law, which is not be enforced by the Parliament, would be automatically deemed void after six months.[46] Another interesting practice was established by the Constitutional Tribunal when it considered that Sejm had no authority to overcome the decision of the Constitutional Tribunal regarding the act adopted without the signature of the President.[47]

In this case, it is also noteworthy that if we consider not only the normative act as a possible object of dispute in the Court, but also any other constitutional-legal act or action or omis-

[42] Nakashidze (n 10) 226.
[43] The Constitutional Court can overcome its own practice, but in this case it is necessary to make such a decision by the plenum.
[44] Judgment of the Constitutional Court of Georgia 14 December 2012 No. 1/5/525 Moldovan citizen Mariana Kiku against the Parliament of Georgia. The Judgment of the Constitutional Court of Georgia of 24 June 2014 1/2/563 Austrian citizen Matthias Huter against the Parliament of Georgia.
[45] Schwartz (n 20) 119.
[46] ibid 120.
[47] ibid.

sion of a competent authority, the issue may become problematic in part of its enforcement. On the one hand, it is true that the decision of the Constitutional Court is self-enforceable and, as a rule, does not lead to additional legal actions, on the other hand, in case of such competence dispute, the annulment of an overruling constitutional act can be somewhat ineffective without substantial review. Since when the dispute concerns a specific action, it may be difficult to assess if an action leads to the same legal consequences. Thus, this process will resemble "real constitutional control",[48] which will result in the increase of such constitutional disputes at the Constitutional Court, while the Court cannot avoid hearing and adjudicating all these types of cases. Consequently, such regulation will unequivocally lose the positive effect that is the function of the abovementioned norm, the public interests to be safeguarded, the state and judiciary resources to be saved, the economy of the proceedings to be achieved and, most importantly, the guarantees of the enforcement of the Constitutional Court decision to be standing. The enforcement of the decision of the Constitutional Court will change and the parties to the constitutional dispute will be subject to different legal conditions. Despite the possible complications, this competence should be widely understood in order to implement the constitutional principle of the division of power in all forms and means.

In Poland, Lech Walesa tried to circumvent from a decision of the Constitutional Tribunal in the case of "TV and Radio Broadcasting" in 1994,[49] arguing that the decision of the Tribunal had no retroactive force, but in 1995 the same Constitutional Tribunal expounded that its decision usually acted within the retroactive effect as well.[50]

5. THE PRACTICE OF THE CONSTITUTIONAL COURT OF GEORGIA

In legal literature, it is considered that in the common law states the court decision is a law-application; however, in certain instances it also is the source of law as a precedent, unlike the Roman German system, where it only carries the nature of application of law. However, the decision of the Constitutional Court, with its executional effect and the legal nature, can be deemed as a source of law as well, while on the other hand, the general court can only use it for argumentation in the judgment, as the Constitutional Court hold merely the function of negative legislator.[51] It is possible to say that René David's opinion that "the judge should

[48] It is important for the composition of the Constitutional Court to implement the "real" constitutional control. Until now the doctrinal staff: judicial self-restraint, political question doctrine, "abgestufte Verhältnismäßigkeitskontrolle", "Beck'sche Formel", "Schumann's Formel" etc.) and the most difficult process are considered, constitutional control The object (compliance with the Constitution, and not the hierarchical balance between the legislative and general normative acts in the control of the law enforcement process) Asshtabebis and specify the quality of the constitutional judges in the proceedings, in this case the (,, real "constitutional control) <https://emc.org.ge/ka/products/normatiuli-sakonstitutsio-sarcheli-rogorts-konkretuli-sakonstitutsio-kontrolis-arasrulqofili-forma-sakartveloshi >, [last accessed on August 1, 2018].

[49] The president of the TV and Radio Broadcasting Director was considered an exemplary rule.

[50] Schwartz H (n 20) 117.

'[51] Marinashvili M and Gelashvili N, ;Place of the Decision of the Constitutional Court in the System of Justice', Justice No. 3, Tbilisi, 2007, 167-170.

not become a law-maker in countries of Roman-German legal system,"[52] cannot be applied to the Constitutional Court. This is why the judgment of the Constitutional Court has extremely high relevance. It can be said that the legislator is indirectly guided by its rulings,[53] when it makes a decision and it also considers, whether a specific legislative or other normative act may later become subject of dispute at the Constitutional Court.

Georgia's Constitutional Court does not have vast experience in competence disputes. However, we may partially agree with the opinion expressed in the literature that the purpose of competence disputes to safeguard the principle of separation of powers, is carried out by the Constitutional Court with respect to other competences.[54] In this regard, several decisions of the Constitutional Court of Georgia may be considered.[55] For instance, the decision of May 25, 2004 by which the Constitutional Court deemed the declaration of state of emergency by the Autonomous Republic of Ajara unconstitutional, when the dispute was between the MPs and the Head of the Government of the Autonomous Republic of Ajara. The Constitutional Court unanimously established that in accordance with article 3 of the Constitution of Georgia, announcing the state of emergency falls within the exclusive competences of the higher state government. Consequently, the Constitutional Court annulled the Order of the Head Autonomous Republic of Ajara issued on January 7, 2004 and the normative grounds that allowed issuance of such acts within the Autonomous Republic. But in this case the basis for referring to the Constitutional Court by a group of MPs was not sub-paragraph "b" of article 89 of the Constitution of Georgia, but subparagraph "a" of the same paragraph; the competence dispute focused on the violation of the principle of vertical division of powers and not the principle of horizontal division.

Although the Constitutional Court of Georgia does not have practice regarding the separation of powers between the President and the Government, there is some experience in general regarding the competence disputes within the article 89 paragraph 1 subparagraph “b” of the Constitution of Georgia, in particular the case between the members of the Parliament of Georgia and the Ministry of Education of Georgia.[56] In the dispute a group of Georgian MPs disputed the constitutionality of the Order the N469 of September 30, 1997 of the Minister of Education of Georgia that determined the co-funding rule for pre-school, primary and secondary school education, while the group of MPs pointed out that this was contrary to article 94 of the Constitution of Georgia, envisaging that any kind of tax or fee could only be imposed by the law. In this case the Ministry of Education violated the Constitution and was intruding in the competence of the Parliament of Georgia. Since the matter was regulated by the Minister's Order, the Constitutional Court was unable to render a decision as the proce-

[52] David R, *The legal system of Modernity* (Tbilisi, 1993) 125.
[53] Legislation does not mean only legislative authorities, but everybody receiving or issuing a normative act.
[54] Kakhiani (n 7) 22.
[55] Decision of the Constitutional Court of Georgia 25 may, 2004 No. 15/290,266 <http://www.constcourt.ge/index.php?lang_id=GEO&sec_id=22&id=119&action=show >, [last accessed on August 1, 2018].
[56] Judgment of the Constitutional Court of Georgia of 29 January 1998 №1/1/72-73 <http://www.constcourt.ge/index.php?lang_id=GEO&sec_id=22&id=84&action=show>, [last accessed on August 1, 2018].

dure for adoption of this normative act was violated and it could not be regarded as a normative act, and thus could not be adjudicated. Although the Court should have expressed more boldness, as the Constitutional Court takes into account not only the formal nature of the act but also its contents; the Constitutional Court avoided making a decision on this matter. Therefore, it is important, that all categories of disputes are considered essentially in terms of competence dispute, regardless whether or not a normative act is at hand. It is principal that all constitutional legal acts and constitutional legal real-acts (actions) become justiciable within the competence dispute, otherwise the real power of separation cannot be realized through constitutional justice.

Additionally, the expression of institutional conflicts was the judgments of the Constitutional Court No.3/122,128 of June 13, 2000 and No.6134-139-140 of March 30, 2001, when inn both disputes the applicant was a group of Members of the Parliament of Georgia, while the respondent was the Central Election Commission. Apart from this, there are several judgments related to the competence dispute at the Constitutional Court, namely, the decision No.2/53/1 of April 10, 1998, which demonstrates that the Members of the Parliament of Georgia disputed the competency issues of the Ministry of Finance.[57]

The decision of the Constitutional Court of Georgia dated November 9, 1999, No.1/7/87 should also be mentioned. The issue at hand was between the Members of the Parliament of Georgia and the President of Georgia, with applicants claiming that the latter violated his competence. The grounds for filing a claim were also within the subparagraph "b" of paragraph 1 of article 89, *i.e.* "a classical competence dispute", however, this time the Constitutional Court "dodged the responsibility" indicating that the issue of the dispute – the President's ordinances, – were adopted prior to the adoption of new Constitution, consequently, the Constitutional Court clarified that there was no normative act at hand in that case, since such a decision had not been taken by the Minister of Justice. In this case, based on the formalities of the matter, the Constitutional Court avoided rendering the relevant judgment as well.[58]

The practice of the Constitutional Court includes little number of decisions on competence disputes. Specifically, the Constitutional Court's statistics state that in total five constitutional claims have been submitted to consider the constitutionality of normative acts under article 89 paragraph 1 subparagraph "b" of the Constitution.[59] Therefore, it can be said that the separation of power in Georgia is not implemented through constitutional justice, not just because the cases are not submitted to the Court, but also because the Court has obviously

[57] <http://www.constcourt.ge/index.php?lang_id=GEO&sec_id=23&id=277&action=show> [last accessed on August 1, 2018].
[58] <http://www.constcourt.ge/index.php?lang_id=GEO&sec_id=23&id=280&action=show > [last accessed on August 1, 2018].
[59] See statistical data, available at: <http://constcourt.ge/album/stat/9.gif> [last accessed on August 1, 2018].

been avoiding adjudicating of this issue. “[T]he state’s impotence in settling frictions among its various organs will in the end endanger security and, in this way, freedom.”[60]

The Supreme Court of the United States has never tried to avoid conflicts among the branches of state government. The doctrine of separation of power was recognized in 1787 not to encourage their efficiency, but to prevent them from arbitrariness. The goal was not to avoid disagreements, but to protect people from autocracy, through the inevitable disagreement of the division of power into three sections.[61] In the USA there is a "political question" doctrine, according to which the Supreme Court of the United States may refuse to consider the case where "the issue is political". In practice, the Supreme Court basically refuses to discuss foreign policy issues. The American doctrine of "political question" is less common in Germany and continental Europe. The German Constitutional Court developed its own doctrine of political question.[62] The Federal Constitutional Court of Germany does not distinguish the issues that are not subject to judicial review due to political content. At the same time, the German Constitutional Court does not avoid adjudicating the politically relevant issues that may have high impact on the political system. It can be stated, that the Constitutional Court of Germany became an important state factor in political life. “Decisions of the Constitutional Court define the frameworks of the government not only for individual cases, but also for politics and they not so rarely affect the content of the politics."[63] Thus it can be said that Georgia, as a country of continental law system, has to share a great deal of European experience and the issues of so called "political question" should be adjudicated within the Constitutional Court more actively, of course, in the event of the existence of adequate preconditions.

6. Conclusion

Competence dispute is an inevitable solution for the division of power and for ensuring its flawless realization, which is more established in semi-presidential and in classic parliamentary systems of mixed governance models, where the functions of state power bodies are not strictly divided and it is less common in states with government powers rigidly divided.

It can be said that the dispute between the high bodies is a natural constitutional phenomenon and should not be treated as a crisis in the functioning of the government, on the contrary, all the bodies should be determined to try to eliminate such incompatibilities of governing functions within their competence, the resource of the Constitutional Court should particularly be applied in such instances.

[60] Sajo A., *Limiting Government: An Introduction to Constitutionalism* (Translator Maisuradze M., Scientific Editor T. Ninidze, Tbilisi, 2003) 92.
[61] ibid 92-93. Compare *Myers v. United States*, 272 U.S. 293 (1926) (J. Brandeis, dissenting).
[62] Khubua (n 38) 5.
[63] ibid.

It is notable to state, that the subject of constitutional dispute should be all state institutions holding constitutional status, the ability to be the subject shall be also understood as the role to be the applicant or the respondent within the dispute. It is fulfilling that the amendments of the Constitution have specified the authority to raise the claim and the competence of all constitutional bodies have been clearly and distinctly recognized, however in practice the role of activism from the Head of State and collaboration in disputes is relevant. As for the issue of respondent in these disputes, - it is linked with the object of the claim, whereby it is notable, that the current legislation needs to be revised in order to allow claims related not only to the normative act, since such construction is both defective and improper.

The Constitutional Court should adjudicate the competence disputes fully and decide all hypothetic events as well, including the disputes on normative and non-normative individual acts, as well as constitutional actions. Relevant interest, in the event of its existence, should be disputable at the Constitutional Court, due to the qualification of such dispute, as well as the fact, that legal tool for its resolution is within the Constitutional Court.

The execution of the judgment of the Constitutional Court is significant, since the constitutional dimension of the primacy of law is created through the self-execution nature of the judgments adopted through constitutional adjudication and the safeguards existing within the Constitutional Court for these judgments. Additionally, the Court should in all matters envision the issues widely and when deciding on the case argue generally based on the governance model of the state, which could be the degree of argumentation and a certain legal test.

When assessing the practice of the Constitutional Court generally, it should be noted that the competence disputes are not actively heard, although there have been the attempts to use the resources of the Court for this direction. It has not been fully successful in practice, however, I should be stated, that it is relevant for the future the body of constitutional revision to play real and decisive role for such disputes.

In summary, it can be said, that it is of particular relevance to put the practical side of state constitutional organization within the frames of the law and to develop the idea of constitutionalism within this legal primacy and thereby realize the principle of separation of powers, where the special and leading role is carried out by the relevant constitutional body, the Constitutional Court, equipped with appropriate competences to ensure the steady development and full realization of the principle of power separation.

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THE MECHANISM FOR REVISING THE CONSTITUTION OF GEORGIA AND THE CONSTITUTIONAL REFORM OF 2017

ABSTRACT

The purpose of the discussion in the present paper was to assess the dependence of the reform of the Constitution of Georgia regarding the Constitution Revision mechanism. The study revealed the main positive and negative trends that characterize the new mechanism for revising the basic act.

Within the scope of the research, the new method of revising the constitution was evaluated in the retrospective context, which led to the conclusion that the mechanism of revision of the constitution becomes more robust. The research assessed positive and negative sides of the Scandinavian model selected for the revision of the constitution and the conclusion indicated that the Scandinavian, quasi-referendum model may have a lot of negative characteristics, but as an expression of direct democracy and an important mechanism of stability was recognized as a positive step in the final assessment. Also, critical assessment was made on the revision and accelerated mechanism of adoption of the Constitution, which in fact opposed the existence of a Scandinavian model.

The paper discusses the attitude of the constitution revision mechanism to the constitutional control and the perspective of existence of entrenched clauses, which resulted in specific recommendations and tools for their implementation in the Constitution of Georgia. The paper also expresses the views on the better formation of several procedural issues in revising the constitution.

Finally, the constitutional reform of the 2017 regarding the constitutional revision should be assessed as a step forward, but it must be noted that there are important shortcomings in the existing mechanism and it is impossible to say that the mechanism of revision of the Constitution of Georgia is perfect and flawless.

1. INTRODUCTION

The mechanism for constitutional revision is the key to interpreting the constitution and correct regulation of it is highly significant for efficiency of the constitution and the political life of the country. In 2017, a reform of the Georgian constitution was carried out, which

substantially covered the constitution revision rules, as a result of which a completely new mechanism was established.

The aim of the present paper is to discuss and assess the constitution revision mechanism formed by the 2017 reform. Within the scope of this research, we will touch upon the relation of the constitution revision mechanism with the existence of entrenched clauses, the possibility of constitutional control in the process of revision, the circle of constitution revision initiators; we will also discuss the attitude of the reform towards the issues of partial and general revision, constitution revision dates, positive and negative aspects of the beginnings of the new model of constitution revision; we will, moreover, look into some procedural issues of the constitution revision model, correct development of which has high significance for the final efficiency of the new method.

