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TABLE OF CONTENTS

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POSSIBILITIES OF CONSTITUTIONAL ADJUDICATION IN SOCIAL RIGHTS MATTERS*

ABSTRACT

Irrespective of the advantages or negative consequences of social rights, and unrelated to the textual recognition of such rights in a given constitution public opinion and a great number of scholars and politicians take such rights for granted. Most constitutional and supreme courts in welfare states have to operate (and in certain cases are willing to operate) as if these rights were part of constitutional reality. In this paper I take this point of departure as part of constitutional reality. This is, however, an open reality, i.e. even with strong textual recognition in more recent constitutions, it is to a great extent a matter of constitutional policy, a matter of judicial choice how these references will be used. The following remarks intend to review some of the applicable judicial strategies arguing that strong substantive recognition of such rights is justifiable only in very exceptional circumstances.

I. JUSTIFICATIONS OF SOCIAL RIGHTS

The list of social rights is long and uncertain. The medieval zoo of social rights is a collection of imagined and exotic animals and certain pets of people and (leftist) intellectuals. The chapters on social rights in national constitutions or in the International Covenant on Economic, Social

* This article was first prepared by Prof. Sajó in 2009 and was presented at a Conference held by the Constitutional Court of Georgia "Justiciability of Social Rights in Courts of Constitutional Jurisdiction and the European Court of Human Rights". Since the issues brought up in the paper are still relevant, it was edited and prepared for publication in the Journal of Constitutional Law with collaboration with the Author. The paper is representative of the reality at a time of its original drafting and does not reflect changes that took place after 2009. We hope the readers of the Journal find the views and the work interesting.

and Cultural Rights (CESCR) contain fundamentally different claims.[1] Some of these rights concern basic needs satisfaction (right to drinking water and sanitation, food and shelter); others are about some level of insurance against incapacities and handicaps that fundamentally affect one's livelihood (old age pension insurance, maternity leave). Some of the social rights express concerns about accidents of life: here rights are provided in order to counter the injustice of bad luck. Rights of the disabled and sickness related rights, even unemployment benefits belong to this category, since health care related rights might be provided as insurance against misfortune. Social rights also include special status rights like privileges granted to motherhood and childhood. Finally, certain social rights express concerns related to access to communal shared public goods, where universal access of all to the service benefits the whole community, irrespective of the personal advantage. Education is one such good (with free elementary and increasingly mid-level education constitutionally guaranteed). Though free access to publicly provided roads is not constitutionalized, it has the same characteristics, just like public sanitation or vaccination for epidemiological reasons. The indistinct handling of morally, politically and economically different claims is a major source of uncertainty in constitutional law and results in controversial human rights policies. It contributes to the uncertainties regarding the proper role of adjudication and constitutional adjudication of social rights.

Given the uncertainty and ambiguity of the constitutional text regarding social rights, constitutional courts have to find ways to interpret such provisions. Moral and consequentialist considerations are particularly important here. In areas of uncertainty a court cannot disregard the public sentiment of the day.

Since positive formulations concerning social rights are mostly ambiguous, sometimes even missing in the constitutions, moral considerations become important for constitutional law. Demonstrably shared social values may help to fill the vacuum in the text. However, such public intuitions and sentiments cannot be accepted without proper moral justification. In the interpretation of social rights constitutional courts should refer to the reconstruction of the moral foundations of these claims. The interpretive choice should be based on the inherent logical force of the theory, and its social acceptance, in light of the foreseeable consequences of such theories.

[1] There is a certain inconsistency even as to the catalogue "social rights" enshrined in constitutions. Although several Central and Eastern European constitutions enumerate a number of the ICESCR rights (e.g. right of everyone to social security, right to health, right to education), the inclusion of others e.g. the right to adequate housing is not that unambiguous. While the Constitution of Poland explicitly mentions in its Article 75 par. 1 that "Public authorities shall pursue policies conducive to satisfying the housing needs of citizens, in particular combating homelessness, promoting the development of low-income housing and supporting activities aimed at acquisition of a home by each citizen", no such allusion can be found e.g. in the Hungarian Constitution and this interpretation was reinforced by the Hungarian Constitutional Court (Decision 42/2000. (XI. 8.) AB hat.). Similarly, the right to adequate housing is also missing from the Czech Charter of Rights and Fundamental Freedoms of 1991.On the other hand, it is incorporated into Section 26 of the Constitution of South Africa, which uses even stronger terms to create an obligation of the state to take `reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right` and also prohibits arbitrary eviction. Meanwhile, the Ugandan Constitution also includes e.g. special provisions on the rights of persons with disabilities.

For example, strict egalitarianism might be attractive to a majority because of envy but given the economic consequences of such understanding and the morally dubious nature of envy, courts should disregard it. Constitutional system is created exactly to exclude suicidal dictates of certain emotions. Additional constitutional considerations, related to the function of courts, may militate against such inclusion (see below).

There are a number of different moral and political considerations behind the social rights claims. After all, the constitutionalization of social rights presupposes that no morally legitimate political society can ignore such claims; though rights might be included for less stringent reasons and the presence of socioeconomic rights in a constitutional text is not in itself an evidence of their moral necessity. In the following pages I will sketch some of the relevant moral considerations that might point towards social rights to show that the normative foundations of these rights are multifaceted and contradictory, with specific consequences regarding the judicial enforcement of social rights.

It is often argued that social rights have a specific nature. They are not directly justiciable as claims of individual rights holders and the state's obligation is only a planned systematic effort to provide services depending on available state resources. This is corroborated textually in the CESCR[2] and in the constitutions following the example of the Irish Constitution which turns these rights into judicially non-enforceable state goals. But the textual arrangement is not decisive. The Indian example indicates how directive policies of the state and isolated provisions of the CESCR were turned into rights that serve to evaluate laws. The constitutional position on the nature of non-justiciable social rights is a consequence of the applicable moral concerns and of the role attributed to constitutional adjudication.

1. *Dignity.* A very common judicial justification refers to human dignity. Recognition of mutual equal dignity requires from all to grant at least minimum livelihood to all. This entails the satisfaction of basic needs through services provided by the state. There are fundamental differences as to concepts of dignity. In some versions of dignity, it is satisfied by equal respect without material services. The political/democratic concept of dignity emphasizes that since the constitu-

[2] Article 2 par.1. of the CESCR states the following: "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures." The obligations incumbent upon State Parties were further elucidated in the relevant general comment issued by the Committee on Economic, Social and Cultural Rights, and maintained that these obligations "include both what may be termed […] obligations of conduct and obligations of result." Nevertheless the Committee also reiterated that "while the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes various obligations which are of immediate effect") e.g. "the undertaking to guarantee that relevant rights will be exercised without discrimination". General Comment on The nature of States parties obligations (Art. 2, par.1) : 4/12/90. CESCR General comment 3. par.1.

tional system is a democracy and equal participation in the democracy is a precondition, one should receive all the basic support that is needed for his or her meaningful political participation in a democracy. Some dignitarian claims operate under the assumption that the satisfaction of the basic needs is an absolute obligation of the state or even of the international community. But the actual formulations present in constitutions are less demanding.

2. *Equality.* Other justifications reflect equality concerns. Very often equality is satisfied as long as discrimination in the enjoyment of social rights is not tolerated. Sometimes equality is only an auxiliary consideration - but with extremely far reaching consequences as it serves to extend statutory welfare services. Such extensions, or better, the underlying equality concerns often prohibit the favorable targeting of the needy. Whatever services the state provides, especially if it concerns the provision of welfare, it should be provided to all, and perhaps on equal grounds. Additionally, transfer burdens have to be extended too (on grounds of equality, but also for the practical reasons of increased expenditure triggered by the extension of beneficiaries).[3] Once intergenerational equality is taken literally, the pension and health care systems of the welfare state will explode.

3. *Contractarian concerns.* Contractarian theories of constitutional government argue that the state is created not only to protect the life, liberty, property of participants through transfer of individual power to the state (the transfer of individual power is at the center of social compacts). The welfare state might be understood as an insurance system against hardship. Here people hypothetically "agree"—in the sense of a social compact, i.e. by constitutional *fiat* – to transfer self-protection regarding their old age income, other aspects of social security or health care through a system of social insurance that provides a level of service to a great extent irrespective of the actual contribution of the person and the actual occurrence of the event. The personal contribution might be totally irrelevant, as in the case of services and opportunities provided to the disabled. Here the insurance element is clearly based on an *ex ante* consideration. The contractarian theory is applicable also to situations of disaster relief: here at least some of the occurrences cannot be "insured" – society as an insurance association provides first aid. The contractarian theory of insurance reflects an agreement accepted behind the veil of ignorance: there is a statistical chance that some people will be born disabled or will become disabled. In view of such probabilities reasonable people would agree to protect themselves through cooperation. The service provided as a right reflects the average readiness of individuals in a society to insure themselves against such situations. One could argue that similar considerations apply in regard to the provision of minimum livelihood to those who deserve it or to those who are victims of bad luck, e.g. losing their job. Contrary to the dignity based approach, moral hazard considerations apply here: the person shall be responsible for his or her own choices and if she is not seeking a workplace etc., he or she is not entitled; otherwise the system would encourage people to rely on welfare institutions instead of trying to find work.

[3] See for BVerfG, 1 BvR 2014/95 vom 3.4.2001, Absatz-Nr. (1 - 93) (*Pflegeversicherung*).