Consideration of the issues listed in the above paragraph will help us assess the effectiveness of the new constitution revision mechanism established as a result of the 2017 constitutional reform and, also, reveal positive and negative sides of this mechanism.

The paper utilizes the following research methods – descriptive, comparative, analytic, systemic, logical analysis, statistical and historical methods. The paper, alongside the analysis of legal norms, relies on the historical experience of the country and examples from global practice.

2. National Experience of Constitution Revision Mechanisms

It is necessary to refer briefly to the national experience of revising the Constitution of Georgia, whose general and descriptive review will clearly demonstrate the government's aspirations, wishes and the challenges Georgian legislator faces. A brief overview will illustrate the diagram of the constitution revision, which varies between the hard and flexible revision.

The Georgian Act of Independence is considered the starting and founding document of Georgian constitutionalism, though it did not contain the rules and conditions for adoption of the constitution. The Rules of the Founding Council did not provide for the adoption of the Constitution, either.[1] In 1920 the founding council adopted "The Rule of the Constitutional Review".[2] According to this Rule, the constitution should have been adopted by the Founding Council itself (the Founding Council was the subject that presented the constitutional draft), first the basic grounds of the constitution were discussed, next the Council moved on to chapter review, after the successful completion of which, the Constitution was moved for

[1] M Matsaberidze, *The 1921 Constitution of Georgia, Development and Adoption Thereof* (Part 2 Political Science Institute Press 1993) 2.
[2] V Sharashenidze (ed.), The Rules adopted by the Founding Council of Georgia on 16 November 1920 on Consideration of the Constitution, Collection of Legal Acts of the Democratic Republic of Georgia 1918-1921 (Publishing House Iverta Mkhare 1990) 442.

a vote.[3] During the adoption of the Constitution of 1921, the idea of adoption of the first Constitution through referendum was actively discussed (moreover, article 147 of the Constitution of 1921 envisaged the rule of the constitution revision by referendum), however, the expected Soviet occupation suppressed this desire, as it was evident that no referendum could be held in the country at war.[4] In spite of such a force majeure, the Georgian nation still managed to create a constitution that became a step forward in the legal and state thinking of the world.[5]

When considering the revision mechanism of the 1921 Constitution, the legislator chose a hard model of revision,[6] according to which half of the MPs and 50,000 voters were subjects for revising the Constitution.[7] Revision was made by a 2/3 majority of the Members of Parliament and the prerequisite of its implementation was to approve the amendments by a referendum.[8] The six-month deadline was set for the commencement of consideration of the revision, which meant that within six months of the initiative, the legislator should have thought about constitutional amendments.[9] The 1921 edition of the Constitution did not envisage a special rule for the adoption of a new constitution, although the text of the basic law was familiar with the "general and partial revision concepts".[10]

In the adoption of the Constitution of 1995, Georgian legislator chose a simple mechanism for revising the Constitution in which the initiators were President, more than half of the total number of MPs and 200,000 voters.[11] The initiative was supposed to be taken to the general public discussion and would be considered adopted if two-third of the Parliament supported it.[12] The reform of 2004 did not handle this article, but the next two constitutional reforms did. In 2010, the constitutional revision mechanism became relatively stable, the president left the circle of initiators of revision and the support of the three-quarters of the full parliament on two consecutive sessions with three months interval between them became necessary. Public involvement in the adoption of the constitution remained the same.[13] As a result of the reform of 2017, the text of basic law enhanced the involvement of the people

[3] Varshanidze, (n 2) 443.
[4] Matsaberidze (n 1) 32.
[5] T Nemsitsveridze and Z Kordzadze, Legal Discussions and Adoption of the Constitution of 1921, Chronicles of Georgian Constitutionalism (Zviad Kordzadze Publishing 2016) 12.
[6] T Papashvili and D Gegenava, The Georgian Model of Revision of the Constitution - Deficiencies of Normative Regulation and Perspectives (Publishing of David Batonishvili Institute of Law 2015) 17.
[7] Article 145, paragraphs "a" and "b", the Constitution of Georgia of 21 February 1921.
[8] ibid article 147.
[9] ibid article 146.
[10] ibid article 145.
[11] G Davituri, 'Mechanism for Revision of the Constitution of Georgia in 1921 - Perspectives of Constitutional Reform', in Collection of Articles Democratic Republic of Georgia and the 1921 Constitution (Publishing House of David Batonishvili Institute of Law 2010) 161.
[12] Article 102, the Constitution of Georgia, Legislative Herald of Georgia, original edition of 24.08.1995, Legislative Herald of Georgia.
[13] ibid article 105, edition as a result of 15.10.2010 Constitutional Reform.

and a quasi-referendum model emerged, according to which the amendments initiated during one parliament cohort would require approval by the next one.[14]

The above review of the experiments of the creation of the National Constitution clearly indicates that the Georgian legislator appraises gradually the relevance of sustainability and stability of the Constitution and progressively returns to the hard model of the Constitution revision adopted by the Founding Council of 1921.[15] The constitutional amendments of 2010 and 2017 on the revision of constitution indicate precisely this. We move towards a stricter procedure for constitutional revision and towards a higher engagement of the people. Our goal is to analyze these trends and the norms proposed by the new regulation.

3. ENTRENCHED CLAUSES FORGOTTEN BY THE CONSTITUTIONAL REFORM

None of the "waves" of the Georgian Constitution reforms have handled the issue of the permanence of constitutional norms and the internal hierarchy of the Constitution, also rejected by the Constitution reform of 2017.

The entrenched clauses in world constitutionalism are a common practice (Japan, Germany, Greece, Italy, Armenia),[16] the most striking example of which is the Japanese Constitution, in which the public sovereignty, basic rights and pacifism cannot be modified by constitutional amendments.[17] Granting the immunity against amendments to the constitutional provisions for the protection of democratic governance and human dignity is even more widespread.[18]

Entrenched clauses, in “world constitutional chest”,[19] are not a homogeneous experience, many researchers favor their existence, and many are against it. The following main arguments are on the side of such clauses: 1. the basic principles of the Constitution (which are usually assigned the immunity of permanence) must endure generations and there will be no need to change them; 2. the unalterable provisions envisage "hermetic protection", thus avoiding violations of certain basic constitutional principles by "temporary" majority." “Therefore, they reflect the idea that the identity of the nation and the constitutional narrative should not be subject to the capital of the majority";[20] 3. The creators of the Constitution

[14] Constitution of Georgia (n 12), article 77, edition as a result of 13.10.2017 Constitutional Reform.
[15] See B Kantaria, Fundamental Principles of Constitution and Legal Nature of the Form of Administration in the First Georgian Constitution (Publishing House Justice 2013) 333.
[16] Papashvili and Gegenava (n 6) 84.
[17] The Constitution of Japan, available here: <https://japan.kantei.go.jp/constitution_and_government_of_japan/constitution_e.html> accessed on March 13, 2018.
[18] Y Roznai, Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers (London School of Economics and Political Science, LSE Press 2014) 23.
[19] A Sajo, *Limiting Government: An Introduction to Constitutionalism*, Georgian translation by M Maisuradze, T Ninidze (ed) (Sezanne Print 2003) 19.
[20] Sh Weintal, *'Eternity Clauses' in a Constitution: The Strict Normative Standard in Operating the 'Constituent Power'* (LL.D Thesis, Supervisor: Prof. Eyal Benvenisti, Faculty of Law, Tel-Aviv University. 2005) 28.

shall establish such constitutional provisions, which will ensure the continuity of the state tradition and culture and will be protected from harm by the ordinary, daily political processes.[21] In favor of these arguments, we must add that the Constitution, as the core document of the values of society and nation, should necessarily contain values that will never be revised (because society and state are built around solid values),[22] in the Constitution, just like in humans, there are certain concepts that have not changed since the earliest consciousness of human beings and are not likely to change. Consequently, such high-end values must have the immunity of constant status granted at the level of the Constitution which will not be revised. In addition, we should definitely consider one fact - a major challenge to contemporary constitutionalism is the self-restraint of the government, and in the 21st century, the main purpose and task of the legal, democratic (i.e. self-restricted) state is to protect the minority from the vast majority. In carrying out this goal, the entrenched provisions of the Constitution will certainly be able to tame the majority and protect the rights of minorities. There is also an argument under which the eternal clauses and hard revision should protect the constitution from the populist political forces and the good example of this (from the point of view of hard revision) is the United States.[23]

Against the arguments contained in the previous paragraph, there is an argument of self-determination of generations, according to which one generation adopting the Constitution should not restrict subsequent generations from the possibility to revise it. The previous generation should not force further generations to change the regulatory arrangement established by its entrenched clauses through the revolution. Through the revolution, which will not be subject to any sanction and will create new order. Under this argument, future generations should not be forced into the revolutions, directed towards denying constant legal principles.[24] The constitution can take into account the constant provisions of the constitution, but the people (future generation) still retains the right to final decision. The example of revolutionary constitutions also shows that restrictions on the creation of people's constitutions in the pre-set legal order are not efficient.[25]

"The advantage of entrenched provisions lies in the so-called 'beacon' function - to indicate the direction of the amendments after the adoption of the Constitution. The guarantees of permanence are a type of assessment measures that ensure the stability of constitutional values and do not allow the ruling majority to substantially change the social contract. This

[21] CR Sunstein, 'Constitutionalism, Prosperity, Democracy' [1991] 2 Constitutional Political Economy 371, 385.
[22] An entrenched clause can be revised in case of destruction of a specific political order, e.g. the big revolutions resulted in the people rejecting the current political order and the document regulating this order - the constitution.
[23] A Hamilton, 'Paper N15' in *Federalist Papers* (01.12.1787), for Georgian see <http://federalistpapers.ge/index.php> accessed on September 10, 2018.
[24] F Mélin-Soucramanien and P Pactet, *Droit Constitutionnel* (28th edn), Georgian Translation by G Kalatozishvili, scientific edition by A Demetrashvili (Tbilisi State University Press 2014) 104.
[25] A Sajo and C Klein, 'Constitution Making: Process and Substance' in A Sajo and M Rosenfeld (eds.) *Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012).

is not a problem for responding to the challenges of social progress, since such changes require centuries, necessitating the amendments to the foundational principles."[26]

From the above-mentioned, we claim that in the framework of the Constitutional Reform of 2017, relevant persons should have thought about the entrenched clauses, particularly the Preamble to the Constitution of Georgia and paragraph 2 of article 1, which states that "[t]he political structure of the State of Georgia is a democratic republic" and about granting the immunity of permanence to article 17 of the Constitution (human honor and dignity shall be inviolable). I believe that the constitutional principles should be granted the immunity of stability, by which they will become the so-called "beacon" for further revision of the constitution.

In the framework of the 2017 reform, the reason for rejecting this approach should be the fact that the entrenched clauses are a kind of incitement to constitutional control over the constitutional provisions and the 2017 reform is obviously against the latter.

4. CONSTITUTIONAL CONTROL AND CONSTITUTIONAL REVISION

There is always a dilemma within the constitutional control, how and in what form it is possible to implement constitutional control over the constitution norms. This issue was raised before the Constitutional Court of Georgia in several cases ("Alliance of Patriots Case",[27] "Geronti Ashordia Case",[28] "National League of Constitutional Protection Case"[29] and "Shalva Ramishvili Case"[30]), but the Court did not find it within its competence to exercise constitutional control over the clauses of Constitution. It is not the goal of this paper to evaluate the above-mentioned case-law of the Constitutional Court of Georgia, but to discuss the possibility of preventive constitutional control over revision of the Constitution and its suitability.

James Madison, in the "Federalist Papers", focuses on the efficiency of the principle of hard division of power, but he nonetheless believed that people would never refuse to act on private interests, thus they would form groups of interests and use government institutions for their own purposes. According to Madison, it was impossible to eradicate the causes for these as we cannot change human nature. As for the outcome, Madison was more hopeful of

[26] V Menabde, 'The Revision of the Constitution of Georgia - What Ensures the Legitimacy of the Supreme Law of Georgia' [2013] Journal 'From Presidential to Parliamentary, Constitutional Amendments in Georgia' (Ilia State University Press) 127.

[27] Citizens of Georgia Irma Inashvili, David Tarkhan-Mouravi and Ioseb Manjavidze v. the Parliament of Georgia Decision №1/1/549, the Constitutional Court of Georgia, February 5, 2013.

[28] *Geronti Ashordia v. the Parliament of Georgia* Decision N1/3/523, the Constitutional Court of Georgia, October 24, 2012.

[29] Non-Entrepreneurial (Non-Commercial) Legal Entity 'National League for Constitutional Protection' v. the Parliament of Georgia Decision N2/1/431, the Constitutional Court of Georgia, July 10, 2010.

[30] *Citizen of Georgia Shalva Ramishvili v. the Parliament of Georgia* Decision №2/1/431, the Constitutional Court of Georgia, March 31, 2008.

the control thereof.[31] The governmental powers must be separated not by strict boundaries, but by checks and balances principles. Only confrontation of ambitions with ambitions could devise such a system of government, wherein no one ambition would win out fully. Restricting the most powerful branch by equipping the weaker one more means of defense from the first. Such a branch may only be the highest representative body, which directly legitimizes the power source, especially in the parliamentary republic, when no level of legitimacy of any other branch counterweighs it. According to Madison and Hamilton, the legislative body was the most powerful and, hence, most dangerous because of its function, the proximity to the people and the great democratic legitimacy. This was the reason for its particular restriction. Madison considered that: "there are particular moments in public affairs when the people, stimulated by some irregular passion, or some illicit advantage, or misled by the artful misrepresentations of interested men, may call for measures which they themselves will afterwards be the most ready to lament and condemn."[32] Hamilton, in contrast to these fears, supported the constitutional control of the judiciary power – "In these critical moments, how salutary will be the interference of some temperate and respectable body of citizens, in order to check the misguided career, and to suspend the blow meditated by the people against themselves, until reason, justice, and truth can regain their authority over the public mind? What bitter anguish would not the people of Athens have often escaped if their government had contained so provident a safeguard against the tyranny of their own passions? Popular liberty might then have escaped the indelible reproach of decreeing to the same citizens the hemlock on one day and statues on the next."[33]

From the point of view of the aforementioned, the Founding Fathers of the United States Constitution, it is clear, that even then, there was discussions over exercising preventive constitutional control of constitutional amendments. Granting such authority to a body carrying out constitutional control can be a legal stage with a highest legitimacy in the revision procedure; it is true that through this the revision becomes a more complicated mechanism, but establishing such a stage, as a legal component in the highly political process of revision, will set the latter process in the frames of legal rationality and constitutionality, which will certainly bring benefits.

Constitutional control of constitutional amendments is regarded as vertical separation of power.[34] This implies that the amendment body (legislative body) shall act within its competence, but it also requires the mechanism to determine whether the amendment body has exceeded its authority in making these revisions. And, the judiciary power is primarily regarded as the executor of amendments,[35] except, when a specialized body of constitutional control exists. This is considered to be a judicial legitimation of the constitutional amend-

[31] D Zedelashvili, 'The Revision of the Constitution in Georgia: The Passion of the Majority and the Constitutional Order' [2013] Journal 'From Presidential to Parliamentary, Constitutional Amendments in Georgia' (Ilia State University Press) 157.
[32] J Medison, 'Paper N63' in *Federalist Papers* (01.03.1788), for Georgian see <http://federalistpapers.ge/index.php> accessed on September 10, 2018.
[33] Zedelashvili (n 31) citing Hamilton 'Paper N63' (n 32) 158.
[34] SH Guha and M Tundawala, 'Constitution: Amended it Stands?' [2008] 1 NUJS L. Rev., 554.
[35] Weintal (n 20) 289.

ments (unlike moral or sociological legitimacy). There are two forms of constitutional control on the revision of the constitution, formal and substantial, the first one inspects the procedures of the constitution revision (Romania,[36] Kyrgyzstan,[37] Kosovo,[38] Turkey[39]), and the second implies identifying the conformity of the amendments with the constitution (Ukraine[40]). Formal compliance is usually a compulsory component of revision of the constitution, but substantial is optional, which only begins when a special subject disputes a specific constitutional amendment.

I believe that the constitutional control of the revision of the constitution must necessarily be a simultaneous process in constitutional changes. In the course of our country's constitutional reforms, concerns of constitutionality of the revisions have been put forward by both the internal opposition political forces as well as the international community. There have been complaints about the formalities of procedures of the revision itself, of which the constitutional reform of 2004 was a clear example,[41] and, also regarding the constitutionality of specific clauses, the clear example of which is the 2017 constitutional reform, in the scope of which, the case-law of the Constitutional Court of Georgia was practically overruled by "reincarnating" the norms declared unconstitutional by imprinting them into the basic law.[42] The history of revision of the Constitution of Georgia clearly shows that constitutional revision procedure necessitates the involvement of constitutional control, both formal and substantial.

Under the revision of the constitution, it is necessary to contain preemptive constitutional control within which the formal preventive control will be mandatory, and the constitutional control on material grounds – optional.[43] Implementation of mandatory constitutional control on material grounds is impossible due to the massive nature of the reform, as it is ineffective to carry out a "mechanical" constitutional control of the entire text of the reform, besides, constitutional control will take too much time, which in itself is a problem. We believe that special political subjects should have the right to constitutional claims on material grounds, specifically the right to submit constitutional submission should belong to the President, the Government, and the number of MPs, which would allow the opposition forces to actually use this mechanism.

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[36] Constitution of Romania <http://www.cdep.ro/pls/dic/site.page?id=371> accessed September 11, 2018.
[37] Constitution of the Kyrgyz Republic <http://www.wipo.int/wipolex/en/text.jsp?file_id=458383> accessed September 11, 2018.
[38] Constitution of the Republic of Kosovo <http://www.kuvendikosoves.org/?cid=2,1058> accessed September 11, 2018.
[39] Constitution of the Republic of Turkey <http://www.hri.org/docs/turkey/> accessed September 11, 2018.
[40] Constitution of Ukraine <http://www.justice.gov/sites/default/files/eoir/legacy/2013/11/08/constitution_14.pdf> accessed September 11, 2018.
[41] W Babeck, S Fish and Z Reichenbecher, *Rewriting a Constitution: Georgia's shift towards Europe*, (Nomos Verlagsgesellschaft 2012) 92.
[42] *Citizen of Denmark Heike Kronqvist v. the Parliament of Georgia* Judgment N 3/1/512 of the Constitutional Court of Georgia, June 26, 2012 and *Citizen of Austria Mathias Huter v. the Parliament of Georgia* Decision 1/2/563 of the Constitutional Court of Georgia, June 24, 2014.
[43] G Kakhiani, Institute of Constitutional Control and Its Problems in Georgia: Analysis of Law and Practice (Tbilisi State University Press 2008) 31.

In my view, it is necessary to include constitutional control in the revision mechanism of the constitution; this procedure will transform a highly political and destructive atmosphere onto legal, constructive paths. The basis for this opinion is the experience of constitutional revision in our country. The use of this mechanism will also end the not-so-positive tendency of giving exclusive right of revision to the ruling majority.

5. CONSTITUTION REVISION INITIATORS

As a result of the reform of the Constitution in 2017, more than half of the total number of MPs and 200,000 voters were prescribed as initiators of revision of the basic act. In this regard, the circle of initiators of the revision of the Constitution as a result of the 2010 reform has been maintained. Until 2010, the President of Georgia also had the right to unconditionally present draft law of amendments. Within the framework of the constitutional reform of 2010, s/he was deprived of this right, based on the change of the form of governance, as a result of the reduction of the President's authority and this was positively assessed both at domestic and international levels.[44]

There is a large variety of experience in the world constitutionalism in relation to the initiators of constitutional revision, including the models, where the initiators of ordinary law and constitutional law do not differ (e.g. Italy, Spain, Finland, Norway).[45] I do not consider this approach appropriate - specific minor subjects (such as a member of the Parliament or a small number of MPs) should not be authorized to initiate constitutional law, as initiating the revision of the basic act should not turn into a storm in a teacup. The initiative of the constitutional amendments should be viable from the very beginning, and therefore, as a rule, the highest qualified majority of MPs are equipped with this right (Albania -1/5, Bulgaria - 1/4, Turkey - 1/3, Argentina - 2/3, or a specific number, Serbia - 20 MPs, Azerbaijan - 63 MPs),[46] Georgia belongs in this list since 1921 and this approach had not been rejected by the 2017 reform. The majority of the total members of the Parliament is the optimal number that should initiate and, in case of consolidating the opposition forces, can make the initiative viable.

The government's inclusion in the initiators list of the revision of the constitution is also an accepted practice, although the 2017 reform has rejected it. In my opinion, this should be assessed as a correct choice, since within the context of parliamentary life in Georgia the government carries a big role as it is, and this is expressed in the right to legislative initiative of the government and in practice, where most of the legislative initiatives come from the government. We think that the constitutional amendment should commence from the Parliament. As the supreme representative body of the country, it should be the origination of such fundamental reforms; such initiatives should be borne in the Parliament from the very begin-

[44] Papashvili and Gegenava (n 6) 33.
[45] ibid, p.34.
[46] ibid.

ning; the strive towards the Parliamentary Republic is an additional argument for this, where such rights are the ones strengthening the primacy of the Parliament among its equals. In addition, the parliament is the determinant of domestic and foreign policies of the country and the privilege of revising the Constitution should be in its hands (except for the general public initiative).

The basic acts of almost all countries grants the right to a revision to the electorate, which is understandable because people are the source of power and such authorities are considered a mechanism for engaging the people in democratic processes. People, as supreme sovereigns, should necessarily be among the initiators of the revision of the constitution, especially when the constitution is revised inside the parliament rather than through a referendum. Since 1921, the Constitution of Georgia shares this approach, according to which 200,000 voters have the right to initiate constitutional amendment (by the Constitution of 1921, 50,000 voters). Determining the number of voters considered as the initiator is a separate issue, is it a high number or not? There are 3,700,000 voters registered in Georgia, 5.4% of this is 200,000 voters. We think that this number is reasonable and quite enough to generate a viable constitutional initiative, and even the most viable, since consolidating 200,000 voters is a serious factor in the initiative of constitutional amendment for gaining the support of the political forces in power and capable of doing many things to grant the revision of the constitution viability.

The constitution also effects a vertical balance of power (this is especially relevant in federal republics), the constitution is often a "treaty"[47] between territorial entities or even territorial entities and the center, and it is natural that the parties to the treaty need to be involved in revision of such a treaty. There is an opinion according to which granting such competences to autonomous entities is unnecessary for unitary countries and is more expedient for federal states,[48] but I hardly share this opinion. The territorial unit, which has the power of autonomy, deserves the right to initiate the constitutional revision. Assigning such a right will underline the significance of the autonomy and the perception that the constitution belongs to all, including the people living in the autonomous unit; this approach suppresses the feeling that the constitution is written by others and pressed down to the autonomous units; anything and especially the Constitution is a document, where the ability of participating in its creation/amendment increases the quality of trust and national perception. Besides that, the constitution is a political document that unites people, especially, ethnic minority populations with the people of the “centre”.

The constitutional reform of 2017 should be assessed positively in terms of defining the initiators of the revision of the constitution. The qualified majority of MPs and the number of voters is within the constitutional logic, rejection to involve the President and the Government in the circle is also rightful. As for determining a territorial unit as the subject, so long as the Constitution includes the clause “[t]he state territorial arrangement of Georgia shall be

[47] F Martin, The Constitution as Treaty – The International Legal, Constitutionalist Approach to the U.S. Constitution (Cambridge University Press 2007) 4.
[48] Papashvili and Gegenava (n 6) 36.

revised by a constitutional law of Georgia […] after the complete restoration of the jurisdiction of Georgia over the entire territory of the country" (paragraph 3, article 7 of new version of the basic law), the inclusion of such subjects is unacceptable; after the disappearance of the text of this entry and the restoration of territorial integrity, we could really consider prescribing the territorial entity as the initiator of the revision of the constitution. The reason for this is that the countries with territorial concerns refuse to activate territorial issues, as such issues are politically sensitive. A clear example of this is the approach of the Constitution of Georgia that refuses to establish a territorial arrangement until full jurisdiction is restored on the entire territory of Georgia. Consequently, we consider that any issue, including the right to initiate revision of the constitution, regarding the territorial units of Georgia, shall be determined only after the territorial integrity of Georgia is restored.

6. Partial and General Revision of the Constitution

The general and partial revision of the constitution was always relevant when discussing the mechanism of revision of the Constitution of Georgia. The constitutional reform of 2017 also touched upon this issue; therefore I consider the discussion of this issue and the assessment of the correctness of the position expressed by the 2017 reform significant.

The seventeenth chapter of the 1921 Constitution distinguished between two forms of constitutional revision, the general and partial revisions. This approach was also adopted by the Constitution of 1995 too and the right to general or partial constitutional revision was established. Part of the Georgian constitutionalists link general revision of the constitution to the adoption of a new Constitution and partial to making changes in the existing text.[49] This difference would be acceptable if the appropriate procedure was placed behind a form of revision. Since such mechanisms are not found within the Constitution, it is difficult to take this difference as anything more than etymological.

One cannot find a record anywhere in the world on partial or general revision without them being backed by different procedures for each.[50] The practice of world constitutionalism clearly shows that a state that differentiates the revision forms, sets out the different procedures for each of them, such as Bulgaria[51] and Switzerland[52]. The Venice Commission Reports also point to this approach.[53] Our reality clearly demonstrates that in the Constitutions of 1921 and 1995 these approaches were rejected, which led to the confusion in the basic

[49] A Demetrashvili and I Kobakhidze *Constitutional Law* (Publishing House Innovation 2008) 65.
[50] ibid, 29.
[51] Chapter 9, Constitution of The Republic of Bulgaria <http://www.parliament.bg/en/const> accessed on July 13, 2018.
[52] Article 192, Federal Constitution of the Swiss Confederation <https://www.admin.ch/opc/en/classified-compilation/19995395/201801010000/101.pdf> accessed on July 13, 2018.
[53] *Report on Constitutional Amendment*, European Commission for Democracy Through Law (Venice Commission), CDL-AD(2010)001 (Strasburg, 19.01.2010) 56.

law,[54] the solution to which is given orally by those directly involved in the creation process of the 1995 Constitution.

It is interesting to know what was the reason that gave rise to the partial and general revision forms, first in the 1921 Constitution and then in the 1995 Constitution. It is known that the Founding Council of the 1921 Constitution actively used the experience of world constitutionalism.[55] The Constitution of Switzerland had a great impact on the Georgian constitutional process and the latter differentiates two forms of revision, for which it sets out different procedures (the distinction is seen in the quality of engagement of people). Georgian researchers express an assumption, which I share, that the above mentioned precisely might have been the goal of the founding council, however, because of singular kind of force majeure circumstances of 1921, the issue could not be fully processed and the forms of revision were prescribed without corresponding procedures.[56] In 1995, when the Constitution was developed, the 1921 Constitution's entry was directly transmitted without its adequate analysis, which resulted in the preservation of the text in the basic law to date.

The Constitutional Reform of 2017, unlike previous reforms, has settled this issue and got rid of any notion on partial or general revision of the Constitution in the text of article 77 of the Constitution. This approach of the reform must be assessed positively. This amendment has once and for all put an end to the possibility of speculation and misunderstanding.

7. TIMEFRAME OF CONSTITUTIONAL REVISION

The term of revision of the constitution is an important issue in the development of revising mechanism. The existence of deadlines should provide a reasonable timeframe for revising the Constitution, on the one hand, and, on the other hand, the possibility of universal engagement in revising the basic law. Despite this argument, such a practice in world constitutionalism does not have much support, but there are still separate cases, such as the South Korean Constitution, which states that the Parliament should make a decision within 60 days after the publication of the project,[57] and the Bulgarian Constitution setting the minimal and maximal terms for deliberation.[58]

According to article 102 paragraph 2 of the Constitution of Georgia, the draft law shall be reviewed by the Parliament within a month after its publication. This approach was shared by the constitutional reform of 2017. According to article 146 of the 1921 Constitution, "the general or partial revision of the Constitution shall be laid on the agenda of the Parliament

[54] Davituri (n 11) 154.
[55] R Arsenidze, *Democratic Republic* (publishing house of David Batonishvili Institute of Law 2014) 6.
[56] Davituri (n 11) 154.
[57] Article 129, Constitution of The Republic of Korea <https://www.wipo.int/edocs/lexdocs/laws/en/kr/kr061en.pdf> accessed November 20, 2018.
[58] Article 154, Constitution of The Republic of Bulgaria <http://www.parliament.bg/en/const> accessed July 13, 2018.

not earlier than six months."[59] This record clearly shows that the founders of the Constitution of 1921 wanted to have a vigorous term determined by the Constitution, during which the members of the society would have reasonable opportunity to get engaged in constitutional processes, to develop critical analysis of the draft and to research the best international practice. This period also allowed the political process to be properly conducted during the consideration of the Constitution. This "cooling" period established by the Constitution of 1921 facilitated the proper implementation of political processes and the proper engagement of the civil society.

This timeframe set by the Constitution of 1921 is a reasonable period during which the significant constitutional processes mentioned in the previous paragraph can be conducted. The existence of similar terms in the text of the Constitution contributes to the suppression of the tendency of "adjusting" the constitution and undoubtedly makes the process healthier. It is possible to say that in the "force majeure" situations such timeframes are redundant, the argument which is unacceptable for me, since the revision of the Constitution should not be done in a "force majeure" manner and in such situations the rapid revision of the Constitution has never brought any good.

Considering the arguments developed in this chapter, it would have been welcomed if the constitutional reform of 2017 had taken into consideration the existence of such a period of time between initiation and consideration of a constitutional amendment.

8. Lobbying And Constitutional Revision

The issue of lobbying is a common and familiar phenomenon for law, its roots come from the United States and has found the development in the legislative domain of Georgia – within the Law "On Lobbying Activity" regulating the rule and scope of lobbying.

Clearly, lobbying activity is a rational way to involve interest groups in the processes, ensuring the "taming" of the interests and making the process more transparent, but the admission of lobbyists to constitutional changes, in my opinion, will cause deformation of the political processes and promote speculations. Here it should be noted, that the interest groups will try to introduce their interests into the Constitution in any case, the possibility of which they are given already in the scope of civic engagement, but a person with a lobbyist license should not wander the halls of legislative bodies creating a perception, according to which the more powerful interest groups are effecting an unlawful, hidden influence over the process of constitution revision. Lobbying activity is a form of civic engagement in the legislative process; its existence is required and necessary from this perspective, also; in the legislature, lobbying is an ideal opportunity for the interested person to get engaged in law-making discussions, to look into its development and to provide the legislative body with relevant information and arguments in favor of or against a specific draft. In the revision of the con-

[59] Collection of Legal Acts of the Democratic Republic of Georgia, 1918-1921 (n 2).

stitution the level of civil engagement is higher; unlike the draft law, the constitutional draft goes through general public discussions; it is in this way that interested people can have an impact on the revision of the Constitution through healthy discussions. Involvement in this process would be the most public and transparent way of lobbying, when all will see the declared interests of relevant groups. As the revision of the constitution has a high standard of public engagement, based on all above mentioned, the necessity of lobbying activities is no longer in place; in contrast to ordinary legislative process, public discussions of a constitutional draft substitutes and entails the lobbyist form of community's engagement (through high standard of transparency).