While social insurance-based welfare might be provided strictly on grounds of contribution and on actuarial grounds, the constitutionalization of such systems as social rights departs from the strict insurance philosophy as it imposes disproportionate burdens on some people while the service provided is only partially related to the contribution. Since the different principles and justifications are mixed in the existing constitutional systems there is little consistency in human rights protection across the borders and even within a single jurisdiction. For example, in most jurisdictions the relevance of personal contribution is considered to be of high importance in social security pensions. At the same time, it is argued that in health care egalitarianism shall prevail, given the equality of life and health of all. In more aggressive formulations of this principle even a contribution brought on the market would violate the equal right to health claim.

4. *Compassion.* Additional considerations emerge from dictates of human compassion. Compassion driven considerations apply at least to those areas of needs satisfaction where suffering is identifiable. Obviously, this is a narrower concern than the one that emerges under the hardship or dignity arguments. Such compassion might be considered historically constitutionalized in the following sense. Historically, charity used to be a social class based or local community based expression of compassion. Compassion based institutions like church related welfare services and local charitable services were nationalized. It follows that the state shall continue to provide these compassion services.

5. *Communitarianism.* Communitarian considerations of social welfare emphasize that pertinence to a national community creates a community of fate, which becomes the source of obligations of solidarity, irrespective of personal contribution.

6. *Restorative justice.* A special case of social rights might be that of restorative justice. Where social injustice results from past governmental or social discrimination there might be compelling reasons to provide services that promote social rights. The grounds for providing such services are not related to preexisting, substantive social rights but to social injustice that happens to violate livelihood interests. Such considerations were voiced e.g. in the context of the mentally disabled in the US where members of this group were considered to be victims of systematic, past injustice originating in social prejudice. The Supreme Court never considered this to be a ground for constitutionally mandated legislative benefits, and not even the discrimination against the mentally disabled falls under stricter scrutiny. But the radical legislative empowerment was certainly constitutional and non-arbitrary in view of past injustice.

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Whichever background consideration is relied upon in the judicial construction of social rights, the accepted concept must respect two constitutional considerations. Contemporary constitutional governments cannot exist without the free market, and therefore they ought to presuppose

a market economy.[4] Secondly, the modern constitutional system operates under the assumption of equality of persons in the sense of *nonsubordination* of one person to another. As Kantians would say, no one should serve as a means to another person.[5]

Equality of persons is tricky. From a free market perspective it means equality of preference: in principle, one should accept that the preference to have shoes for 500 dollars is equal to the preference dictated by the need to have a 5 cent piece of bread. This implies that one shall not be deprived of the chance of buying expensive shoes even if 10.000 people could be nourished from that amount of money. Benthamites and socialist do not accept this logic. Utilities of the same amount differ; a dollar for the hungry is worth more than a dollar for the millionaire interested in buying an extra cask of expensive wine.

The market principle implies that policies enabling self-reliance are to be promoted instead of redistribution.[6] This is certainly in line with one interpretation of dignity, namely dignity as autonomy and self-determination. The market consideration does not prescribe market rationality. John F. Kennedy famously said that a rising tide lifts all boats. A selective lifting of boats through social transfers founders many others, as the water level recedes (this does not exclude the temporary use of life-saving poles.) Institutions in charge of protecting the constitution as a rational enterprise should defend such rationality and perhaps even the institutions that promise market rationality. It is legitimate to assume that people would prefer an absolute improvement of their lot, which is quintessential for the satisfaction of basic (biological) human needs. Overtaxation in order to provide transfer for egalitarian or dignitarian welfare will diminish total welfare, at least understood in quantitative terms of aggregate wealth, measured, among others,

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[4] Justice Holmes famously claimed that there is no economic theory endorsed by the American constitution. However, to the extent the living constitution has to reflect generally shared beliefs of the nation the US is constitutionally a market system. Many post-1945 constitutions expressly state that the economic system of the country is a social market economy. Needless to say, social rights claims are often used as a platform to propose radical restrictions to the free market. See e.g. Menendez, A.J., *New Foundations for Social Rights. A deliberative democratic approach*, ARENA Working Papers, WP 02/32.

[5] Dworkin has argued that it is morally justified to create a system of insurance against bad luck in a community where egalitarianism (or other assumptions like feudalism, nationalism) ties people's fortune together. Redistribution is legitimate to counter, at least to some extent, bad luck, which is not attributable to one's choices. Government coercively operates to maintain the "insurance community". In this reasoning one does not need to rely on social rights, though social rights might be seen as indicators of special concerns about bad luck. See Dworkin, R. *Sovereign Virtue: The Theory and Practice of Equality*, Harvard University Press, 2000; Markovits, D., *How Much Redistribution Should be There?* 112 Yale Law Journal 8, at 2291 (2003). Relying on Rawls, Michelman promotes a non-insurance centered but still contractarian argument in favor of social rights: "How can we reasonably call on everyone, as reasonable but also as rational, to submit their fates to a democratic-majoritarian lawmaking system, without also committing our society, from the start, to run itself in ways designed to constitute and sustain every person as a competent and respected contributor to political exchange and contestation and furthermore to social and economic life at large? If we cannot do so, then no 'constitutional agreement' is a 'sufficient' one if it lacks all trace or token of such a commitment. It thus seems that social rights guarantee of some kind would have to appear in a legitimate liberal-democratic constitution." Michelman, F.I., *The Constitution, Social Rights, and liberal Political Justification*, 1 INTLJCL 13, at 25 (2003).

[6] See e.g. Epstein, R. A., *Against redre*ss, Daedalus, 2002, at 39-48.

in GNP and similar indicators.[7] May be people think and vote differently. It is quite possible that for many people it is relative deprivation that matters, at least above the level of basic needs satisfaction. Such people may prefer smaller slices of the cake (or dry bread) as long as their neighbor is as deprived as they are. A non-communist constitution is, by definition, a device against such preferences, as private property protection seems to indicate. True, in view of the acceptance of many instances of regulatory taking and social obligations of property this is not a very robust protection, but it is still a protection. Justice Holmes would intimate that courts don't have the power to protect the market economy, but this does not mean that they have a mandate to disregard the consequences of the rights-based choices.

The nonsubordination principle highlights more practical concerns. The principle indicates that only those arrangements are constitutionally acceptable that one would reasonably accept as a desirable social benefit for himself or herself in view of the equal burdens triggered by the benefit. Deciding behind the veil of ignorance would you accept a 5 per cent income tax to receive a subsistence pension if the likelihood of becoming invalid is *x* per cent? Certain social insurance models operating within the contractarian theory rely on such calculus. The requirement of nonsubordination is satisfied if the benefit is reasonable on the basis of actuarial tables and in view of median expenditure for such occurrences.

Let's assume that the free health care system is expected to provide the highest level of care. In such a system we just don't know how much the person benefiting of it would be ready and able to pay for the actual service, hence such a system easily violates the nonsubordination principle. In case of extreme poverty for which the person is not responsible (this is the case with children) one could argue that the money transferred to them has much more utility. In the insurance logic it is reasonable to assume under the veil of ignorance that we all might be born as needy children and cannot do anything about it. Here one should reasonably pay an insurance premium in order to have a better minimal care as a needy child. A more aggressive welfare rights protection emerges in the context of education. Extended participation in education provides benefits to all members of the society. Therefore you do not have to bother about nonsubordination, at least not at the level of primary and secondary education.

II. JUDICIAL POSSIBILITIES

What is the proper role of constitutional courts facing these multifaceted social rights? Irrespective of the applicable specific language of the constitution the real issue concerns the proper role of constitutional courts and the judiciary in social rights related matters. Judicial decisions may

[7] A strict Benthamite would depart from this position claiming that individual happiness is to be aggregated. However, most Benthamites will accept that on the long run – where aggregation should take place – a non-market based administrative distribution will diminish happiness as there will be less to distribute.

result in policy setting and may have direct budgetary impacts. The budget deficit may increase in direct consequence of them. Contrary to the argument that traditional rights are costly too and therefore the distinctions between positive and negative obligations of the state are meaningless, only social rights have direct fiscal effect. Only a welfare right enhances decision that sustains spending or creates additional spending by ordering the provision of a government service or a welfare payment results in an abrupt change, or prevents a necessary saving, by imposing a duty of immediate rewriting of specific expenditure lines in the budget.