There is a prevailing view that lobbying is limited to certain boundaries, for example lobbyism is considered inadmissible in judiciary.[60] According to paragraph 2 of article 1 of the Law of Georgia “On Lobbying Activity", lobbying is also inadmissible on the procedures of the decree of the President of Georgia and the order of Commander-in-Chief. We believe that such a restriction should be made on the prohibition of lobbying in the constitutional revision procedure as well. This prohibition is not in the text of the Constitution, but the constitutional reform of 2017 and specifically article 77 require further implementation in the subordinate legislation. This reservation should be prescribed within the Law of Georgia "On Lobbying Activity".

9. SCANDINAVIAN MODEL OF CONSTITUTION REVISION IN GEORGIA

The Scandinavian Model of revising the constitution implies the involvement of elections in the process of revision, which gives the revision process a "quasi-referendum" character and the parliamentary elections decide the fate of the amendments. If the electorate supports the political party initiating the revision, naturally, the initiatives become constitutional changes. As a result of the constitutional reform of 2017, article 77 paragraph 3 states that the constitutional draft shall be considered adopted if it is supported by at least two thirds of the total number of the Members of Parliament. The constitutional law shall be handed over to the President of Georgia by the next convocation of the Parliament within 10 days after its consideration by one hearing and its unchanged approval by no less than two-thirds of the total number. With the introduction of this regulation, the form of revision of the Constitution of Georgia has moved on to the Scandinavian Model. The Scandinavian Model actually entails higher political temperature for constitutional amendments and engagement of more politics in the revision. In this chapter I would like to argue, how correct the reception of the Scandinavian Model is, which in its essence means development of quasi-referendum approaches. While discussing "quasi-referendum" issues, one cannot ignore a little overview of its essence. Referendum, including "quasi-referendum”, is primarily an appeal to the electorate by the government to understand the attitude of the public on topical issues. The referendum is considered the most efficient means of granting legitimacy. The referendum, in its essence,

[60] C Gogiberidze, Lobbyism and Legal Aspects of Its Regulation (Universal 2012) 48.

is as political as it is legal. The referendum is considered by the blind fans of democracy as the highest expression of the sovereignty of community, but subjects with a comparatively right ideology are somewhat suspicious of it.[61] In the governing circles of some countries, the referendum institution implies a certain danger for parliamentarism of substituting the "civilized" parliamentary government with the "government of ignorant masses".[62] And the spirit of the nation, expressed in the referendum, can often be saturated by conservatism and radicalism promoted by demagogues.[63]

It is necessary to remove the poison and illusion from the referendum and "quasi-referendum" measures, according to which the people are sovereign and unmistakable here, because the referendum expresses their unmediated will. No matter how attractive the referendum looks with the background of democratic slogans, in reality, it does not always bring positive results. It is mainly certain interest groups, who resort to public initiatives for their own corporate interests. People's initiative is the last refuge for the marginalized political groups and movements that want to attract public attention.[64] A person is not always at the height of their dignity within the crowd and examples from history illustrate this: Hitler used the referendum three times, among them to approve Anschluss and the issue of all three referendums was sanctioned by the decisive majority; people approved "Brezhnev's Constitution" by the referendum;[65] president Nayazov in Turkmenistan and president Karimov in Uzbekistan[66] extended their presidential terms by general public vote. These examples show that people are not sovereign and unmistakable.

The above criticism of the referendum and the "quasi-referendum" measures should not be understood as a claim that the referendum is an unacceptable and negative phenomenon, it is a form of democracy and its existence is validated in this format and it is undoubtedly the highest legitimating event. Thus, the introduction of a referendum-like format in the constitutional revision procedure is a step forward, this mechanism increases the legitimacy of the constitution and adds stability to the constitutional revision procedure, which was undoubtedly lacking in the existing revision mechanism. It is also acceptable to choose the "quasi-referendum" approach, as it would be impossible to hold a referendum directly due to its very essence, since the referendum should be held throughout the whole territory of Georgia and the territorial integrity of Georgia is currently violated by the Russian occupation.[67]

Involvement of parliamentary elections in the revision of the constitution makes the process of revising more solid, which was definitely absent from the Constitution of Georgia; in addition, the "quasi-referendum" model is correctly chosen as the referendum, due to the

[61] Sajo (n 19) 81.
[62] *Referendum - the Main Institution of Direct Democracy*, Research Department of the Parliament of Georgia, Analytical Division. 5.
[63] Sajo (n 19). 80.
[64] ibid 82.
[65] RG Gidadhubli, 'The Brezhnev Constitution' [1977] *Economic and Political Weekly*, Vol. 12 No48, 1982.
[66] A Luhn 'Islam Karimovre-elected Uzbekistan's president in predicted landslide' *The Guardian* (March 30 2015).
[67] According to paragraph 1 of article 1 of the Organic Law of Georgia on Referendum, referendum is a general-public survey and, according to paragraph 3, referendum is held on the whole territory of the country.

reality, which somewhat reduces the legitimacy issue as the population of Abkhazia and Samachablo (South Ossetia) would not be able to participate. This fact is of great importance from a political and legal point of view. In addition, with this amendment, the revision of the constitution takes on an extremely heated political character. The fate of the revision of the constitution will depend on the political sympathies of the electorate and not directly on the constitution's modification (unless the change touches on some sensitive issues for the public, such as same sex marriage). This circumstance further requires that the Constitutional Court of Georgia be involved for preventive constitutional control in the revision process.

10. Simplified Rule of Constitutional Revision

The Constitutional Reform of 2017 introduced an entry in article 77, paragraph 4 of the Constitution according to which "[i]f supported by at least three fourths of the total number of the Members of Parliament, the constitutional law shall be submitted to the President of Georgia for signature within the time frame established by article 46 of the Constitution" Based on this entry, the simplified rule of revision is established, according to which the draft law of the Constitution is adopted by the same convocation and is sent directly to the President for signature. Such an approach is not unfamiliar to world constitutionalism and a similar model is known by the Constitutions of Finland and Estonia.[68]

The existence of the simplified rule can be explained by the possible extenuating circumstance, but in my view, this argument is not relevant for Georgian reality. No less than three quarters of the Members of Parliament is the quorum, which is easily obtainable on the evidence of the electoral system and the historical approaches of the electorate. There is a danger that an exceptional rule existing in paragraph 4 of article 77 of the Constitution may become the primary rule if the majority has 113 seats in the Parliament. In addition, the exceptional case does not account for a mechanism of considering the constitutional draft on two consecutive sessions, with three-month interval; this circumstance leaves the stability of constitutional revision solely in the hands of the quorum, which is unacceptable and makes factual revision mechanism unacceptably flexible.

I find the simplified rule of the constitution revision unjustifiable, as it makes the "Scandinavian Model" meaningless. The Scandinavian Model becomes a façade by the existence of the simplified rule of the adoption of the constitution, the only purpose of which is to overshadow the degeneracy of the exceptional rule. The simplified rule of revising the constitution is not justified by the argument of the existence of a possible exceptional situation either, since the only possible exception is already reflected in article 77, paragraph 5 of the Constitution, which states that "constitutional law related to the restoration of territorial integrity shall be adopted by a majority of at least two thirds of the total number of the Members of Parliament and shall be submitted to the President of Georgia for signature within the time frame established by article 46 of the Constitution". This exception is undoubtedly an extenuating cir-

[68] Papashvili and Gegenava (n 6) 82.

cumstance, where the constitutional law is required to be approved in a timely manner; the justification of the simplified rule of revising the Constitution by other possible exceptional cases is an intolerable argument.

11. Definitions of the Rules of Procedures of the Parliament of Georgia on Revision of the Constitution

11.1. The Issue of Sequence of Legislative Hearings

In this chapter I shall discuss the procedural issues of the regulations of the Parliament of Georgia, which essentially manage and specify revision mechanisms existing in the Georgian Constitution. One of such issues is the implementation of parliamentary hearings during the revision of the constitution. The clause in article 102, paragraph 3 of the current Constitution on review of a draft constitution on two sessions is defined by article 176, paragraph 8 of the parliamentary regulation of Georgia, as follows – "draft law on general or partial revision of Georgian constitutional law is reviewed and adopted by three hearings, according to the rule on review and adoption of law determined by this regulation. Moreover, the draft law will be discussed and adopted by the first and second hearings at the same session, and the third hearing will be held only at the next session of Parliament, no later than 3 months after the second hearing." And articles 157, 159 and 160 of the Rules of Procedure of the Parliament of Georgia prescribe the process for the first, second and third hearings, according to which the issues discussed at the previous hearings should no longer be considered on the following hearings.

In my opinion, the normative reality set forth in the previous paragraph should no longer continue to hold as the article 77 set by the 2017 constitutional reform established the rule of review of the draft law by two convocations of the Parliament. The Parliament of the next convocation should vote for a new constitution and no longer have the right to make any amendments in its text. The reason for this position is that article 77 of the Constitution establishes a quasi-referendum procedure of revision, which implies that the Parliament of the next convocation should be a sort of a "voter" who answers a question put forward by the referendum by yea or nay. If the parliament of the new convocation had a right to introduce any amendments into the draft constitution, it would be able to reject the existing draft and adopt a completely new constitution, which will neglect the concept and principle of article 77 of the Constitution of Georgia.

11.2. Legislative Proposal And the Initiative of Revising the Constitution

According to the Paragraph 1 of article 150 of the Rules of Procedures of the Parliament of Georgia, "the legislative proposal is a formal, substantiated appeal to the Parliament by a person unauthorized to submit an initiative, to make a new law, to make amendments to a law or declare a law void", it is a form of public engagement in the legislative process. It is

interesting what will happen if a person addresses to the parliament in the form of a legislative proposal and the object of the proposal is a constitutional provision. In such a case, we shall be guided by paragraph 9 of article 150 of the Rules of Procedures according to which "the Leading Committee shall be considered as a subject of legislative initiative in case the legislative proposal is accepted for consideration" and paragraph 1 of article 102 of the Constitution (paragraph 1 of article 77 in the new edition), envisaging that the majority of the parliament and no less than 200,000 voters have the right to initiate a constitutional law. This normative reality demonstrates, that the legislative proposal cannot be transformed into a legislative initiative by the leading committee if the proposal refers to the revision of the constitution, as the Committee itself is not the initiator of the revision of the Constitution.

This issue was put on the agenda of the previous convocation of the Parliament and was decided by the above-mentioned clauses. We believe that the regulation of this issue is necessary in the context of constitutional reform, not at the constitutional level, of course, but at the level of the Rules of Procedure of Parliament; the legislative proposal should not necessitate a revision of the Constitution.

12. Conclusion

In this work the mechanism of revision of the constitution established through the reform of the Constitution of Georgia implemented in 2017 was discussed.

Within the scope of the research, we reviewed and assessed the attitude of the new mechanism of revision of the constitution to the existence of entrenched clauses, the possibility of constitutional control in the revision of the constitution, the circle of initiators of revision of the constitution; we also discussed the attitude of the reform regarding the partial and general revision of the Constitution, the timeframe of revision of the constitution was also deliberated, the positive and negative aspects of the new model of revision of the constitution were discussed and in the course of the work, the procedural issues of the new mechanism of revision of the constitution, which are of great importance for the final efficiency of the revision mechanism was also looked into. Here, we present a conclusion that will summarize the efficacy of the new form of revision of the constitution.

- I believe that within the constitutional reform of 2017, proper attention should have been paid to establishing entrenched clauses in the Constitution of Georgia, I think, the entrenched clauses in the Constitution of Georgia can create a kind of "beacon" that will bear an important declaratory and legal functions;

- It is necessary to involve constitutional control in the revision mechanism of the constitution, this procedure will transform a highly political and destructive atmosphere of revision into legal and constructive one, given the national experience, it is clear that the Constitution of Georgia needs the latter;

• The reform of 2017, unlike previous ones, resolved the incomprehensible issue of partial and general revision of the constitution, the text of the Constitution no longer envisages the revision forms. This approach of reform must be assessed positively, as it has once and for all got rid of the possibility of speculation and misunderstanding;

• The existence of timeframe between the initiation and the commencement of the discussion in the text of the Constitution contributes to the suppression of the "fitting" tendency of the constitution and undoubtedly makes the process enhanced. I believe it is necessary to have reasonable time (for example, five months) before parliamentary discussions on the constitutional amendment begins;

• Involvement of parliamentary elections in the middle of the revision of the constitution gives an appropriate strength to revision of the Constitution that has been lacking in the Constitution of Georgia, and with this amendment, the revision of the Constitution takes on extremely sharp political character. The fate of the revision of the constitution will depend on the political sympathies of the electorate and not directly on the constitution's modification (unless the changes are more sensitive for the public, such as the same sex marriage, tax issues, etc.). This circumstance further requires that the Constitutional Court of Georgia be involved for preventive constitutional control in the revision process;

• We find the simplified rule of the constitution revision unjustifiable, as it makes the "Scandinavian Model" meaningless. The simplified rule of revising the constitution is not justified by the argument of the existence of a possible exceptional situation either, since the only possible exception is already reflected in of the Constitution, relating to the restoration of territorial integrity.

• The issue of considering the draft law of the Constitution of Georgia by the old and new convocation parliaments should be correctly regulated. I believe, that the Parliament of the new convocation should either adopt or reject the draft constitutional law, without the right to amend it.

According to the above conclusions, the new form of revision of the constitution, which was created as a result of the constitutional reform of 2017, is truly a novelty of a wide scope in Georgian constitutionalism, but it cannot be evaluated positively. Although there is a lot of positive and welcoming clauses in a new form of revision of the constitution, the existence of a "simplified revision" mechanism (para.4 of article 77) neglects everything else. This means that the Constitution of Georgia is left vulnerable against the passions of the majority and the existence of a high quorum alone cannot guarantee the constitutional stability.

Despite the position expressed in the previous paragraph, I believe that the new form of revision of the constitution, which has been created as a result of the constitutional reform of 2017, can be improved and will give us an ordered, balanced and fair mechanism for revision.

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COMPARATIVE ANALYSIS OF CENTRALIZED AND DECENTRALIZED MODELS OF CONSTITUTIONAL REVIEW: AN ANALYSIS OF MODERN CONSTITUTION STUDIES

ABSTRACT

This paper examines the basic characteristics of centralized and decentralized constitutional review in the lens of a modern constitution and public power. Based on the "spontaneous order" doctrine and "framework originalism" - the type of constitutional interpretation, the opinion of Professor Stone Sweet regarding the strictly legal nature of the constitutional review in decentralized models has been criticized. *Erga omnes* effect that is characterizable to the centralized models and the monopoly on constitutional interpretation has been regarded, as institutes harmoniously complying with the semantic system stemming from modern constitutions. Decentralized models are represented, as an appeal to the fragile nature of legal systems and the transcendence from a set of characteristics of a modern constitution. The leitmotif of the paper is the idea that the independent assessment of constitutional review models is not relevant and the absence of destructive effects due to an existence of the social contract does not render the model perfect.

1. INTRODUCTION

Law is an exclusive form of the exercise of public power, whereas a modern constitution in its normative meaning can be defined as a framework of the legislation in a state. Since the normative dimension is an essentially fictional fact, in which the events need to be accommodated to notions and not *vice versa*, any social construct requires systematic, logical and semantic arrangement. This paper aims to examine and evaluate the key distinctive features of centralized and decentralized models of constitutional review in the lens of major characteristics of a modern constitution and determine the model that is more appropriate to the nature of public power, interpretation of the constitution and a general systemic logic. The developed argumentation does not serve the purpose of positively or negatively evaluating the models of constitutional review (by any criterion), but to present them in a common argument and to provide a contextual classification of the topics and sub-topics.