As to the justiciability of social rights constitutional and prudential arguments were formulated indicating that the judicial enforcement of such rights through courts and even by constitutional courts is not appropriate. The Irish Supreme Court offers an authoritative summary of the constitutional concerns:

"The extent to which, and the manner in which, the revenue and borrowing powers of the State are exercised and the purposes for which the funds are spent are the perennial subject of political debate and controversy, but the paramount role of those two organs of state, the Government and the Dáil, in this area is beyond question. For the courts to review decisions in this area by the Government or Dáil Eireann would be for them to assume a role which is exclusively entrusted to those organs of state, and one which the courts are conspicuously ill-equipped to undertake."[8]

Courts are not accountable for social policies and for the economic consequences of such policies. Policy and budget are matters of democratic accountability while constitutional court judges and the judiciary in general are placed beyond democratic accountability. Judges have no expertise regarding welfare policies and budget; the very nature of the judicial process precludes the judicial formation of reasonable social policy; courts cannot provide adequate remedies. These objections do not preclude, however, the taking into consideration in the determination of other matters interests that are classified as social rights, for example in a balancing procedure. These "nonworrisome ways almost certainly can play a useful role in the promotion of the distributive aims of social rights guarantees. … [however] Two possible grounds for hesitation remain, even for those who are persuaded morally of reasons to go ahead and fear no resulting evil of judicial overreaching. These are, first, a *democratic objection* […] to the effect that adding social rights to the constitution constricts democracy unduly, regardless of judicial involvement in the enforcement of such rights; and, second, a *contractarian objection* to the effect that adding social rights to the constitution defeats a crucial function of the constitution-as-law, that of providing legitimacy to the coercive political and legal orders."[9] Social rights preclude

[8] McKenna v An Taoiseach (No.2) [1995] 2 IR 10
[9] Michelman, op. cit., see *supra* note 5 (2003).

the democratic process. For some authors like Fabre this is not a problem, as rights are important values that are institutionalized exactly to curtail democracy.[10]

Given that the above legitimacy concerns remain contested and prevailing social expectations cannot be completely disregarded by courts,[11] even if the constitutional judge is honestly concerned with the constitution, one cannot rely on existing approaches applicable to fundamental rights. This restriction results from the very nature of social rights. Social rights refer primarily to collective benefits and to status related handling and they inevitably rely on positive government action, in opposition to civil and political rights which presuppose and enhance individual choice. At the same time, a disregard of the social rights claims as constitutional and social facts would be a dangerous mistake. There is a field of indeterminacy in the constitution and a sizeable field when it comes to social rights.

While the individual rights approach is not appropriate, there are a number of legitimate strategies in the constitutional handling of social rights. The following remarks concern some of the constitutionally permissible strategies and the constitutional consequences of the most commonly used strategies. The remarks are more descriptive than normative, although the consequences that emerge in light of the description are important in shaping normative considerations.

Constitutional strategies make sense in the specific context of the given case. The activism or deferentialism of social rights decisions depends, at least partly, of the procedure. An abstract review of a legislation that curtails existing entitlements has far reaching budgetary consequences, while a finding of constitutional omission in the name of a social right might have even more dramatic consequences, if it implies more than the obligation of specific planning and monitoring. On the other hand, the consequences of a decision emerging from an actual case might be more isolated, even if a positive duty of the state is recognized, as the impact might be fact specific and will be limited to local actions (e. g. the obligation to create a specific school to promote rights).

Social rights related strategies are more contextual than political and civil rights enforcement strategies. Torture is only slightly culture dependent, to the extent that humiliation or pain are culture specific, but there is nothing in the economic conditions that would make torture more or less “necessary”, and hence acceptable.

The need for social rights is very much dependent upon the actual economic conditions. Consequently social rights have fundamentally different implications in conditions of mass poverty or in a country where unemployment is below 30 per cent. For this reasons, the proper function of constitutional courts in social rights adjudication is to be understood in view of the specific

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[10] Fabre, C., *Social rights under the Constitution. Government and the decent life*, Oxford University Press, 2000, at 86 ff.

[11] Constitutions as living documents are built with at least a small window to look at the current values of society.

socio-economic situation. Abrupt poverty in extremely poor countries is different from the problem of the poor homeless in rich countries and hence the legitimate strategy in constitutional adjudication might be different too. It should be added that the actual possibilities of the courts are limited too, given the actual scarcities. The underlying justification of social rights might be equally important in strategy formulation. It matters to what extent one understands social rights as pertaining to all, instead of considering these rights the dictates of compassion responding to the actual suffering of the petitioners. "Social rights as constitutional insurance against hardship" is a different ballgame again.

In rich countries and even in post-communist transition countries welfare rights are administered as middle class entitlements. Constitutional courts do not have a moral duty to push for such policies, for example, by claiming that there is a constitutional obligation to provide existing services as entitlements. There is no constitutional obligation to sustain the ratchet effect of irrational services.[12] Of course, rule of law and property protection considerations are legitimate in decisions concerning welfare service provision. Such considerations might be quite expensive. But, at least for a lawyer the additional cost of the rule of law is not a decisive issue – if the rule of law is too expensive it is the very service that has to be discontinued.[13]

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The social rights related decisions of courts emerge from a wide range of very different judicial processes. There can be no valid generalization concerning the role and possibilities of constitutional adjudication without considering what really is at stake. Here are some of the recurrent situations:

1. The protection of *minimum livelihood* (either on clear textual grounds as in South Korea[14] or on the basis of general principles of the social state, as in Germany). In the cases I know, Constitutional Courts do not create such a right; in fact, the issue is always about the *extent* of min-

[12] The ratchet considerations reflect important legal concerns, including non-retroactivity in regard to civil rights protection where economic changes in society should not play a crucial role. The Supreme Court of the Nation (Argentina) stated that family allowances can be regulated but never withdrawn. (19 August 1999. V.916. XXXII. 22/96). But there is no *Rücktrittsverbot* embedded in the German social welfare state concept.

[13] Two examples: the Latvian Constitutional Court in its judgment of the in 2005 on the Compliance of the Provision Incorporated in Section 7 of the Law on State Social Allowances found unconstitutional a scheme that granted childcare benefit only if the parent was not working, which restricted the parent's right to occupational development (*Kristīne Dupate, Aija Freimane un Aivita Putniņa*. 4 November, 2005, case no. 2005–09–01). The Supreme Court of the Nation (Argentina) provided that cash compensation awarded to workers for certain occupational disabilities be made in a single lump sum and not in monthly installments. (*Milone, Juan Antonio v/ Asociart S. A. Aseguradora de Riesgos de Trabajo s/ accidente*, 22 October 2004, M. 3724. XXXVIII). Importantly, the consideration was one of lack of individual concern. This due process concern is recognized (at considerable expense as Justice Black, dissenting, indicated) in the US too: *Goldberg v. Kelly* 397 U.S. 254 (1970).

[14] 9-1 KCCR 543, 94 HunMa 33, 29 May 1997.

imum livelihood which is already recognized and operational at the level of statutes. The constitutional court's contribution is one of bringing consistency into the system that influences minimum livelihood. For example, a tax law should reflect the otherwise existing statutory livelihood concept and the constitutional court shall consider how the different statutory burdens affect minimum livelihood.

Minimum livelihood is often determined on the basis of some kind of dignitarian approach. As the Italian Constitutional Court "has stressed on several occasions, protection of the right to health is subject to the constraints faced by lawmakers in redistributing the revenue at their disposal. However, the demands of public finance cannot become so great that they destroy the hard core of this right, which is protected by the Constitution as an inviolable part of human dignity. There can be no question that the right of poorer citizens - or 'the indigent', to employ the term used in Article 32 of the Constitution - to free health care comes under this heading."[15]

2. Social rights can be understood as intensive *liberty* protection. The protection of needs satisfaction as liberty is granted at the level of fundamental rights. This situation is the closest to individual rights claims. Here we can talk about a negative right, and of a corresponding government duty of non-interference. "At the very minimum, socioeconomic rights can be negatively protected from improper invasion."[16] Such understanding makes sense even in the context of basic needs, given the insensitivity and perverse interests of governments in such matters, which are detrimental to basic needs satisfaction. Consider e.g. the right to drinking water: corrupt or irresponsive governments are often ready to boldly embark upon projects that would jeopardize access to drinking water for many people. In that regard, social rights operate as enhanced liberties.

Such negative stance is no small treat. The only politically embarrassing decision of the South African Constitutional Court so far emerged in the *TAC*[17] case, where the Court decided to strike down a restrictive government policy 1) to make nevirapine available in the public health sector, and 2) to set out a timetable for the roll-out of a national program for the prevention of mother-to-child transmission of HIV. Here the primary function of social rights was to eliminate a government created obstacle to health care. The test applied is not one of compelling state interest. Furthermore, it is not likely that social rights as liberties would prevail in a balancing test, as it would be generally the case with a fundamental civil right.

The elevation of livelihood related liberties to the rank of social rights can be justified not only on grounds of their importance for everyday subsistence but also in more juridical-conceptual terms, in relation to their diffuse nature. The interests behind social rights claims are often un-

[15] 309/1999, 16 July 1999 *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), 21 July 1999, para. 29.
[16] *Ex parte Chairperson of the Constitutional Assembly: In re certification of the Constitution of the Republic of S. Afr.*, 1996 (4) SALR 744, 801 (CC), para. 78.
[17] *Minister of Health v. Treatment Action Campaign* (TAC) 2002 5 SA 721 (CC)

certain and depend on collective services; they cannot be individually provided and the nature and level of claim satisfaction does not depend on the beneficiary's choices. It is this non-specific, non individual nature of the social right that makes it very problematic to construe it as an individual claim triggering specific public services. This complication constitutes one of the major difficulties for justiciability. For the collectively provided service the legislative determination is decisive.

3. *Impact on other rights.* Of course, social rights, once recognized, may play a significant role in judicial decision making. This role consists in generating important considerations in the *determination of the proper scope of other rights* or government functions. It is for such reasons that most courts are quite easy going when it comes to radical restriction of property rights in the name of social policies, favoring those who are considered vulnerable and hence entitled to special protection of social rights. This attitude is present in American decisions, although without elevating the concern to the level of a fundamental right. The recognition of social rights considerations explains the deferentialism of the ECHR or the German Constitutional Court in matters of rights restrictive social policies. But such deferentialism cannot be taken for granted. In fact, it remains contested, especially where there was no actual positive legislation to determine and protect the social rights claim. The Czech Constitutional Court ruled:

"The long-term inactivity of the Parliament of the Czech Republic, consisting of failure to pass a special legal regulation defining cases in which a landlord is entitled to unilaterally increase rent, is unconstitutional. [It violates the right to property]. In matters of rent control it is not permissible to shift the social burden of one group of people (tenants) to another group (landlords), and […] it is also not permissible to create various categories of landlords, depending on whether the rent in apartments owned by a group is subject to rent control or not."[18]

The Czech Court is aware of the transfer effects of social rights based decisions and indicates the needs for a balancing that considers the interests of those who should carry the burden of social rights largesse.