2. A MODERN CONSTITUTION

The existence of a modern constitution is impossible when the factual constitution[1] does not comprehend the principle of the rule of law in the social or government institutions. The principle of rule of law is a meta-legal ideal - rarely given explicitly in national constitutions or organic legislation.[2] It is not an accident, since the legislation and the nature thereof is dependent on the doctrine of rule of law, accordingly, inclusion in legislation would resemble the definition of general by specific (or inclusion in itself) that would be principally invalid. In the rule of law, public governance needs to be based on, exercised and limited by law, however, the rule of law does not exclusively mean governance based on laws. Effective execution of a particular norm is necessary, yet insufficient criteria for the rule of law. The governance is required to be exercised not only in compliance with the law but to be deontologically justifiable, since, in a strictly formal sense, an authoritarian ruler could subordinate its own tyrannical power to legal norms and thus, limit own actions with the law. This does not *a priori* mean the limitation (that is one of the criteria), it is necessary to introduce certain moral criteria into a legal system. The modern constitution characteristics described by Professor Grimm constitute the extent of such criteria:

1. The constitution is a set of legal norms, not a philosophical construct. The norms emanate from a political decision;
2. The purpose of constitutional norms is to regulate the exercise of public power;
3. The constitutional regulation is comprehensive, as no extra-legal or supra-legal regulations are recognized;
4. Constitutional law is the higher law;
5. The legitimate source of power for the constitution is the people.[3]

Thus, the modern constitution, contrary to the pre-modern one, should be understood not as a descriptive, but a prescriptive category, while the fifth criterion suggested by Professor Dieter Grimm unequivocally indicates that a modern constitution rendered the law reflective.[4] On the one hand, it emanates from the government and addresses the people, and on the other hand, stems from the people and addresses the government. I believe, that from the perspective of the centralized constitutional review, the above-mentioned interrelation has a third dimension - emanating from an individual and addressing the people, however, the more detailed reasoning will be given in the following chapters.

The modern constitution has become an organic part of a democratic state, accompanied by semantic rather than only practical-functional effects in the academic circles. An illustration

[1] Factual constitution - a set of real public relations that define the basis of public order (See Z. Rukhadze; Georgian Constitutional Law, Chapter 4).
[2] J Hart, *Safeguard of Individual Liberty*, (Texas University Press, 2002) 313.
[3] D Grimm, *Types of Constitutions, The Oxford Handbook of Comparative Constitutional Law* (2012) 104.
[4] ibid 174.

could be a definition of democracy adopted by Professor Walter Murphy: "democracy is a balance between the majority rule and the fundamental human rights."[5]

Any normatively justifiable political or legal process and the exercise of power by democratic institutions need to be a consistent attempt of achieving the abovementioned "balance". However, an institute that exercises constitutional review is an avant-garde of the events. Hence, the counter-majoritarian dilemma does not really constitute a "dilemma" in a sense that, it is necessary to be overcome, on the contrary, in terms of the modern constitution, the counter-majoritarian projection of a judicial power is irreversible and overcoming it would amount to the rejection of balance.

One of the substantial arguments to justify the constitutional review, aside from the protection of rights of an individual (or minorities), is that the constitution is a "fundamental view" of the society, whereas there is a reasonable presumption towards the everyday politics that they serve relatively short-term goals. In that sense, the Bruce Ackerman's doctrine "dualism and the higher lawmaking" is relevant.[6] He draws a distinction between (1) normal politics and (2) constitutional politics. Normal politics that is a part of daily routine politics are governed by government leaders, bureaucrats, who act in their own self-confined interests, while constitutional (same as higher) politics revive periodically, in short periods of the history, for instance: mobilization of the society during the change of a constitutional regime, adopting crucial constitutional amendments, holding referendums on significant issues. At that time, every action of the both - electorate and the government are a subject of public discussions, a well-considered action, and the society evaluates itself "fundamentally" in the lens of constitutional values. Ackerman assumes that the deficiency arising from the periodic character of the "higher politics" can be "remedied" by the institution in charge of the constitutional review that will apply the "fundamental views" to the daily political decisions.

3. CENTRALIZED AND DECENTRALIZED MODELS

Decentralized model of the constitutional review is characterized by the specific form of control - by regular courts, in the process of judicial review. The judiciary has the capacity to suspend the application of certain legal provisions if they contradict with the constitutional rights. In a centralized model, where the constitutional court is separated from regular ones, the constitutional court provides for abstract judicial review of the disputed norms. The abstract review can be referred to as the review of legal norms or a preventive review. It has a textual dimension - litigation is a necessary precondition for a constitutional challenge. Furthermore, the decision will be incorporated in the judicial system and is binding for everyone - due to the *erga omnes* effect. In decentralized models, the lack of *erga omnes* princi-

[5] W Murphy, *Constitutions, constitutionalism and democracy* (American Council of Learned Societies, 1988).
[6] B Ackerman, *Abstract Democracy: A review of Ackerman's 'We the People'* (Harvard University Press, 1991) 312.

ple is balanced by the principle of precedent case law.[7] Although the existence of a different doctrinal framework is not directly correlated to such evident effects, such as democratic development of a state or the degree of protection of fundamental human rights, both models successfully serve their purposes in a number of countries. However, it is crucial to analyze the doctrinal frameworks of each model to decide which one complies with the essence and the scope of a modern constitution and the systematic logic behind it.

According to the third principle of Professor Grimm: "[t]he constitutional regulation is comprehensive, it does not recognize extra-constitutional or supra-constitutional regulations".

When the judge John Marshall delivered the historic judgment in Marbury vs. Madison[8] and established the constitutional review of the legal acts in the United States of America, the Constitution did not include any indication regarding the institute of a constitutional review. I believe that although the decision is a cornerstone of various positive political and legal processes, it constitutes an extra-legal projection of the governmental power. A spontaneous criticism of this opinion could be based on the argument that the decision of Judge John Marshall did not contradict the Constitution and the aims of a democratic state; on the contrary, it served the purpose of a stable social-political system and the breach of the political deadlock. We could absolutely agree with the discussion regarding the worth of outcome, however, I assume that such set of ideas would be a rigid consequentialism,[9] contradicting with the systematic logic of normative reality. The fact that the decision of the government does not harm anyone (or even improves the conditions), could not be a legitimate ground for justifying it, as in terms of the rule of law, each action of the government is determined with the following principle: "everything that is not prohibited is permitted". Accordingly, the constitutional review in the US was exercised extra-legally, circumventing the principle of the rule of law. Hence, the third criterion suggested by Professor Grimm has been violated. In the US case, the constitutional regulation of the state did not turn out to be absolute, since in Marbury v. Madison Judge John Marshal found an extra-legal "gap". However, it does not undermine the constitutional system of the US for two reasons: (1) although while discussing a modern constitution, that scholarly work is the very model and limit, the criteria suggested by Professor Grimm is not an axiom and conceptually the existence of a different opinion is possible; (2) the emergence of constitutional review could be justified by a different systematic argument - based on the doctrine of "spontaneous order".

According to an epistemological argument of Friedrich Hayek, "knowledge is distributed in a society, whereas the legal norm needs to be general in order to guarantee an individual an opportunity to determine life."[10]

Hayek does not only apply the idea of "distributed knowledge" the requirement of being "general", but links it with the idea of spontaneous order and considers the judges to be such

[7] G Fernandes, 'Comparative Constitutional Law: Judicial Review', University of Pennsylvania Journal of Constitutional Law, p. 979.
[8] The US Supreme Court case *Marbury v. Madison*, N137, "Marbury v. Madison", 1803.
[9] S Armstrong, 'Consequentialism', Stanford Encyclopedia of Philosophy, 2015.
[10] F Hayek, *Law, Commands and Order* (Routledge & Kegane, 2010) 218.

an institution of spontaneous order. According to his arguments, factual circumstances are ever-evolving, and a lawmaker is unable to define a particular norm that would rightly and legally apply to every situation. Under those circumstances, a judge has a function of a "stabilizing" power, i.e. a function of realizing the spontaneous order. According to Hayek, a judge is not a public servant or a supervisor, who oversees the execution of legal norms, but the primary function is to focus on spontaneous order and exercise the principles that underlie this norm.[11] According to this perspective, a legal norm is not a prerequisite that leads to a court decision because it lacks the established precedential "*Ratio Decidendi*".[12] While developing *Ratio Decidendi*, a judge becomes a lawmaker, or, at least a law perfector. We can assume that it was the case in the decision delivered by Judge John Marshall.

In a centralized constitutional review, justification of this instrument by indirect or far-reaching arguments is not necessary. Establishment of such institution is inherently related to an explicit (generally, written) will of a political power, that assigns an exclusive constitutional space for the court and hence, aside from the third criterion, the first criterion is also present: *The constitution is a set of legal norms, not a philosophical construct. The norms emanate from a political decision.*

On the other hand, for the justification of the US decentralized constitutional review model, it is more appropriate to represent the constitution as a "philosophical construct", rather than just as "a set of legal norms". As it has been noted above, none of the legal norms indicated to the institute of constitutional review.

4. *ERGA OMNES* EFFECT AND A NEGATIVE LEGISLATOR

In a centralized model of constitutional review, constitutional courts enjoy a monopoly over the ultimate interpretation of the constitution. Here, the *erga omnes* effect implies that a decision is final and binding within the entire legal system.[13] Kelsen, who is regarded as a founder of centralized model of constitutional review, rightly referred to this institution as a "negative legislator". *Erga omnes* effect constitutes a guarantee of the legitimacy of the constitutional court's "surgical interference". Constitutional review which is allowed by the constitution, and is at the same time final and binding, is also a legal act, superior within the hierarchy of legal norms, given that such a review is the reason why the constitution becomes a "living instrument". Institutional regulation of this sort fully meets the third criterion of a "modern constitution" model, elaborated by Professor Grimm, - "the constitutional regulation is comprehensive" – constitutional interpretation is also a form of constitutional regulation, which characterizes not only centralized, but also decentralized models [of constitutional review]. It is undeniable, that in decentralized models of constitutional review, the act of conducting concrete review by a judge, interpretation of the constitution represents a

[11] Hayek (n 10) 95.
[12] D Lambert, 'Ratio Decidendi' (Kentucky State Law Review, 1963) 689.
[13] GF Andrade, 'Judicial Review' (University of Pennsylvania Journal of Constitutional Law, 2011) 980.

declared form of constitutional regulation. This is due to the fact that it is binding upon the parties to the dispute; however, it does not amount to a "comprehensive regulation". Although it can be given the effect of a "comprehensive regulation" by the doctrine of case-law, this would be a unity of numerous acts, as opposed the constitutional interpretation, as a legal norm. Hence, in decentralized modes, "surgical intervention" is not to be deemed as a matter of comprehensive regulation, because "surgical interventions" of this sort are necessary to be conducted irreversibly, in order to preserve the uniform standards. This points towards the fragility of the system, and to the necessity of its constant "artificial" preservation.

Kelsen has also rightly foreseen that considering natural rights in the process of judicial review would turn a constitutional court into the "positive legislator".[14] This can be demonstrated by an example of the 1975 decision of the Constitutional Court of Germany.[15] This decision indicated not only that the laws favoring liberalization of abortion laws were unconstitutional (negative legislation), but it also referred to certain legislative actions, which were needed to be taken in order to regulate this action in a manner compatible with the requirements of the Constitution: "As a last resort, if the constitutional right to life cannot be protected by other means, the legislature is obliged to protect the right to the development of life by the means of criminal law".[16]

Many scholars support the view that using the jurisdiction of bodies conducting constitutional review in either a positive or a negative manner would amount to the violation of the principle of separation of powers. The principle of separation of powers is an immanent attribute of the rule of law, while the rule of law, in its turn, is a cornerstone of modern constitutions. Therefore, following questions might arise: whether a chain of actions has occurred; whether using constitutional review in a manner of negative/positive legislation is in breach of the requirements of modern constitution.

The doctrine of separation of powers has two primary grounds: (1) functional specialization; and (2) mechanisms of restraint and balancing.[17] As noted in previous chapters, bodies conducting constitutional review can be perceived as "stabilizing" institutions. They are fixing a natural dissonance, arising from the projection of political power in the legal sphere. Besides, it would not be exactly correct to assume that constitutional courts are only interfering with the legislature's autonomy, since the power of lawmaking might as well be delegated to the executive branch (bylaws). Hence, a presumption might be that constitutional courts interfere not only within the autonomy of the legislature, but also within that of the executive branch; can such a presumption be reasonably justified? Certainly not: violation of the requirement of functional specialization does not amount *a priori* to derivation from the principle of separation of powers. Functional overlaps among different branches and institutions

[14] A Stone Sweet, *Constitutional Courts* (New York, 2010) 6.
[15] Federal Constitutional Court of Germany, N39, 'Does the reformed abortion statute violate the right to life of life developing in the mother's womb?' 1975.
[16] ibid, Chapt. 3, para. 2.
[17] JS Martinez, Horizontal Structuring, Oxford Handbook of Comparative Constitutional Law (2012) 547-575.

are necessary, in order for the restraining and balancing mechanisms to be implemented in the system. The efficiency of restraining and balancing mechanisms does not mean that the branches of government should be isolated from one another; rather, - it means that, whenever necessary, they should overlap with each other to ensure the proper functioning of the entire system. Accordingly, constitutional review does not represent the delimitation of the doctrine of separation of powers, but – rather its realization. At this stage, the nature of the arguments presented in this paper render it necessary to consider these questions, which I will try to answer in the following chapter: under which status does the constitutional court have "stabilizing" functions? Does it represent any of the branches of government? What happens in cases of decentralized models? Is it possible to conduct constitutional review in a purely legal dimension?

5. THE STATUS OF CONSTITUTIONAL REVIEW

According to Professor Stone Sweet, decentralized model of constitutional review is indistinguishable from carrying out regular judicial functions. It implies the subsumption of the norms existing in a legal system, with a reference to factual circumstances and ensures their enforcement.[18] At the same time, a centralized model of constitutional review is defined as a transitional stage between the legal and political dimensions.

Such a definition of decentralized models undermines the aforementioned doctrine of a "spontaneous order" and deliminates the law-making functions of a judge. In addition, it limits the interpretation of a constitution to a narrow category of "skyscraper originalism". "Skyscraper originalism" is one of the methods of constitutional interpretation, according to which constitution is an unfinished product, which envisages the power to amend constitutions to the legislatures only; however, it does not allow constitutional construction by judges, or filling gaps of the system with a new normative content. According to this method of interpretation, a judge cannot say anything new with respect to existing constitutional norms, even in the process of subsumption of factual circumstances.[19]

Today, the "skyscraper originalism" merely bears theoretical categorical functions and is not used in any legal system adhering to constitutional democracy. So called "framework originalism" can be deemed the leading model of constitutional interpretation. According to this model, a constitution can be constructed by a body or a branch conducting constitutional review.[20] Constitutional construction means the perfection of a constitution, and implies the process of making it compatible with the changing circumstances, as well as incorporation of the political will and principles within the legal system. Two instances of constitutional construction are being distinguished: "[1] When the terms of the Constitution are vague or silent on a question and to apply them we must develop doctrines or pass laws to make its

[18] Stone Sweet (n 14) 6.
[19] Jack M. Balkin, *Framework Originalism and the Living Constitution* (Yale Law School Faculty Scholarship Series, 2009) 550.
[20] See German Constitutional Court (n 15).

words concrete or fill in gaps; [2. When it is necessary to] to create laws or build institutions to fulfill constitutional purposes".[21]

This was the case in *Marbury v. Madison*. Justice Marshall has "constructed" the Constitution by its interpretation, which does in no way equate to performance of regular judicial functions, or a subsumption of legal norm and a subsequent syllogistic relation between, on one hand, predicament and, the result, - on the other.

Constitutional construction, its expansion and completion definitely goes beyond the scope of a purely legal frame, and is linked to the projection of a political power by the virtue of its characteristics. A normative constitution (not a nominal or a semantic one)[22] implies the act of organizing political will and public power, and every attempt of constitutional "regulation" inevitably touches upon the political power. Therefore, from the point of view of systemic logic, there are no convincing arguments which would demonstrate that the decentralized model of constitutional review is only limited to ordinary judicial functions in its scope. References to institutions of concrete review do not prove that decentralized models are politically neutral. The latter might formally meet the criteria of regular judicial functions; however, constitutional construction can never be a purely legal action.

On the other hand, there is no ambiguity surrounding the institutional status of centralized models of constitutional review: constitutions do create political legal spheres for their functioning.

While interpretation of the constitution is uniformly binding in centralized models of constitutional review, there is much ambiguity with respect to interpretation of the constitution by the courts of lower instances as to the substance of a given constitutional norm when it comes to decentralized models, – federal Supreme Courts can affect the validity of the lower courts' argumentation. Hence, decentralized models of constitutional review do not fill the "gaps" in a legal system, but rather periodically create even more empty spaces. Such kind of an institutionalized systematic interruption is not to be deemed compatible with the aforesaid characteristics of a modern constitution.

6. INDIVIDUAL COMPLAINT

In the majority of decentralized models of constitutional review, the basis for determining the issue of a provision's compatibility with the constitution is an individual complaint (limited or full). While some systems allow *actio popularis*,[23] in others it is for the applicant to argue that a disputed provision is infringing or will infringe upon his or her constitutional right(s). This possibility reflects the nature of modern public administration and meets Pro-

[21] Balkin (n 19) 560.
[22] Grimm (n 3) 107.
[23] Stone Sweet (n 14) 15.

fessor Grimm's fifth criterion: *the legitimate source of power for the constitution is the people.*

Clearly, the paradigm of popular legitimacy is much broader than solely constitutional review; however, as noted above, the purpose of this paper is to provide a systematized picture of the issues related to constitutional review.

In the first chapter, we referred to Professor Grimm's opinion, that modern constitutions have made the law more reflective. The phrase - "emanates from the people and addresses the government," - refers to the results deriving from the implementation of direct democracy. However, results stemming from individual constitutional complaint can be put into a different, third category. The applicant is directly participating in the construction of the constitution, - she or he provides arguments, demonstrates the normative content of a specific norm, which was hardly noticeable before and this process is followed by a uniformly binding decision of the Constitutional Court. Nevertheless, in a number of systems, it is only the ruling section, that has a binding nature, as opposed to the reasoning. In effect, constitutional courts are trying to follow the standards enshrined in reasoning sections.[24] Hence in most cases, applicants contribute to the process of constitutional construction, regardless of whether their claim is upheld.

7. CONCLUSION

In normative reality, all types of institutional development are based on the inductive method of systemic reasoning, which refers to the process of drawing generalized conclusions from previous experience, *i.e.* separate events, as well as standardization of a scale of the events' value. In contrast to a decentralized model, creation and development of a centralized model resulted from a long process of reflection and that of learning on institutional mistakes. A social construction cannot be deemed perfect merely due to the fact that it does not bring upon negative consequences in a socio-political sphere; in order for it to be complete, it is necessary that the issues considered therein meet the criteria of semantic exactitude, as well as their relation with deontological reality. In the last century, the pathos of defending fundamental human rights was a reaction to the projection of tyrannical political power. From the perspective of modern constitutions, in terms of systemic-semantic realization of this pathos, centralized model of constitutional review constitutes a better operating mechanism.

[24] This derives from an attempt to preserve foreseeability and institutional authority of the court. A practical example is provided in Article 21^1 of the Law of Georgia "On the Constitutional Court of Georgia", which sets forth a high standard for changing the position of the Court by subjecting a case to a review by the Plenum.

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DOCTRINE OF SUPREMACY OF THE EUROPEAN UNION LAW OVER MEMBER STATE'S CONSTITUTIONS ACCORDING TO THE MELLONI CASE

ABSTRACT

The paper reviews the decision of the European Court of Justice in the case of "Stefano Melloni v. Ministerio Fiscal", where the absolute primacy of European Union Law over those of the member states was exercised. This decision has a significant influence on framing the equality and mutual dependence of the constitutions of the Union member states and the law of European Union. The paper claims that from the point of view of EU Law, in relation to the national law, including the constitutions, primacy is held not only by the European Union Acts, adopted supranationally, but, also, the so-called intergovernmental legal tools – Framework Decisions. The current paper shows that expanding cooperation and maintaining achieved results in the scope of European integration, are fundamentally reflected on the supremacy of constitutions of the member states and cause content modifications thereof.

1. INTRODUCTION

Equality and codependence of EU law and laws of member states always takes one of the central places in European legal field. Even though it is not clearly defined in a material-normative form, which of the legal systems – national or supranational (European) – takes precedence,[1] the European Court of Justice and member states' supreme courts are constantly attempting by their practices to define this issue. Motivations of supreme courts and European Court of Justice, aside from some contradictory exceptions, differ substantially.[2] The policy of European Court of Justice is grounded on three basic components, which are indispensable for perfect functioning and execution of EU Law and maintaining supranational

[1] It is noteworthy that article 6 of the draft European Constitution explicitly declared, that the European Constitution and other legal acts of the European Union adopted in accordance with the competences of the Union, have primacy over member states' laws, including constitutions. See 'Treaty establishing a Constitution for Europe" <https://europa.eu/european-union/sites/europaeu/files/docs/body/treaty_establishing_a_constitution_for_europe_en.pdf> accessed 20 July 2018.

[2] For example, the decision of the Czech Constitutional Court: Judgment EAW, 3 May 2006, <https://www.ejn-crimjust.europa.eu/ejn/libdocumentproperties.aspx?Id=974> accessed 20 July 2018.

character primacy, unity and effectiveness.[3] Constitutional courts act with the view of constitutional primacy and high quality assurance of basic rights and maintenance of their role and function. Practices of the Constitutional Court of the Federal Republic of Germany and of Poland reinforce this view.[4] Although, if the equality of EU law and the member states' constitutions are assessed by the consequences of the courts' decisions, the tendency to decide for the benefit of the EU law becomes clear.

Aim of the current paper, by analyzing the preliminary ruling of the European Court of Justice on the case of "Stefano Melloni v. Ministerio Fiscal"[5] (hereafter Melloni case), is to show that in relation to the constitutions of the member states, the EU Law holds primacy, including not only the acts of the supranational scope of the EU law, but, also, the legal instruments adopted for the deepening of cooperation in the justice field - Framework Decisions[6]. Besides, the paper develops an opinion, that, following the aforementioned case, the doctrine of primacy of the EU Law is further reinforced, broadened and completed.

2. Facts of the Case and the Question of the Spanish Constitutional Court

In 2004, the Court of Appeals of Bologna issued a European arrest warrant against the Italian citizen, Stefano Melloni. According to the arrest warrant, Stefano Melloni was found guilty of fraud and the sentence of ten years of imprisonment was handed down *in absentia*.[7] In 2008, for the execution of the European arrest warrant, by the order of Central Investigating Court, the Police arrested Stefano Melloni.[8] He did not agree to being handed to Italy, although, by the decision of National Supreme Court, he was subjected to extradition to Italy.[9]

According to Melloni, since the Italian criminal procedure did not provide for the mechanism of decision review in absence of the accused, the European arrest warrant should not

[3] European Court of Justice decision: Opinion 2/13 Article 218 (11) TFEU - Draft international agreement - Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms - Compatibility of the draft agreement with the EU and FEU Treaties, [2014], available on the website:
<http://curia.europa.eu/juris/document/document.jsf?text=&docid=160882&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=304567> accessed 20 July 2018. paras 188 and 189.

[4] Decisions of the Constitutional Court of the Federal Republic of Germany: BVerfG, Order of the Second Senate of 15, available on the website: <https://www.bundesverfassungsgericht.de/SharedDocs/-Entscheidungen/EN/2015/12/rs20151215_2bvr273514en.html> accessed 20 July 2018;
BVerfGE 73, 339 2 BvR 197/83 Solange II, available on the website: <http://www.servat.unibe.ch/dfr/bv073339.html> accessed 20 July 2018;
BVerfGE 37, 271 2 BvL 52/71 Solange I, available on web- page: <http://www.servat.unibe.ch/dfr/bv037271.html> accessed 20 July 2018.
Decision of the Constitutional Court of Poland: P-1/05 (Judgment), EAW, 27.04.2005, available on the website: <https://www.ejn-crimjust.europa.eu/ejn/libdocumentproperties.aspx?Id=976> accessed 20 July 2018.

[5] The decision of the European Court of Justice: Melloni v. Ministerio Fiscal, C-399/11 [2013] <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62011CJ0399&from=EN> accessed 20 July 2018.

[6] For the legal nature of the Framework Decisions, see the European Court of Justice judgment: *Pupino v Italy*, C-105/03 [2005] <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-105/03> accessed 20 July 2018.

[7] *Melloni Case* (n 5) para 14.

[8] ibid para 15.

[9] ibid para 17.

have been executed, because, on the one hand, according to the Framework Decision on the European arrest warrant and the surrender procedures between Member States,[10] there was sufficient basis for rejecting the extradition.[11] On the other hand, a lack of such a possibility contradicted the right to fair trial guaranteed by the article 24, paragraph 2 of the Spanish Constitution. He found such limitation of the right to fair trial to be infringing on human dignity as well, as he did not have the ability to contest the sentence imposed for a grave offense in the country requesting the extradition, which simultaneously made an effective realization of the right to defense impossible.[12] Therefore, Melloni appealed to the Spanish Constitutional Court and requested the annulment of the decision on his extradition to Italy. The Spanish Constitutional Court admitted the constitutional claim, however, prior to the hearing of the case on merits, within the scope of preliminary decision procedure the Court applied to the European Court of Justice.[13]

It is noteworthy that the right to a fair trial in the Spanish Constitutional Court has an 'external' effect, which means guaranteeing minimal material-procedural tools for exercising this right in the country of extradition.[14] According to the Court, if such elementary standard of protecting the rights of a person subject to extradition is not satisfied, the right to a fair trial guaranteed by the Spanish Constitution is indirectly violated and human dignity is infringed.[15] Notably, the Spanish Constitutional Court, in 2009, annulled the decision of the court on the extradition of a person to Romania on the basis that the European arrest warrant did not include mechanisms for review of the ruling against the person subject to extradition in their absence.[16]

The Spanish Constitutional Court faced a dilemma in the case. A constitutional court of a member state does not hold authority to assess constitutionality of the secondary legal sources of EU. Moreover, Spain, as a member state, was obligated to execute the European arrest warrant issued according to the Framework Decision on European arrest warrant and surrender procedures. If it had declared the order of the Supreme National Court of Spain invalid, legal grounds for handing Melloni over to Italy would become annulled and Spain would be in violation of the above Framework Decision. But if the decision of the Spanish Supreme Court was declared consistent with the Constitution and Melloni was handed over to Italy for the execution of the sentence, the case-law of the Spanish Constitutional Court would be altered, on the one hand, and the standard guaranteed by the Spanish Constitutional Court on the right to a fair trial and protection of human dignity would, at the very least,

[10] Council of Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States < http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex% 3A32002F0584> accessed 20 July 2018.
[11] The Framework Decision on procedures of European arrest warrant and transfer of persons determines the grounds for non-compliance with the European arrest warrant, which can arbitrarily be divided into three groups: Absolute Grounds, Optional Grounds and Special Occasions.
[12] *Melloni case* (n 5) para 18.
[13] ibid para 19.
[14] ibid para 20.
[15] ibid.
[16] ibid para 22.

become limited (more probably, violated), on the other. Therefore, the Spanish Constitutional Court, within the preliminary ruling procedures, applied to the European Court of Justice with a question: *in case of systematic interpretation of the articles 47 (right to a fair trial), 48 (presumption of innocence and right to defense) and 53 (level of protection)*[17] *of the Charter of Fundamental Rights of the European Union, is a member state, receiving extradition request, entitled, having higher standard of fundamental rights protection guaranteed by its Constitution, to refuse execution of an European arrest warrant in a case, when the state requesting extradition does not possess mechanisms for reviewing a sentence passed in absentia of the person subject to extradition?*[18] The motivation of the question makes it clear, that the Spanish Constitutional Court wished to employ the constitutional standard on the basis of the article 53 of the Charter of Fundamental Rights of the European Union, as it was defending the basic processual rights on a higher level than the EU Law, specifically, the Framework Decision.[19]

3. THE RESPONSE OF THE EUROPEAN COURT OF JUSTICE

The European Court of Justice, as already stated, is the guarantor for the realization of the primacy, unity and effectiveness of the EU Law. Sometimes it attempts to achieve this goal at the expense of reducing the standards of fundamental rights. In this sense, this case is no exception. Regarding the Melloni case, the European Court of Justice stated unequivocally that such an interpretation of the article 53 of the Charter of Fundamental Rights, which would give a member state the possibility not to adhere to the EU Law completely in conformity with the Charter,[20] and to act according to its own Constitution, would undermine the principle of primacy of the EU Law.[21] Pursuant to the ECJ, it is a settled case-law that, by virtue of the principle of primacy of the EU Law, an essential feature of the EU legal order, the rules of national law including the constitutional order, cannot be allowed to un-

[17] According to article 53 of the Charter of Fundamental Rights of the European Union, "Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the [European] Union or all the Member States are party, including the [ECHR] and by the Member States' constitutions."

[18] The European Court of Justice was asked three questions in total, but the rest of the questions go beyond the scope of the present work.

[19] It is noteworthy that the Constitutional Court of the Federal Republic of Germany has developed the concept of constitutional identity in the case related to the European arrest warrant, which allows the Federal Constitutional Court of Germany the possibility to assess the compliance of the European arrest warrant, as well as other general acts of the Union, to the right to dignity recognized by the German basic law. The decision of the Constitutional Court of the Federal Republic of Germany is available on the website: <http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2015/12/rs20151215_2bvr273514en.html;jsessionid=8C76433FF1384ABF38F047A3F8583A4E.1_cid370> accessed 20 July 2018.

[20] The European Court of Justice found the execution of the European arrest warrant and handing the person subject to extradition over in accordance with the Charter of Fundamental Rights of the European Union, despite the fact, that, as has been mentioned, the person was not equipped with the mechanism for revision of the judgment of conviction passed *in absentia*. See *Melloni case* (n 5) para 53.

[21] ibid para 58.

dermine the effectiveness of the EU Law on the territory of that State.[22] Moreover, the Court underlined the importance of protecting the principles of mutual trust and recognition between member states and stated that the refusal to execute European arrest warrant, barring the exceptional cases provided in the Framework Decision, would undermine the principles of mutual trust and recognition.[23]

Following the Judgment of the European Court of Justice, the Spanish Constitutional Court rejected Melloni's appeal and, utilizing the mentioned Framework Decision, at the very least, limited the standard of the right to a fair trial and the right to protection of dignity established by the Spanish Constitution.