4. *The impact of equality concerns.* Equality concerns and social rights often overlap. The consequences are quite similar as equality concerns often force the extension of existing social welfare services. This is illustrated in a number of Italian decisions, including the famous di Bella treatment cases.[19] Here the Italian Constitutional Court ordered the public health insurance

[18] "*Rent Control*" Pl. US 20/05, 28 February 2006. Available at: http://test.concourt.cz/angl_verze/doc/p-20-05.html. The Czech court does not deny the right of legislation to set rent control but refuses freezing of rents by legislative omission. This means that there is no directly enforceable constitutional right to controlled rent even where this right was earlier recognized.

[19] 185/1998, 29 May 1998; 253/2003, 18 July 2003. The equality and dignity considerations brought the Italian Constitutional Court to conclude that by allowing the prescription of the drug without its inclusion in the public insurance scheme violated the rights of the poor who have an expectation: the enjoyment of the right cannot depend on the financial means of the person. The state had to make additional transfers to the Health Fund to cover the

administration to extend the insurance coverage to accommodate desires of cancer patients, because the experimental drug was available to a small number of patients participating in a clinical trial. The di Bella treatment case illustrates some of the dangers of an activist enforcement of aggressive social rights claims to receive free services. The constitutionally mandated scheme undermined the reliability of the cancer drug experiments, which at the end of the day did not result in the hoped for miracle cure.

A fundamentally different understanding of equality is offered in the South African dialysis case.[20] Here equal access to treatment was denied in the name of efficient service provision based on professional considerations. The disparity in access to treatment was understood as not amounting to impermissible discrimination but was perceived as a matter of medical (professional) rationality. The health care provider's denial of dialysis to a terminally ill diabetic person was upheld since the reasonable choice of the provider was dictated by the scarcity of available resources.

5. *Welfare ratchet.* The activities of the Hungarian Constitutional Court are praised by the friends of the court and in public opinion polls for the Court`s intervention to protect social rights by forcing governments to rewrite social policies and even changing the budget. In 1995 the Hungarian Court found that sick pay and pension are property like interests which cannot be simply curtailed at short notice where the beneficiaries had no time to consider alternatives.[21] It should be added that, given the way pensions were administered in communism social security services, they were not based on contributions. Furthermore, other welfare payments, like child support to all, irrespective of needs, were held to be protected in a rule of law state, because the relevant statute has created legitimate expectations, which cannot be revoked at 6-month notice. The 1995 Hungarian decisions limited the efficiency of the austerity package that was dictated by the fiscal crisis. The decisions were celebrated by American scholars as showing that the Constitutional Court found the proper role for courts in social rights matters.[22] This role would be the supervision of the means chosen in the social reform. The gentle pressure exercised by the court allegedly did not cause any serious economic hardship, and the economy did recover.

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expenses of the useless but expensive free drug to the poor and the claim to health is a "perfect subjective right', i.e. individual claims are enforceable. See Cassazione SS. UU. Civili, 24 June 2005, nº 13548 (*Giuseppe Buffone*). See further, Cassazione SS. UU. Civili, 23 May 2000, nº 209.

[20] *Soobramoney v. Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC), para. 29, was decided under the right to have access to health care services in section 27(1)(a) and (2) of the 1996 Constitution, the Court reviewed the allocation of resources in a provincial health budget and at hospital level for "rationality" and "good faith".

[21] Decision 56/1995 (IX. 15) AB hat. on sick pay, see also on other social security benefits: Decision 43/1995 (VI. 30.) AB hat. See also, Sajó, A., *Social Rights as Middle - Class Entitlements in Hungary: The Role of the Constitutional Court*, in Courts and Social Transformation in New Democracies An Institutional Voice for the Poor? Ed. by Gargarella, R., Domingo, P., Roux, T., Ashgate, 2006.

[22] See e.g., Schwartz, H., *The Struggle for Constitutional Justice in Post-Communist Europe*, University of Chicago Press, 2000; Scheppele, K. L., *A Realpolitik Defense of Social Rights*, 82 Tex. L. Rev. 7 at 1949 (2004); Scheppele, K. L., *Guardians of the Constitution: Constitutional Court Presidents and the Struggle for the Rule of Law in Post-Soviet Europe*, 6 University of Pennsylvania L. Rev. 154, at 1782 (2006)

In a way the court was authoritatively voicing the claims of the people and the needy in particular. "The decisions forced the Hungarian government to take the needy into account and to ensure that welfare reforms did not treat people as mere objects of state policy who lacked important claims of their own."[23]

True, the impacts were limited as the social reform represented only a small per cent of the total savings. But even this difference required a four point increase in the upper levels of personal revenue tax, which shows how problematic such judicial decisions might be from the nonsubordination perspective. However, lasting impacts are more interesting since the Court contributed to the freezing of the welfarist public mentality inherited from communism. This mentality became the fertile intellectual valley of populism. Welfare services continued to be provided as entitlements, irrespective of contribution and transfer consequences. A new generation has been educated in the belief that education from kindergarten to higher education has to be provided to all at no cost and without considerations of personal need. Needless to say, this meant that inherited privileges (e.g. early retirement for certain categories of employees) and institutional mismanagement were also protected. Government after government used a rethoric of entitlements and argued that these entitlements cannot be diminished because there is a "subjective right", i.e. a kind of birthright to such social rights. In fact, in the populist mood referring to equality and fairness consideration the services were extended. Nationalism (the communitarian concern) contributed to all this. People of Hungarian nationality, irrespective of citizenship and residence and hence contributions were entitled to certain welfare services. Contrary to the rosy picture of social rights preachers' expectation the economy could not continue under the pressure of entrenched rights.

In ten years the costs of welfare imposed such transfer burdens that by 2006 the economy lost its competitiveness. By 2009 Hungary is the only new member state of the EU that has a growth rate below the average EU growth rate.[24] By the time the government tried to impose a second austerity project, with elements of revision of the welfare system, it was too late.

By reinforcing the welfarist mentality, the Constitutional Court contributed to the denial of individual responsibility. When the 2006 reform package introduced a system of co-payment in higher education, this was met with public discontent, though the fee can be used only by the universities for educational purposes. Like in many other countries with similar reforms students (including those enrolled in semi-private education, which had to pay it already) are understandably against the change. But interestingly, even the majority of the non-concerned are against the measure as it violates something taken for granted and therefore is part of an entrenched right. As expected, the constitutional and political endorsement of the "subjective social rights"

[23] Scheppele, op. cit., see *supra* note 22.
[24] While economic growth in Poland was around 6-7% and that of Slovakia reached 8.3%; the economic growth of Hungary ranged around 3.9%. Data retrieved from the web-page of the World Bank: https://data.worldbank.org/

reinforced the endowment effect. What was once given became considered to pertain by right. The introduction of a one euro co-payment for medical visits triggered similar reactions. The Parliamentary Commissioner (Ombuds) for civil rights declared that the reduction of unused public hospital beds resulting in the closing of certain hospitals is unconstitutional as the current level of hospital services does not guarantee that the patients will receive "legally proper" treatment in the remaining hospitals because the medical services are not provided "in a foreseeable way".[25] The welfare activism of the Hungarian constitutional court reached a point where the underlying understanding of social entitlements did push for the revision of the very system of representative government, moving the country towards direct democracy. Following a referendum initiative of the opposition parties to bloc social reforms, the Hungarian Constitutional Court, in disregard of its earlier decisions, ruled that revocation of the various user (service) fees, which were introduced in public health care and in higher education, is a proper subject for referendum.[26] In conformity with the Hungarian Constitution the Court admitted that measures affecting the budget cannot be subjected to referendum, but the service fees were considered not to be "sufficiently closely" related to the budget. In its referendum decision the Court implicitly recognized that the democratic process may authorize free lunch to all in the name of social entitlements. In other words, even if constitutional social rights do not amount to specific individual claims enforceable in court, at least they are subject to a specific determination process, where individuals have direct deliberative power.

Of course, given that additional transfers cannot be required in a declining national economy, the "free" welfare services will continue to decline. Like in the past, in order to get free medical treatment, the patients will continue to bribe physicians.

The Hungarian approach is one where the court is basically concerned with ratchet effects. The decisions stand up for the defense of the existing welfare system that is understood as an endowment, irrespective of actual needs of the indigents and to a great extent irrespective of actual contributions. The Court continues to act as a defender of the middle class that continues to expect the protection of its welfare privileges. The dignity of the poor, or even their suffering, remains below the constitutional radar. As the Constitutional Court ruled the homeless have no right to shelter, only in case of life-threatening situation (that applies again to all, irrespective of means).[27]

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[25] Parliamentary Commissioner for Civil Rights statement on the shutdown of the National Institute of Psychiatry and Neurology, **OBH 2530/2007 (September 17, 2007).**

[26] See e.g. Decision 34/2007. (VI. 6.) AB hat., Decision 33/2007. (VI. 6.) AB hat. on the admissibility of referendum service fees introduced in public health care and Decision 15/2007. (III.9.) AB hat. on service fees in higher education. The service fee to be paid for medical visit is about one Euro, the measure allegedly reduced visit at least by 20-25 percent (though other factors may also have contributed to this reduction). Erdei, E., *Tudatosabbá tette a betegeket a vizitdíj*, Weborvos egészségügyi magazin, 15 August 2007. Available at: http://www.weborvos.hu/regionalis_hirek/tudatosabba_tette_betegeket/95742/.

[27] 42/2000. (XI.8.) AB. hat.

To my knowledge the most dramatic example of resistance to legislation in the name of social rights was offered by the Polish Constitutional Tribunal. In 1992 the Tribunal rejected the radical reform of the pension system that intended to flatten and reduce current and future benefits.[28] The tribunal's position was formally respected; even the Minister of Finance has resigned. But the solution accepted by the legislator after the ruling of the Tribunal did not really change the situation: the law now contained a provision that the difference between the current pension payment and what the Tribunal found to be legitimate is to be paid later. Inflation took care of the rest of the problem. Given that the deferred payment was nominal it became completely irrelevant for the budget as well as for the beneficiaries. The Tribunal may have asserted important principles about rule of law and its own powers but without actually influencing the public spending.

6. *Enforceable individual social rights.* We are short of reliable studies regarding the effects of judicially devised social rights-based policies. But the cases regarding pavement dwellers in India are indicative. Thousands of pavement dwellers live in big Indian cities and are a major nuisance. When Mumbai (Bombay) Municipal Corporation evicted pavement dwellers in 1981, the Supreme Court of India responded with a landmark judgment (*Olga Tellis*). The Court found that the Right to Life, recognized in the Indian Constitution included the Right to Livelihood. As livelihood of the poor depends directly on where they live, this was a verdict in favour of pavement dwellers.[29] The decision in the *Ahmedabad* case found that pavement dwellers cannot be removed from the streets unless they are provided some permanent shelter, even housing.[30] The ruling had a particularly perverse effect as organized gangs expelled the original dwellers from the judicially recognized area and replaced the original poor with their own people in the hope that these people will be the beneficiaries of the judicially ordered housing development. It is not clear whether the cities really built the housing or who actually benefited of it. But it is clear that such judicially dictated policy meant that the municipality had to readjust its welfare service priorities, something that might have resulted in serious inefficiency and even violation of other social rights. Because of reallocating money for housing there might be less left for education, etc. I am not sure about the positive consequences of judicial activism. Here is what happened:

"In the early 70s [Mumbai] passed Slum Clearance Act, while the Slum Upgradation Scheme was conceptualized in the 80s, which later became the Slum Redevelopment Scheme of the 90s.

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[28] 11 February 1992 (K. 14/91). The Tribunal based its decision on rule of law considerations; here the acquired rights were taken away by the reform, without suitable adjustment period. Would it have been legitimate for the Tribunal to rule instead that the reasonable expectation created by the pervious law was that pension benefits would not be reduced so long as the country did not face serious economic difficulties and fundamental socio-economic changes?

[29] Roy, D., *Urban poor increasingly made homeless in India's drive for more 'beautiful' cities*, *Combat Law*. Available at: http://www.citymayors.com/development/india_urban1.html. The most important case is *Olga Tellis v. Bombay Municipal Corporation & Ors,*Supreme Court of India [1985] 2 Supp SCR 51.

[30] *Ahmedabad Municipal Corporation v Nawab Khan Gulab Khan & Ors*, Supreme Court of India [1996] Supp. 7. S.C. R. 548.

But at the turn of the century the very same metropolis used massive force with helicopters and armed police, to evict 73,000 families from the periphery of the Sanjay Gandhi National Park. This action was in response to Court orders in another 'public interest' petition but filed this time by the Bombay Environmental Action Group (BEAG)."[31]

Notwithstanding the unexpected consequences[32] of *Olga Tellis* and some other similar decisions one can see here a legitimate judicial concern. First of all, *Olga Tellis* was about genuinely poor people, who could not do much about their misery given the existing social conditions. The original approach of the municipalities was to send back the pavement dwellers to their village of origin forcibly, a move that most likely made their conditions even worse. What the *Olga Tellis* decision required was to offer them the possibility of finding a (miserable) place for dwelling at the outskirts of the city, actually close to the industrial zone (Let's leave the health hazards aside).

We should keep in mind that the activist reaction advocated by the Indian Court, at least in *Olga Tellis*, refers to a specific situation. Contrary to the all-encompassing effects of a constitutional court decision, the impacts of such specific rulings are case bound and the impacts are incremental as similar measures require additional litigation. The proposed judicial remedy is one of ultimate despair and one that is based on considerations that do not exist in the context of the welfare reforms in Central or Western Europe. The desperateness is the reason given for the judicial intervention in *Olga Tellis* by Justice Chandarchud (para 49):

"There is no doubt that the petitioners are using pavements and other public properties for an unauthorised purpose. But, their intention or object in doing so is not to "commit an offence or intimidate, insult or annoy any person", which is the gist of the offence of 'Criminal trespass' under Section 441 of the Penal Code. They manage to find a habitat in places which are mostly filthy or marshy, out of sheet helplessness. It is not as if they have a free choice to exercise as to whether to commit an encroachment and if so, where. The encroachments committed by these persons are involuntary acts in the sense that those acts are compelled by inevitable circumstances and are not guided by choice."

Such concerns might be legitimate under, and limited to, compassion as one of the moral justifications of social rights claims. When the Russian Constitutional Court in its 1997 postonovlenie found that the reduction of unemployment money to one month violates constitutional rights of subsistence, this might have been justified under the above approach. Of course, the *individualization* is missing, i.e. there is no need to prove that the affected is actually suffering a basic deprivation once she is unemployed, but in 1997 it was reasonable to assume that the overwhelming majority of the dismissed laborers will face enormous hardship. The claim is stronger where there are actual, specific individuals, i.e. victims singled out by the rights restrictive

[31] Roy, op.-cit., see *supra* note 29.
[32] Unexpected consequences are another reason for deferentialism.

policy. Furthermore, it makes a difference if the court advocates temporary measures of limited impact which do not determine the structure of welfare, and are dictated by genuine compassion to genuine suffering, as these conditions guarantee that no *permanent* duty of public spending is generated.

7. *Setting policy priorities.* To avoid judicial budget (re)writing in the name of social rights is not easy. In the celebrated *Grootboom* case[33] the South African Constitutional Court had to decide an actual claim to housing presented on behalf of squatter families. More specifically, in the case of Ms Grootboom single mothers with children suffering in pouring rain without adequate shelter were asking for relief. The Court held that the state's failure to make proper provision for people in desperate need violated its obligations under section 26(1) and (2) of the 1996 Constitution to "take reasonable and other measures within its available resources" to provide access to adequate housing. What the Court did in this case was a reversal of priorities in existing housing policies, insisting that under a rationality analysis priority should be given in housing to mothers with children (while earlier the parents were left out where priority was given to children). This approach remains at the level of policy review on traditional judicial grounds and does not, in fact, require the state to change its budget or even allocations within chapters of the budget, or increase transfers. The decision may still be criticized as it recognized Ms Grootboom's claim although she put herself in illegal position and benefited of it by jumping the queue. But *Grootboom* is more important for what it does not say about social rights: in fact it refuses the claim of petitioners to recognize a substantive social right. Let me quote Theunis Roux, a South African scholar:

"Closer examination of the reasons for the decision, however, reveals a diplomatically worded and respectful message to the political branches, overwhelmingly endorsing their efforts, even as the Court finds fault with aspects of the national housing programme. The key discretionary gap exploited by the Court in *Grootboom* was the ambiguity surrounding the application of international law, in particular, General Comment 3 of 1990 issued by the UN Committee on Economic, Social and Cultural Rights. Paragraph 10 of this Comment interprets articles 2.1 and 11.1 of the International Covenant on Economic, Social and Cultural Rights as meaning that States Parties have to devote all the resources at their disposal first to satisfy the 'minimum core content' of the right to adequate housing. Counsel for the amici curiae in *Grootboom* had argued strongly that this was the governing norm, and therefore that the Court should order the state to 'redirect its spending so as to devote all available resources to meeting the needs of people in the position of the claimant community'".[34]

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[33] *Government of the Republic of South Africa and Others v Grootboom and Others*, 2001 (1) SA 46 (CC). For a famous praise of social rights in this context see Sunstein, C. R., *Social and Economic Rights? Lessons from South Africa*, 11 Constitutional Forum 123 (2001).

[34] Roux, T., *Legitimating Transformation: Political Resource Allocation in the South African Constitutional Court*. Available at: www.law.wits.ac.za/cals/lt/pdf/norway_paper.pdf. See also, *Grootboom*, see *supra* note 33, para 18.

The reasonableness review standard is not one of imposing spending but a mid level equality scrutiny. The government has to show that its welfare policy or social program that promotes constitutional rights and goals does not unreasonably exclude the segment of society to which the claimant group belongs. The concern is primarily that of social exclusion.