4. CONCLUSION

By the judgment of the European Court of Justice on the Melloni case, the perfection and substantial broadening of the doctrine of primacy of the EU Law over the laws of the member states was carried out. It has, for the first time in the history of Union, passed beyond supranational margins and spread through all dimensions of the EU law, including the justice field, namely, cooperation in criminal cases. This judgment established that the national courts should, on the one hand, interpret the internal acts, including constitutional ones, according to the EU Law and, on the other hand, they should not to take such constitutional decisions, that would undermine the primacy and effectivity of the EU Law. From the point of view of EU Law, it is also inadmissible to adopt the constitutional provisions that would potentially jeopardize the primacy of the EU Law. However, before the normative materialization of the principle of primacy of the EU Law in judiciary practice, legal literature will always dispute: whether the European Union's Law has primacy over the constitutions of the member states.

[22] *Melloni case* (n 5) para 59.
[23] ibid para 63.

CASE NOTES OF THE CONSTITUTIONAL COURT OF GEORGIA

ABSTRACT

The Constitutional Court of Georgia has rendered several significant cases in 2018, which have influenced the constitutional adjudication and established new approaches. Below are case notes of seven important judgments adopted by the Court within the first part of the year depicting the content and argumentation of the cases.

CITIZENS OF GEORGIA – GUCHA KVARATSKHELIA, GIVI TSINTSADZE, GIORGI TAVADZE, ELIZBAR JAVELIDZE AND OTHERS (17 APPELLANTS) V. THE PARLIAMENT OF GEORGIA

On February 22, 2018, the Second Chamber of the Constitutional Court of Georgia delivered the judgment "Citizens of Georgia – Gucha Kvaratskhelia, Givi Tsintsadze, Giorgi Tavadze, Elizbar Javelidze and others (17 appellants in total) v. the Parliament of Georgia" (Constitutional Claim N863), where the subject of the dispute was the constitutionality of article 5.4 of the law of Georgia on "Georgian National Academy of Sciences" with respect to article 14 of the Constitution of Georgia. According to the disputed norm, a person aged more than 70 years old could not have held an administrative position of the Academy, namely the office of the President and the Vice-President of the Academy.

The claimants indicated that the disputed provision had restricted psychologically and mentally healthy persons above 70 years with full legal capacity the right to hold administrative positions of the Academy based on age. According to the claimants, in spite of age difference, academicians both above and under 70 years, were substantially equal and the differential treatment between them had no objective justification. Therefore, the regulation was discriminatory and in violation of equality before the law enshrined in the Constitution of Georgia.

According to the Respondent, establishing age limits, in general, does not violate equality before the law. The legitimate aim for the restriction provided by the disputed norm was to promote the effectiveness and unhindered functioning of the activity of the Academy. Even a healthy person above 70 years might not be able to handle the features of administrative-governing activities and the necessary physical requirements for it.

At the same time, by the position of the Parliament, the administrative positions of the Academy could only be held by the persons holding the Academic status. The number of academics was limited by the legislature and in fact, the age of the majority of academics was above 70. Hence, it was likely for the Academy not to be able to elect the person on the respective position. For these arguments, the Respondent admitted the constitutional claim.

By the legislature applicable at the time admitting the complaint by the Respondent does not lead to termination of the case. Therefore, the Constitutional Court considered the constitutionality of the disputed provision in spite of admitting the claim.

The Constitutional Court considered that with respect to holding an administrative position of the Academy, academics under and above 70 years were substantially equal and the disputed norm had established differential treatment based on their age. The Court also held that the differentiation was not based on any ground indicated in article 14 of the Constitution of Georgia and the intensity of interference was not high. Therefore the Court used rational differentiation test for considering the constitutionality of the differentiation.

The Constitutional Court emphasized that in general, it might be allowed to impose different qualification requirements upon servants for the effective functioning of an establishment. But it is also important for the age restriction to be in logical and rational correlation with the intended aim. Although, diminishing certain skills is the subsequent result of getting older, is not sufficient to a priori justify every age restriction.

The Constitutional Court set the two-step test for assessing the rationality of age restriction. Namely, for the age restriction to be justified the lawmaker has to show that, due to the nature of the duties assigned, as a rule, a majority of people reaching certain age cannot handle to appropriately perform these duties. It is necessary to be reasoned that in the majority of cases, reaching the indicated age leads to the diminishment of the skills necessary for handling certain activities. At the same time, imposing a blank restriction will be irrational if the decision about the compatibility with the position can be evaluated based on the individual assessment of a person's skills.

The Constitutional Court assessed the duties and the responsibilities imposed on the positions indicated in the disputed norm and held that implementation of the aims of the Academy and the functions of academics as well, is not connected to any kind of special physical activity. It was also clear from the hearing on the merits, that holding administrative positions of the Academy did not require such energy that is impossible for academics to hold. Therefore, the Court ruled that there was no indication for people above 70 holding administrative positions of the Academy to not be able to fulfill their duties because of the age.

The Constitutional Court also outlined that there were only a few current academics whose age was under 70 and their number is decreasing as the time goes by. Therefore, it is possible that the group of persons who can be elected on the positions at hand will disappear in the future because of the disputed norm. Considering these merits, the disputed provision not only fails to reach the intended aim but in fact, at a certain stage it may cause difficulties and make it impossible for the academic positions of the Academy to be taken by academics.

Based on these merits, the Constitutional Court of Georgia granted the constitutional complaint and found unconstitutional article 5.4 of the law of Georgia on "Georgian National Academy of Sciences".

CITIZEN OF GEORGIA TAMAR TANDASHVILI V. THE GOVERNMENT OF GEORGIA

On May 11, 2018 the Second Board of the Constitutional Court of Georgia granted the constitutional complaint of the citizen of Georgia, Tamar Tandashvili, and declared unconstitutional a rule of the Decree of the Government of Georgia (№126 originally adopted on 24.04.2010), which aims at establishing a centralised registry for the socially vulnerable families, who would then be eligible for state-provided social assistance. The disputed provision excluded those persons from registration, who were in unlawful possession of the premises owned by the state without a permission of the owner

The complainant argued that those individuals who lived in the property owned by the state without permission and were entitled by law to the registration (before the disputed legal provision took effect on 1 June, 2013) as a socially vulnerable family, were effectively stripped of the possibility to receive state-provided social assistance. By contrast, such assistance was provided to those people, who unlawfully occupied the state-owned premises, yet managed to undergo registration before the contested law was introduced. Based on this argument, the complainant declared that it was subject to a differentiated treatment contrary to the constitutional right to equality (Article 14).

The complainant further noted that as a result of the disputed law, it had to make a difficult decision between their housing and the right to receive social assistance. Therefore, according to the complainant's position, the disputed law was also in contradiction with the right to dignity (Article 17.1) since it employed the people as the means of achieving the state's regulatory aim.

The respondent, the Government of Georgia, emphasized that the law in question pursued the important legitimate objective to ensure the protection of state property, and it provided for a proportionate measure in line with the constitutional requirement. To justify the differential treatment, respondent noted that cancelling the registration of already registered persons would cause difficult economic consequences for them.

The Constitutional Court sided with the complainant's arguments and indicated that for the purposes of the state-provided social assistance, those persons who lived in the state-owned property without permission, irrespective of the fact when they were entitled to obtain the status of a socially vulnerable family and undergo registration, were substantially equal. The constitutional court also pointed out that there was a differential treatment between comparable persons.

According to the court, in the instant case taking into consideration that one part of the comparable persons could not get social assistance at all, disputed provision interfered with the right at a high intensity, therefore differentiation should be assessed by the strict scrutiny test.

The constitutional court stated that differential treatment could be somehow reasonable if it was linked to the date of arbitrary possession of state property, but the disputed regulation differentiated comparable persons by the date of their registration in the social database.

Therefore the measure was not considered suitable to achieve the legitimate aim. Besides, rejecting claimant's demand for registration in database should be considered as painful as canceling the registration for those who were registered before. In conclusion the court stated that the disputed law unjustifiably restricted the rights of the complainant (and persons with a similar status). The Constitutional Court found the foregoing differentiation between the two equal groups of individuals unconstitutional, in violation of the constitutional right to equality.

The Constitutional Court further noted that the state does enjoy the legitimate interest to ensure the protection of their property from unlawful possession. Nevertheless, any measure employed in the course of attaining the mentioned objective has to be in line with the constitutional rights and freedoms. The Court indicated that in the present case, to ensure the protection of their property, the state effectively resorted to deprive the complainant (and persons with a similar status) of their right to receive social assistance. Hence, the economic hardship of individuals was, in fact, the very measure employed in the given case to achieve the legitimate objective of protecting the state property from unlawful possession. The court concluded that using humans as a mean for achieving the aim, violates the right to human dignity.

LEPL "EVANGELICAL-BAPTIST CHURCH OF GEORGIA" AND OTHERS V. THE PARLIAMENT OF GEORGIA

On July 3, 2018 the First Chamber of the Constitutional Court of Georgia made the rulings on the cases: "LEPL "Evangelical-Baptist Church of Georgia", NNLE "Word of Life Church of Georgia", LEPL "Church of Christ", LEPL "Pentecostal Church of Georgia", NNLE "Trans-Caucasus Union of the Seventh-Day Christian-Adventist Church", LEPL "Caucasus Apostolic Administration of Latin Rite Catholics", NNLE "Georgian Muslims Union" and LEPL "Holy Trinity Church" v. the Parliament of Georgia" (Constitutional Claim №671) and "LEPL "Evangelical-Baptist Church of Georgia", LEPL "Evangelical Lutheran Church of Georgia", LEPL "The Highest Administration of all Muslims in Georgia", LEPL "The Redeemed Christian Church of God in Georgia" and LEPL "Pentecostal Church of Georgia" v. the Parliament of Georgia" (Constitutional Claim №811).

Subject of the dispute of abovementioned cases was constitutionality of the wording of subparagraph "B" of section 2 of article 168 of the Tax Code of Georgia and the paragraph 1 of article 63 of the Law of Georgia "On State Property" with respect to article 14 of the Constitution of Georgia.1

Under the disputed provisions construction, restoration and painting of cathedrals and churches commissioned by the Patriarchate of Georgia, were exempted from VAT without the right of deduction, as well as the Apostolic Autocephalous Orthodox Church of Georgia was allowed free-of-charge transfer of the state-owned property.

According to the definition of the Claimant party, the disputed provisions were established above-mentioned privileges only for the Patriarchate of Georgia and for the Apostolic Autocephalous Orthodox Church of Georgia. Therefore, the claimants considered that disputed provisions violated equality before the law protected by article 14 of the Constitution of Georgia.

The respondent party emphasized that the Georgian Orthodox Church and the complainant religious organizations represent substantially equal groups, yet the differentiated treatment serves the legitimate purposes of protecting cultural heritage and recognizing the outstanding role of the Georgian Apostolic Autocephalous Orthodox Church in accordance with article 9 of the Constitution and the Constitutional Agreement of Georgia.

The Constitutional Court indicated that the main purpose of religious associations is to coordinate religious activities and create all necessary conditions for believers. Aforementioned purposes are equally important for the Patriarchate of Georgia as well as for religious organ-

[1]Full text of subject of the dispute:
On the Constitutional Complaint №671 – Constitutionality of the wording "under commission by the Patriarchate of Georgia" of subparagraph "B" of section 2 of article 168 of the Tax Code of Georgia with respect to article 14 of the Constitution of Georgia.
On the Constitutional Complaint №811 – Constitutionality of the wording "to the Georgian Apostolic Autocephalous Orthodox" of the paragraph 1 of article 6^3 of the Law of Georgia "On State Property" with respect to article 14 of the Constitution of Georgia.

izations, which represent claimant party. Therefore, comparable persons have an equal interest to gain the state-owned property without charge as well as to create necessary conditions for their religious institutions and services. Since using of tax privilege and the conveyance of the state-owned property without charge is granted only for the Patriarchate of Georgia the Constitutional Court shares the submissions of the parties and considers that disputed provisions establish differential treatment between substantially equal persons based on the ground of religion.

According to the Court's established practice, in order to assess the lawfulness of differentiation based upon the religious ground enlisted in article 14 of the Constitution the strict scrutiny test is applied. The Court firstly made an assessment of the disputed provisions in compliance with the legitimate aim of protecting cultural heritage. According to the statement of the Court the protection of cultural heritage represents a valid legitimate interest. In this context, due to preserving cultural heritage the state is entitled to establish minimum standards for monument protection and restoration. However, it is insignificant for the realization of this legitimate aim whoever from these religious organizations will be allowed to commission works (construction, restoration and painting of churches and cathedrals) so long as other technical requirements are met.

The Court emphasized that the contested regulation is directed not specifically to the VAT exemption of services related to the monuments of cultural heritage, but to the VAT exemption of services under commission by the Patriarchate of Georgia. Consequently, services connected with not only to the monuments of cultural heritage, but also other churches and cathedrals without such status may fall within the regulation of the disputed provision. At the same time such kind of services under commission by the other religious organizations (except the Patriarchate of Georgia) are not exempted from VAT. Based on the above mentioned arguments the Court concluded that there is no logical link between the legitimate aim of protecting cultural heritage and differentiated treatment established by the disputed norm and that achieving of this legitimate aim is possible without the differentiated treatment between comparable persons in this case.

The Constitutional Court also assessed whether the disputed provision was a mechanism for enforcing the requirements of article 9 of the Constitution of Georgia. Specifically, the Court assessed whether article 9 of the Constitution of Georgia requires granting privileges to the Apostolic Autocephalous Orthodox Church of Georgia and restriction of article 14 of the Constitution of Georgia in this manner.

According to paragraph 1 of article 9 of the Constitution, "The State shall declare absolute freedom of belief and religion. At the same time, the State shall recognise the outstanding role of the Apostolic Autocephalous Orthodox Church of Georgia in the history of Georgia and its independence from the State". The Court indicated that the purpose of recognizing the outstanding role of Orthodox Church in the history of Georgia is not to represent the predominance of Orthodox faith with respect to other religions. Considering constitutional provision in question as the basis of entitlement of any kind of privilege would remove the basis of the right to equality and would be incompatible with the requirements of the Consti-

tution of Georgia, including requirements derived from article 7 and paragraph 2 of article 9 of the Constitution.

The recognition of the outstanding role of the Apostolic Autocephalous Orthodox Church of Georgia is associated with its historical contribution, however, historical contribution cannot be considered as a self-sufficient source of legitimacy of any privilege. Consequently, it should be assessed from the view of the content of relations regulated by the disputed provisions whether abovementioned privileges derive from the historical role of the Orthodox Church.

The court indicated that the privileges granted to the Orthodox Church by disputed provisions are not derived from any historical circumstances. Specifically, neither granted tax privileges, nor allowance of free-of-charge transfer of state-owned property does not have direct, rational and inevitable correlation with the special role of Apostolic Autocephalous Orthodox Church of Georgia in the history of Georgia.

Having regard to its findings the Court established that disputed provisions are not in compliance with the requirements of the right to equality recognized by the Constitution of Georgia.

LTD "COCA-COLA BOTTLERS GEORGIA", LTD "CASTEL GEORGIA", JSC "HEALTHY WATER" V. THE PARLIAMENT OF GEORGIA AND THE MINISTER OF FINANCE OF GEORGIA

On 27 July 2018, the "Ltd Coca-Cola Bottlers Georgia", "Ltd Castel Georgia" „Inc Healthy Water" v. The Parliament of Georgia and the Minister of Finance of Georgia" (Constitutional complaint N700).

The applicants challenged constitutionality of article 1921 of the Tax Code of Georgia and paragraphs 781.1, 781.2, 781.4, 781.8 of the instructions "on Tax Administration" approved by the order N996 Minister of Finance of Georgia on 31 September 2010. According to the complaint designated provisions contradicts the requirements of the paragraphs 21.1 and 21.2 (right to property) and the first sentence of the paragraph 30.2 (right to free enterprise) of the Constitution of Georgia.