CONCLUSIONS

Irrespective of the meaning attributed to social rights, courts should keep in mind what is actually at stake in a social rights claim. Only where the democratic constitutional process fails to operate, that is where the poor or other social groups are permanently unable to protect their interests in the democratic process, is there a place for judicial intervention. Likewise, only where state policies contribute to absolute poverty and in particular to personal suffering that judicial activism might be appropriate in the name of social rights. This, however, can be achieved without reliance on substantive social rights theories: quite often the special suffering resulting from poverty is a problem of discrimination, and it could be treated on such grounds. No-fault poverty and other social suffering that are deemed to be social rights violations result from systematic governmental neglect, like in the Indian case where certain villages populated by minorities never had access to a built road. In other situations the presumption is that judges, in adjudicating social rights, should refrain from substituting their judgments for that of the legislative processes. They should merely "remind the government that it is under a duty to do x: [the judiciary] should not tell the government how to fulfil this duty […]."[35] In principle courts refrain from doing so, but in reality a judicial philosophy dictated by otherwise legitimate ratchet considerations results in status quo support, which amounts to choosing a specific policy (the one that exists).[36]

There are many violations of this prescription, and not only dictated by ultimate compassion with suffering, or in case where governments abuse their regulatory power to the detriment of important and specifically vulnerable liberties called social rights. Social rights activism is not only a problem of constitutional interpretation. Constitutional positions regarding socio-economic policies are not occupied in a vacuum. At least some constitutional courts are very politicized. Sometimes judicial rejection of restrictive social policies is about taking sides in polarized political conflicts.

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and Dougart, J. , Roux, T., *The Record of the South African Constitutional Court in Providing and Institutional Voice for the Poor:1995-2004* in Gargarella *et.al.*, op.cit., see *supra* note 21, at 114.

[35] Fabre, C., *Constitutionalising Social Rights*, 6 J. Polit. Phil. 263, at 279 (1998).

[36] "Yet public health and human rights have also, at times, been powerful tools for maintaining the status quo, reinforcing hierarchies of power and domination based on race, gender and class". Freedman L., *Reflections on Emerging Frameworks of Health and Human Rights*, 1 Health and Human Rights 4, at 315-348 (1995).

Power hungry or rights committed constitutional courts are able to shape their functions and support to populist causes. They gain popular support by providing goodies to large segments of society. Such popularity grants them additional authority and hence more power.

In view of the danger of politicization there is a very strong reason to avoid activist positions in social rights adjudication, except in case of dire need of the poor who cannot help themselves, and who are never the darling of majorities and oppositions.

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HOMELESSNESS AND THE ISSUE OF FREEDOM*

ABSTRACT

In this article the author explores the relationship between homelessness, the rules of public and private property, and the underlying freedom of those who are condemned by poverty to walk the streets and sleep in the open. The author focuses on the fundamental question of legal and moral philosophy: how should we think about homelessness, how should we conceive of it, in relation to a value like freedom? Some of the most fundamental and abstract principles of liberal value are at stake in any discussion of homelessness.

INTRODUCTION

There are many facets to the nightmare of homelessness. In this essay, I want to explore just one of them: the relation between homelessness, the rules of public and private property, and the underlying freedom of those who are condemned by poverty to walk the streets and sleep in the open. Unlike some recent discussions, my concern is not with the constitutionality of various restrictions on the homeless (though that, of course, is important).[1] I want to address a prior

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[1] See, e.g., Siebert, *Homeless People: Establishing Rights to Shelter*, 4 LAW & INEQUALITY 393 (1986) (no constitutional guarantee of adequate housing); Comment, *The Unconstitutionality of "Antihomeless" Laws: Ordinances Prohibiting Sleeping in Outdoor Public Areas as a Violation of the Right to Travel*, 77 CALIF. L. REV. 595 (1989) (authored by Ades) (arguing that laws that proscribe sleeping in outdoor public areas violate the right to travel).

question – a more fundamental question – of legal and moral philosophy: how should we think about homelessness, how should we conceive of it, in relation to a value like freedom?

The discussion that follows is, in some ways, an abstract one. This is intentional. The aim is to refute the view that, on abstract liberal principles, there is no reason to be troubled by the plight of the homeless, and that one has to come down to the more concrete principles of a communitarian ethic in order to find a focus for that concern. Against this view, I shall argue that homelessness is a matter of the utmost concern in relation to some of the most fundamental and abstract principles of liberal value. That an argument is abstract should not make us think of it as thin or watery. If homelessness raises questions even in regard to the most basic principles of liberty, it is an issue that ought to preoccupy liberal theorists every bit as much as more familiar worries about torture, the suppression of dissent, and other violations of human rights. That the partisans of liberty in our legal and philosophical culture have not always been willing to see this (or say it) should be taken as an indication of the consistency and good faith with which they espouse and proclaim their principles.

I. Location and Property

Some truisms to begin with. Everything that is done has to be done somewhere. No one is free to perform an action unless there is somewhere he is free to perform it. Since we are embodied beings, we always have a location. Moreover, though everyone has to be somewhere, a person cannot always choose any location he likes. Some locations are physically inaccessible. And, physical inaccessibility aside, there are some places one is simply not allowed to be.

One of the functions of property rules, particularly as far as land is concerned, is to provide a basis for determining who is allowed to be where. For the purposes of these rules, a country is divided up into spatially defined regions or, as we usually say, places. The rules of property give us a way of determining, in the case of each place, who is allowed to be in that place and who is not. For example, if a place is governed by a private property rule, then there is a way of identifying an individual whose determination is final on the question of who is and who is not allowed to be in that place. Sometimes that individual is the owner of the land in question, and sometimes (as in a landlord-tenant relationship) the owner gives another person the power to make that determination (indeed to make it, for the time being, even as against the owner). Either way, it is characteristic of a private ownership arrangement that some individual (or some other particular legal person) has this power to determine who is allowed to be on the property.

The actual rules of private property are, of course, much more complicated than this and they involve much besides this elementary power of decision.[2] However, to get the discussion going, it is enough to recognize that there is something like this individual power of decision in most systems of private ownership. Private ownership of land exists when an individual person may determine who is, and who is not, allowed to be in a certain place, without answering to anyone else for that decision. I say who is allowed to be in my house. He says who is to be allowed in his restaurant. And so on.

The concept of *being allowed* to be in a place is fairly straightforward. We can define it negatively. An individual who is in a place where he is not allowed to be may be removed, and he may be subject to civil or criminal sanctions for trespass or some other similar offense. No doubt people are sometimes physically removed from places where they *are* allowed to be. But if a person is in a place where he is not allowed to be, not only may he be physically removed, but there is a social rule to the effect that his removal may be facilitated and aided by the forces of the state. In short, the police may be called and he may be dragged away.

I said that one function of property rules is to indicate procedures for determining who is allowed and not allowed (in this sense) to be in a given place, and I gave the example of a private property rule. However, not all rules of property are like private property rules in this regard. We may use a familiar classification and say that, though many places in this country are governed by private property rules, some are governed by rules of collective property, which divide further into rules of state property and rules of common property (though neither the labels nor the exact details of this second distinction matter much for the points I am going to make).[3]

If a place is governed by a *collective* property rule, then there is no private person in the position of owner. Instead, the use of collective property is determined by people, usually officials, acting in the name of the whole community.

Common property may be regarded as a sub-class of collective property. A place is common property if part of the point of putting it under collective control is to allow anyone in the society to make use of it without having to secure the permission of anybody else. Not all collective property is like this: places like military firing ranges, nationalized factories, and government offices are off-limits to members of the general public unless they have special permission or a legitimate purpose for being there. They are held as collective property for purposes other than making them available for public use. However, examples of common property spring fairly readily to mind: they include streets, sidewalks, subways, city parks, national parks, and wilder-

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[2] The best discussion remains Honoré, Ownership, in OXFORD ESSAYS IN JURISPRUDENCE 107 (A.G. Guest ed. 1961); *see also* S. MUNZER, A THEORY OF PROPERTY 21-61 (1990); J. WALDRON, THE RIGHT TO PRIVATE PROPERTY 15-36 (1988).

[3] *See* J. WALDRON, *supra* note 2, at 40-42; Macpherson, *The Meaning of Property*, in PROPERTY: MAINSTREAM AND CRITICAL POSITIONS 1, 4-6 (C. Macpherson ed. 1978).

ness areas. These places are held in the name of the whole society in order to make them fairly accessible to everyone. As we shall see, they are by no means unregulated as to the nature or time of their use. Still, they are relatively open at most times to a fairly indeterminate range of uses by anyone. In the broadest terms, they are places where anyone may be.

Sometimes the state may insist that certain places owned by private individuals or corporations should be treated rather like common property if they fulfill the function of public places. For example, shopping malls in the United States are usually on privately owned land. However, because of the functions such places serve, the state imposes considerable restrictions on the owners' powers of exclusion (people may not be excluded from a shopping mall on racial grounds, for example) and on their power to limit the activities (such as political pamphleteering) that may take place there.[4] Though this is an important development, it does not alter the analysis I am developing in this Essay, and for simplicity I shall ignore it in what follows.