Article 1921 of the Tax Code established legislative grounds for mandatory marking of non-excisable goods and empowered the Minister of Finance of Georgia to compile a list of goods subject to mandatory marking and define the terms of the marking. Disputed provisions of the order of Minister of Finance declared non-alcoholic drinks, including mineral and still waters as goods subject to mandatory marking. In addition, the provisions regulated other issues related to marking procedure.

Applicants argued that, disputed norms obligated them to allow marking service provider company selected by the Revenue Service of Georgia in their bottling plants in order to install marking devices on applicant's bottling hardware. Complainants stated that marking devices were performing with multiple failures that was disrupting the industrial process and the generated electronic data did not reflect the actually produced goods with proper accuracy. Moreover, applicants indicated that their obligation to cover the marking expenses constituted an extreme financial burden on non-alcoholic drink industry. Applicants questioned compliance of the disputed provisions with the formal requirements of article 21 of the Constitution of Georgia as the Parliament of Georgia delegated unlimited power to regulate mandatory marking of non-excisable goods.

The respondent party disagreed with applicants opinions. Representatives of the Parliament of Georgia and Ministry of Finance of Georgia asserted that disputed provisions served as valuable legitimate aims of proper tax administration and protection of consumer's rights. The respondents argued that disputed provisions were in compliance with the formal and material requirements of the Constitution of Georgia.

Initially, the Constitutional Court differentiated between right to property and right to free enterprise. The financial burden accompanied to mandatory marking was considered in the context of the right to property whereas claims regarding disruption industrial process examined under the right to free enterprise.

The Constitutional Court indicated that article 21 of the Constitution does not require all property right related issues to be regulated exclusively by primary legislation. The court interpreted that the Parliament is entitled to delegate regulatory power to secondary legisla-

tion if it is not directly prohibited by the constitution and/or such delegation is resulted in denial of caring out its own exclusive powers. The Constitutional Court ascertained that issues related to mandatory marking are not subject to high importance. Therefore, the parliament's decision to transmit the regulatory power of mandatory marking procedure to the Minister of Finance does not contradict the formal requirements of the Constitution.

The Constitutional Court applied principle of proportionality to assess the constitutionality of the disputed provisions. The Court shared the respondent's opinion and recognized that the disputed norms serve as valuable legitimate aims of proper tax administration and protection of consumer's rights. According to the judgment, the legislator is entitled to interfere in the right to property while pursuing the designated legitimate aims if further requirements of proportionality are followed.

Firstly, the Constitutional Court considered the independent expert opinion attached to the constitutional complaint. Applicant used mentioned opinion, as an evidence to prove that the installed marking devices were functioning with failures and generated data was not beneficial for tax administration. The Court emphasized that according to the opinion, data generated by the devices was precise by 99.48%. Moreover, the court indicated that independent expert opinion does not answer the question whether the marking devices caused the error or not. The Constitutional Court pointed out that, problems of technical implementation could be resulted in unconstitutionality of the disputed normative requirements if the law is the basis for existing such technical problems and/or proper technical implementation of the solution required by the law is impossible. Due to absence of designated criteria, the Constitutional Court noted that mandatory marking stipulated by the disputed provision serves as a valuable tool for tax administration.

Complainants argued that the same legitimate goal could be achieved with the same effectiveness by other cost efficient solutions. As an alternative solution applicants designated constant video surveillance and data generated by their own bottling hardware. The Constitutional Court noted that, considering the dynamics of bottling process, video surveillance could not be reliable source for generating valuable data for tax administration. In addition, the Court emphasized that one essence of the disputed provisions was effective external control of non-alcoholic drink business industry and only the data generated by the company owned/controlled hardware is not beneficiary for the idea laid behind the mandatory marking. Moreover, the Constitutional Court underlined that marking procedure includes establishment of central electronic database where records regarding individualities of the products, companies and other data is automatically transferred upon marking. The database enables automatic reporting by reading the individual matrix on the bottle. The Court remarked that complainants could not prove that functioning of such advanced database is technically possible under their suggested alternatives in cost efficient way. Therefore, Constitutional Court ascertained that mandatory marking procedure is beneficiary/admissible and essential instrument for proper tax administration.

The Constitutional Court emphasized the financial burden on the companies stemming from the mandatory marking. The Court noted that, in general, government is entitled to oblige

taxpayers to exercise actions which are necessary for tax administration and protecting the consumers' rights. Following tax regulations is usually resulted in expenses of the taxpayers/companies and such financial burden is inevitably justified by the major legitimate interests of the state.

The Constitutional Court indicated that nominal value of marking is an expense for tax administration where marking process is not exercised by the taxpayer itself. The Court referred that overall expense of such financial burden is not enough to determine unconstitutionality of the disputed provisions. Applicants shall prove that financial burden has major negative impact on business and damage the respective industry itself to great extent. Complainants shall represent that the burden is not an ordinary unpleasant regulation for the business but an intensive measure that is incompatible with free market. The court ascertained that such evidences were not presented in the case.

In connection with right to free enterprise, the Constitutional Court examined arguments regarding the disruption industrial process. The Court underlined that when parties to the constitutional litigation indicate facts as grounds for unconstitutionality of normative regulation they are expected to represent reliable and relevant evidences to support their arguments. There was no evidence indicating that installed marking devices disrupted industrial process beyond the ordinary, expected level.

Therefore, the Constitutional Court considered the disputed provisions in compliance with the right to property and the right to free enterprise recognized by the Constitution of Georgia.

CITIZEN OF GEORGIA NANA PARCHUKASHVILI V. THE MINISTER OF JUSTICE OF GEORGIA SPECIAL PENITENTIARY SERVICE

On July 26, 2018 the Second Board of the Constitutional Court of Georgia rendered a judgement on the case №665/683 and partially upheld the constitutional complaint of citizen of Georgia, Nana Parchukashvili.

According to the disputed provision, in cases of strip searches, any accused or convicted person was obliged to fully or partially remove his/her clothing. The procedure was performed when leaving or entering a jail, solitary confinement and in other cases if a director or authorized officials decide to use that measure.

The complainant argued that undressing a person in front of a stranger, causes humiliation and abuse of human, thereby such kind of measure should be used only in extremely exceptional circumstances. The petitioner mentioned that forbidden things could be discovered by a scanner, so there was no necessity to use such a strict measure permanently. At the same time, the contested norm had blank character as persons arrested for minor offenses were also subjected to strip searches. The complainant also pointed out that director of penitentiary facility possessed too broad discretionary power and legislation was ineffective to prevent unnecessary and arbitrary searches. Therefore the disputed provision was in violation of articles 17.2 (prohibition of inhuman and degrading treatment and punishment), 16 (everyone's freedom to development their own personality) and 20.2 (right to respect for private life) of the Constitution of Georgia.

The respondent emphasised that that legitimate aim of the disputed provision was to preserve safety in prison, prevent commitment of criminal and unlawful acts, and protect life and health, also other's rights and liberties. The respondent noted that scanner could not be considered as alternative measure, as there are substances that can't be discovered by scanner.

The constitutional court stated that undressing a person for checking purposes does not a priori constitutes violation of article 17 of the Constitution of Georgia. But this measure should only be used in utterly exceptional conditions and in such a manner that will not cause inhuman and degrading treatment. The court emphasized that the disputed norms were suitable to achieve above mentioned legitimate aims and also the measure was necessary to achieve that aim. During the proceedings it was revealed that some forbidden substances (such as horsehair and paper), or inscriptions can't be discovered by a scanner.

The court declined the complainant's claim that persons arrested for minor offenses should not be subjected to strip searches and noted that danger of entering forbidden substances into jail, comes from any prisoner regardless of seriousness of crime he/she committed. Therefore requirement of strip searches in cases of solitary confinement or contacting outside world was constitutional.

The constitutional court noted that order №200 did not include clear guidelines for a director's discretionary power in context of using disputed measure; thereby there was high probability of arbitrary interference in constitutional rights. As a result, the disputed norm was

declared unconstitutional with respect to article 17.2 of the Constitution of Georgia. But taking into consideration that order №116 did contained such guarantees, it was not in violation of constitutional right to prohibition of inhuman and degrading treatment and punishment.

The court interpreted the formal requirement of article 20.2 of the Constitution of Georgia according to which any interference in the right to respect for private life would be justified if there is a court decision or urgent necessity provided for by law. The court stated that the purpose of the above mentioned formal requirement is to control discretionary power of executive government. In cases of specific legal relationships, where it's always necessary to interfere in right of private life, above mentioned formal requirement is not relevant anymore.

It was concluded that in penitentiary facilities there is a permanent necessity to interfere in the right of private life in the defined circumstances of instant case. Therefore there was no need to satisfy the formal requirement every time the disputed measure is used. At the same time, the fact that the formal requirement of article 20 of the Constitution of Georgia is not applicable in some specific relationships, does not mean that constitutionality of those provisions won't be assessed on merits.

CITIZENS OF GEORGIA – MARINE MIZANDARI, GIORGI CHITIDZE AND ANA JIKURIDZE V. THE PARLIAMENT OF GEORGIA

On July 27, 2018 the Second Board of the Constitutional court of Georgia partially upheld the constitutional complaint of citizens of Georgia and declared unconstitutional the regulation set out in article 30.8 of the "Law of Georgia on Cultural Heritage". The disputed provision excluded from governmental control cultural heritage objects owned that were under the ownership of religious organisations. In particular, the state organs had no authority to impose responsibility upon the religious confessions in case of their failure to take care of those cultural objects that were under their ownership (enjoyment), as well as state authorities could not take necessary measures to protect objects, without the consent of their owner.

The complainants argued that the state violated its positive obligation to protect cultural heritage, according to article 34.2 of the Constitution of Georgia. At the same time the disputed provision was in violation of right to equality (Article 14 of the Constitution of Georgia) as it exempts from duty of care requirements religious organizations but all the other owners of the cultural heritage objects are subject to legal responsibility in case they do not fulfill their obligations properly.

The respondent, the Parliament of Georgia, emphasized that the extension of the state's monument conservation regime to religious organizations would have seriously restricted their right to freely profess their belief, as owners of the cultural heritage objects that are used for religious purposes, would not be able to fully enjoy by using those objects for religious rituals. Therefore legitimate aim of the contested regulation was to ensure the free exercise of freedom of religion.

The Court noted that facilitating the realization of the freedom of religion represents a valid legitimate interest and as religious organizations are able to use cultural heritage objects for religious purposes without restrictions, the measure is suitable to achieve the aim.

Assessing the necessity of the measure to achieve the legitimate aim, the court indicated that the disputed provision excluded state control of cultural heritage objects in all circumstances without taking into account whether the necessary measures to protect cultural heritage interrupt the realization of religious rituals or not. At the same time the contested law applied to all kind of cultural heritage objects regardless of whether it's used for religious rituals or not. Consequently the provision was considered problematic due to its blank nature and it constituted an unnecessary measure in relation to the proclaimed legitimate objective. Therefore the constitutional court found the disputed norm to be in violation of article 34.2 of the Constitution of Georgia.

Additionally the court concluded that in order to promote realization of religious freedom, legislative branch may enact narrowly tailored regulation, but at the same time, above mentioned measure should be reasonable, considering the competing interests of different legitimate aims at hand.

Assessing the constitutionality of disputed regulation with respect to article 14 of the Constitution of Georgia (right to equality) the court emphasized that while establishing legal responsibility for an act, it should be taken into consideration whether the committed act is motivated by religious beliefs or not, in order to determine if comparable persons are substantially equal. In the instant case disputed regulation is not narrowly framed to religiously motivated acts, therefore comparable persons are substantially equal.

Because of the fact that ground for differentiation is not one of those indicated in article 14 of the constitution, also disputed provision does not interfere with the right at a high intensity, the court assessed differential treatment by the rational differentiation test. The constitutional court noted that the blank character of the disputed provision not only violates requirements of proportionality, but it's also unreasonable by its nature and does not satisfy the criteria of the rational differentiation test. Therefore the contested regulation was found unconstitutional with respect to article 14 of the Constitution of Georgia.

CITIZENS OF GEORGIA – ZURAB JAPARIDZE AND VAKHTANG MEGRELISHVILI V. THE PARLIAMENT OF GEORGIA

On 30 July 2018 the First Board of the Constitutional Court of Georgia rendered a judgment on the case "Citizens of Georgia – Zurab Japaridze and Vakhtang Megrelishvili v. the Parliament of Georgia" (constitutional complaint №1282).

The subject of the dispute was the constitutionality of normative content of the wording "or/and consumption without medical prescription" of section 1 of Article 45 of the Administrative Offences Code of Georgia which imposes punishment for consumption of narcotic substance – Marijuana indicated in 92th horizontal cell of the second appendix of the law of Georgia "On Narcotic Drugs, Psychotropic Substances And Precursors, and Narcological Assistance", with respect to Article 16 of the Constitution of Georgia.

The complainants argued that the consumption of Marijuana does not threaten public order and can only be detrimental to one's individual health. It was submitted that an individual should be allowed to consume Marijuana freely and bear the health risks on their own. Thus, applying sanction carry no valuable public interest.

The respondent, the Parliament of Georgia, contended that the disputed provision served the legitimate objective of protecting the well-being an individual and of the entire society, as well as ensuring the public order. It was further argued by the Parliament that the consumption of marijuana is detrimental to one's health and there is a need to ensure the public, particularly adolescents, are protected.

The Constitutional Court emphasized that the consumption of marijuana is protected by the right to free development of one's personality as guaranteed by the Article 16 of the Constitution of Georgia. When assessing the legitimate aim to protect social safety, the Constitutional Court noted that the Respondent party could not present persuasive information, trustworthy researches, which would demonstrate existence of inevitable correlation between consumption of Marijuana and increased number of violent crimes. The respondent party also opined that marijuana can act as a "gateway drug" leading to addiction to other, stronger narcotic substances. However, The Constitutional Court indicated that neither the Respondent nor experts examined at the hearing, presented trustworthy information, incontrovertible researches showing that there is correlation, or mostly, addiction to hard drugs is caused by Marijuana consumption and not other factors.

The Constitutional Court pointed out that restriction of consumption of marijuana serves the legitimate aim – protection of health. Assessing the legitimate aims to protect the health, the Court distinguished the dangers to health of a consumer of Marijuana and to health of society. Based on the information provided by experts, as well as other relevant materials presented on the hearing, the Court concluded that consumption of Marijuana carries potential threat to human health. At the same time mentioned danger (which marijuana might cause to its consumers) is lighter compared to the damage caused by consumption of other so-called hard drugs. With the level of damage caused to human health, consumption of Marijuana is also comparable to legally permitted substances (nicotine, alcohol).

The Constitutional Court noted that a ban on the consumption of Marijuana has an effect on illegal circulation of Marijuana and serves the legitimate goal of protecting the health of society. Nevertheless, the role of an individual consumer in the circulation of marijuana and threats emanating from an individual consumption are very minimal. The Court also emphasized that consumption of Marijuana does not involve risks of distribution, therefore causing the damage to health of others.

Therefore, the Constitutional Court found that mostly due to its blank character the disputed provision caused intense infringement upon the right to free development of personality, compared the minimum level of protection of health. The Court further noted that responsibility on consumption of Marijuana is in line with the Constitution, when under specific circumstances, an individual consumption of Marijuana poses threat to third persons, e.g. in educational facilities, public transport, in presence adolescents etc. The regulations may limit the age to consume and/or the place where it is allowed to make such consumption. Otherwise, the disputed provision prohibited Marihuana consumption in any situation. The Court did not find that the damages were of such gravity as to warrant an absolute ban on consumption.

Based on the above mentioned, since the disputed provision had a blank character the Constitutional Court of Georgia granted the constitutional complaint and the disputed provision declared unconstitutional.