Property rules differ from society to society. Though we describe some societies (like the United States) as having systems of private property, and others (like the USSR – at least until recently) as having collectivist systems, clearly all societies have some places governed by private property rules, some places governed by state property rules, and some places governed by common property rules. Every society has private houses, military bases, and public parks. So if we want to categorize whole societies along these lines, we have to say it is a matter of balance and emphasis. For example, we say the USSR is (or used to be) a collectivist society and that the USA is not, not because there was no private property in the USSR, but because most industrial and agricultural land there was held collectively whereas most industrial and agricultural land in the United States is privately owned. The distinction is one of degree. Even as between two countries that pride themselves on having basically capitalist economies, for example, New Zealand and Britain, we may say that the former is "communist" to a greater extent (i.e. is more a system of common property) than the latter because more places (for example, all river banks) are held as common property in New Zealand than are held as common property in Britain. Of course, these propositions are as vague as they are useful. If we are measuring the "'extent" to which a country is collectivist, that measure is ambiguous as between the quantitative proportion of land that is governed by rules of collective property and some more qualitative assessment of the importance of the places that are governed in this way.[5]

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[4] In Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980), the United States Supreme Court held that the California courts may reasonably require the owners of a shopping mall to allow persons to exercise rights of free speech on their premises under the California Constitution, and that such a requirement does not constitute a taking for the purposes of the Fifth Amendment to the Constitution of the United States.

[5] For a 'more complete discussion, see J. WALDRON, *supra* note 2, at 42-46.

II. HOMELESSNESS

Estimates of the number of homeless people in the United States range from 250,000 to three million.[6] A person who is homeless is, obviously enough, a person who has no home. One way of describing the plight of a homeless individual might be to say that there is no place governed by a private property rule where he is allowed to be.

In fact, that is not quite correct. Any private proprietor may invite a homeless person into his house or onto his land, and if he does there *will* be some private place where the homeless person is allowed to be. A technically more accurate description of his plight is that there is no place governed by a private property rule where he is allowed to be whenever *he* chooses, no place governed by a private property rule from which he may not at any time be excluded as a result of someone else's say-so. As far as being on private property is concerned – in people's houses or gardens, on farms or in hotels, in offices or restaurants – the homeless person is utterly and at all times at the mercy of others. And we know enough about how this mercy is generally exercised to figure that the description in the previous paragraph is more or less accurate as a matter of fact, even if it is not strictly accurate as a matter of law.[7]

For the most part the homeless are excluded from *all* of the places governed by private property rules, whereas the rest of us are, in the same sense, excluded from *all but one* (or maybe all but a few) of those places. That is another way of saying that each of us has at least one place to be in a country composed of private places, whereas the homeless person has none.

Some libertarians fantasize about the possibility that *all* the land in a society might be held as private property ("Sell the streets!").[8] This would be catastrophic for the homeless. Since most private proprietors are already disposed to exclude him from their property, the homeless person might discover in such a libertarian paradise that there was literally *nowhere* he was allowed to be. Wherever he went he would be liable to penalties for trespass and he would be liable to eviction, to being thrown out by an owner or dragged away by the police. Moving from one place to another would involve nothing more liberating than moving from one trespass liability

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[6] Diluliu, *There but For Fortune*, NEW REPUBLIC, June 24, 1991, at 27, 28.

[7] But this ignores the fact that a large number of people with no home of their own are kept from having to wander the streets only by virtue of the fact that friends and relatives are willing to let them share their homes, couches, and floors. If this generosity were less forthcoming, the number of "street people" would be much greater. Still, this generosity is contingent and precarious: those who offer it are often under great strain themselves. So the situation affords precious little security: at the first family crisis, the friend or relative may have to move out.

[8] *See, e.g.*, M. ROTHBARD, FOR A NEW LIBERTY 201-02 (1973) [emphasis in original]:

> "The ultimate libertarian program may be summed up in one phrase: the *abolition* of the public sector, the conversion of all operations and services performed by the government into activities performed voluntarily by the private enterprise economy […] Abolition of the public sector means, of course, that all pieces of land, all land areas, including streets and roads, would be owned privately, by individuals, corporations, cooperatives, or any other voluntary groupings of individuals and capital […] What we need to do is to reorient our thinking to consider a world in which all land areas are privately owned."

to another. Since land is finite in any society, there is only a limited number of places where a person can (physically) be, and such a person would find that he was legally excluded from all of them (It would not be entirely mischievous to add that since, in order to exist, a person has to be *somewhere*, such a person would not be permitted to exist).

Our society saves the homeless from this catastrophe only by virtue of the fact that some of its territory is held as collective property and made available for common use. The homeless are allowed to *be* – provided they are on the streets, in the parks, or under the bridges. Some of them are allowed to crowd together into publicly provided "shelters" after dark (though these are dangerous places and there are not nearly enough shelters for all of them). But in the daytime and, for many of them, all through the night, wandering in public places is their only option. When all else is privately owned, the sidewalks are their salvation. They are allowed to *be* in our society only to the extent that our society is communist.

This is one of the reasons why most defenders of private property are uncomfortable with the libertarian proposal, and why that proposal remains sheer fantasy.[9] But there is a modified form of the libertarian catastrophe in prospect with which moderate and even liberal defenders of ownership seem much more comfortable. This is the increasing regulation of the streets, subways, parks, and other public places to restrict the activities that can be performed there. What is emerging – and it is not just a matter of fantasy – is a state of affairs in which a million or more citizens have no place to perform elementary human activities like urinating, washing, sleeping, cooking, eating, and standing around. Legislators voted for by people who own private places in which they can do all these things are increasingly deciding to make public places available only for activities other than these primal human tasks. The streets and subways, they say, are for commuting from home to office. They are not for sleeping; sleeping is something one does at home. The parks are for recreations like walking and informal ball-games, things for which one's own yard is a little too confined. Parks are not for cooking or urinating; again, these are things one does at home. Since the public and the private are complementary, the activities performed in public are to be the complement of those appropriately performed in private. This complementarity works fine for those who have the benefit of both sorts of places. However, it is disastrous for those who must live their whole lives on common land. If I am right about this,

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[9] Herbert Spencer was so disconcerted by the possibility that he thought it a good reason to prohibit the private ownership of land altogether.

> "For if *one* portion of the earth's surface may justly become the possession of an individual, and may be held by him for his sole use and benefit, as a thing to which he has an exclusive right, then *other* portions of the earth's surface may be so held; and eventually the *whole* of the earth's surface may be so held; and our planet may thus lapse altogether into private hands […] Supposing the entire habitable globe be so enclosed, it follows that if the landowners have a valid right to its surface, all who are not landowners, have no right at all to its surface. Hence, such can exist on the earth by sufferance only. They are all trespassers. Save by permission of the lords of the soil, they can have no room for the soles of their feet. Nay, should others think fit to deny them a resting-place, these landless men might equitably be expelled from the planet altogether."

A. REEVE, PROPERTY 85 (1986) (quoting H. SPENCER, SOCIAL STATICS 114-15 (1851)).

it is one of the most callous and tyrannical exercises of power in modem times by a (comparatively) rich and complacent majority against a minority of their less fortunate fellow human beings.

III. Locations, Actions and Freedom

The points made so far can be restated in terms of freedom. Someone who is allowed to be in a place is, in a fairly straightforward sense, free to be there. A person who is not allowed to be in a place is unfree to be there. However, the concept of freedom usually applies to actions rather than locations: one is free or unfree to do X or to do Y. What is the connection, then, between freedom to be somewhere and freedom to do something?

At the outset I recited the truism that anything a person does has to be done somewhere. To that extent, all actions involve a spatial component (just as many actions involve, in addition, a material component like the use of tools, implements, or raw materials). It should be fairly obvious that, if one is not free to be in a certain place, one is not free to do anything at that place. If I am not allowed to be in your garden (because you have forbidden me) then I am not allowed to eat my lunch, make a speech, or turn a somersault in your garden. Though I may be free to do these things somewhere else, I am not free to do them there. It follows, strikingly, that a person who is not free to be in any place is not free to do anything; such a person is comprehensively unfree. In the libertarian paradise we imagined in the previous section, this would be the plight of the homeless. They would be simply without freedom (or, more accurately, any freedom they had would depend utterly on the forbearance of those who owned the places that made up the territory of the society in question).

Fortunately, our society is not such a libertarian paradise. There are places where the homeless may be and, by virtue of that, there are actions they may perform; they are free to perform actions on the streets, in the parks, and under the bridges. Their freedom depends on common property in a way that ours does not. Once again, the homeless have freedom in our society only to the extent that our society is communist.

That conclusion may sound glib and provocative. But it is meant as a reflection on the cold and awful reality of the experience of men, women, and children who are homeless in America. For them the rules of private property are a series of fences that stand between them and somewhere to be, somewhere to act. The only hope they have so far as freedom is concerned lies in the streets, parks, and public shelters, and in the fact that those are collectivized resources made available openly to all.

It is sometimes said that freedom means little or nothing to a cold and hungry person. We should focus on the material predicament of the homeless, it is said, not on this abstract liberal concern about freedom. That may be an appropriate response to someone who is talking high-mindedly

and fatuously about securing freedom of speech or freedom of religion for people who lack the elementary necessities of human life.[10] But the contrast between liberty and the satisfaction of material needs must not be drawn too sharply, as though the latter had no relation at all to what one is free or unfree to do. I am focusing on freedoms that are intimately connected with food, shelter, clothing, and the satisfaction of basic needs. When a person is needy, he does not cease to be preoccupied with freedom; rather, his preoccupation tends to focus on freedom to perform certain actions in particular. The freedom that means most to a person who is cold and wet is the freedom that consists in staying under whatever shelter he has found. The freedom that means most to someone who is exhausted is the freedom not to be prodded with a nightstick as he tries to catch a few hours sleep on a subway bench.

There is a general point here about the rather passive image of the poor held by those who say we should concern ourselves with their needs, not their freedom.[11] People remain agents, with ideas and initiatives of their own, even when they are poor. Indeed, since they are on their own, in a situation of danger, without any place of safety, they must often be more resourceful, spend more time working out how to live, thinking things through much more carefully, taking much less for granted, than the comfortable autonomous agent that we imagine in a family with a house and a job in an office or university. And – when they are allowed to – the poor do find ways of using their initiative to rise to these challenges. They have to; if they do not, they die.

Even the most desperately needy are not always paralyzed by want. There are certain things they are physically capable of doing for themselves. Sometimes they find shelter by occupying an empty house or sleeping in a sheltered spot. They gather food from various places, they light a fire to cook it, and they sit down in a park to eat. They may urinate behind bushes and wash their clothes in a fountain. Their physical condition is certainly not comfortable, but they are *capable* of acting in ways that make things a little more bearable for themselves. Now one question we face as a society – a broad question of justice and social policy – is whether we are willing to tolerate an economic system in which large numbers of people are homeless. Since the answer is evidently, "Yes," the question that remains is whether we are willing to allow those who are in this predicament to act as free agents, looking after their own needs, in public places – the only space available to them. It is a deeply frightening fact about the modem United States that those who have homes and jobs are willing to answer "Yes" to the first question and "No" to the second.

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[10] For a useful discussion, see I. BERLIN, *Introduction*, in FOUR ESSAYS ON LIBERTY i, xlv-lv (1969).
[11] See also Waldron, *Welfare and the Images of Charity*, 36 PHIL. Q. 463 (1986).

A. Negative Freedom

Before going on, I want to say something about the conception of freedom I am using in this essay. Those who argue that the homeless (or the poor generally) have less freedom than the rest of us are often accused of appealing to a controversial, dangerous, and question-begging conception of "positive" freedom.[12] It is commonly thought that one has to step outside the traditional liberal idea of "negative" freedom in order to make these points.

However, there is no need to argue about that here. The definition of freedom with which I have been working so far is as "negative" as can be. There is nothing unfamiliar about it (except perhaps the consistency with which it is being deployed). I am saying that a person is free to be someplace just in case he is not legally liable to be physically removed from that place or penalized for being there. At the very least, negative freedom is freedom from obstructions such as someone else's forceful effort to prevent one from doing something.[13] In exactly this negative sense (absence of forcible interference), the homeless person is unfree to be in any place governed by a private property rule (unless the owner for some reason elects to give him his permission to be there). The familiar claim that, in the negative sense of "freedom," the poor are as free as the rest of us – and that you have to move to a positive definition in order to dispute that – is simply false.[14]

That private property limits freedom seems obvious.[15] If I own a piece of land, others have a duty not to use it (without my consent) and there is a battery of legal remedies which I can use to enforce this duty as I please. The right correlative to this duty is an essential incident of ownership, and any enforcement of the duty necessarily amounts to a deliberate interference with someone else's action. It is true that the connection between property and the restriction of liberty is in some ways a contingent one: as Andrew Reeve notes, "even if I am entitled to use my property to prevent you from taking some action, I will not necessarily do so."[16] But there is a similar contingency in any juridical restriction. A repressive state may have laws entitling officials to crush dissent. In theory, they might choose to refrain from doing so on certain occasions; but we would still describe the law as a restriction on freedom if dissidents had to take into account the likelihood of its being used against them. Indeed we often say that the unpredictable element of official discretion "chills" whatever freedom remains in the interstices of its en-

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[12] For the contrast between "positive" and "negative" conceptions of freedom, see I. BERLIN, *Two Concepts of Liberty*, in FOUR ESSAYS ON LIBERTY 118 (1969).

[13] The *locus classicus* of negative liberty, defined in this way, is T. HOBBES, LEVIATHAN 261-74 (C.B. Macpherson ed. 1968).

[14] The claim that the poor become, if not rich, then at least well-off. This line of argument is discussed in *infra* Part VI. For the moment, it does not affect the point that *being* poor amounts to being unfree, even if there are ways of extricating oneself from that predicament (An analogy may help here: a prisoner who has the opportunity to obtain parole and fails to take advantage of that opportunity still remains unfree inasmuch as he remains imprisoned).

[15] For a particularly clear statement, see Cohen, *Capitalism, Freedom and the Proletariat*, in THE IDEA OF FREEDOM 9, 11-14 (A. Ryan ed. 1979).

[16] A. REEVE, *supra* note 9, at 107.

forcement. Thus, in exactly the way in which we call repressive political laws restrictions on freedom, we can call property rights restrictions on freedom. We do not need any special definition of freedom over and above the negative one used by liberals in contexts that are more ideologically congenial.

The definitional objection is sometimes based on a distinction between freedom and ability.[17] The homeless, it is said, are in the relevant sense *free* to perform the same activities as the rest of us; but the sad fact is that they do not have the *means* or the *power* or the *ability* to exercise these freedoms. This claim is almost always false. With the exception of a few who are so weakened by their plight that they are incapable of anything, the homeless are not *unable* to enter the privately-owned places from which they are banned. They can climb walls, open doors, cross thresholds, break windows, and so on, to gain entry to the premises from which the laws of property exclude them. What stands in their way is simply what stands in the way of anyone who is negatively unfree: the likelihood that someone else will forcibly prevent their action. Of course, the rich do try to make it impossible as well as illegal for the homeless to enter their gardens: they build their walls as high as possible and top them with broken glass. But that this does not constitute mere inability as opposed to unfreedom is indicated by the fact that the homeless are not permitted even to *try* to overcome these physical obstacles. They may be dragged away and penalized for attempting to scale the walls.

A second line that is sometimes taken is this: one should regard the homeless as less free than the rest of us only if one believes that some human agency (other than their own) is responsible for their plight.[18] However, the idea of someone else's being responsible for the plight of the homeless is an ambiguous one. It may well be the case that people are homeless as a result of earlier deliberate and heartless actions by landlords, employers, or officials, or as a result of a deliberate capitalist strategy to create and sustain a vast reserve industrial army of the unemployed.[19] That *may* be the case. But even if it is not, even if their being homeless cannot be laid at anyone's door or attributed to anything over and above their own choices or the impersonal workings of the market, my point remains. Their homelessness *consists* in unfreedom. Though it may not be anyone's fault that there is no place they can go without being dragged away, still their being removed from the places they are not allowed to be is itself a derogation from their

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[17] This distinction is found in Hobbes's discussion: he defines liberty as the absence of "externall impediments," and adds that "when the impediment of motion, is in the constitution of the thing it selfe, we use not to say, it wants the Liberty; but the Power to move; as when a stone lyeth still, or a man is fastned to his bed by sicknesse." T. HOBBES, *supra* note 13, at 262. It is found also in Berlin's account: "If I say that I am unable to jump more than ten feet in the air, or cannot read because I am blind, or cannot understand the darker pages of Hegel, it would be eccentric to say that I am to that degree enslaved or coerced." I. BERLIN, *supra* note 12, at 122.

[18] *Cf.* I. BERLIN, *supra* note 12, at 123:

> "It is only because I believe that my inability to get a given thing is due to the fact that other human beings have made arrangements whereby I am, whereas others are not, prevented from having enough money with which to pay for it, that I think myself a victim of coercion or slavery. In other words, this use of the term depends on a particular social and economic theory about the causes of my poverty or weakness."

[19] *See* 1 K. MARX, CAPITAL 781-802 (B. Fowkes trans. 1976).

freedom, a derogation constituted by the deliberate human action of property-owners, security guards, and police officers. To repeat, their having nowhere to go *is* their being unfree (in a negative sense) to be anywhere; it is identical with the fact that others are authorized deliberately to drag them away from wherever they choose to be. We do not need any further account of the *cause* of this state of affairs to describe it as, in itself, a situation of unfreedom.

Thirdly, someone may object that a person is not made unfree if he is prevented from doing something wrong – something he has a duty not to do. Since entering others' property and abusing common property are wrong, it is not really a derogation from freedom to enforce a person's duties in these respects. Ironically, this "moralization" of the concept of freedom certainly *would* amount to a shift in the direction of a positive definition.[20] It was precisely the identification of freedom with virtue (and the inference that a restriction on vice was no restriction at all) that most troubled liberals about theories of positive liberty.[21]

In any case, the "moralization" of freedom is confusing and question-begging in the present context. It elides the notions of a restriction on freedom and an unjustified restriction on freedom, closing off certain questions that common sense regards as open. It seems to rest on a sense – elsewhere repudiated by many liberals – that all our moral and political concerns fit together in a tidy package, so that we need not ever worry about trade-offs between freedom (properly understood) and other values, such as property and justice.[22]

To say – as I have insisted we should say – that property rules limit freedom, is not to say they are *eo ipso* wrong.[23] It is simply to say that they engage a concern about liberty, and that anyone who values liberty should put himself on alert when questions of property are being discussed (The argument I have made about the homeless is a striking illustration of the importance of our not losing sight of that).

Above all, by building the morality of a given property system (rights, duties, and the current distribution) into the concept of freedom, the moralizing approach precludes the use of that concept as a basis for arguing about property. If when we use the words "free" and "unfree," we are already assuming that it is wrong for A to use something that belongs to B, we cannot appeal to "freedom" to explain why B's ownership of the resource is justified. We cannot even extol our

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[20] For the idea of a "moralized" definition of freedom, see Cohen, *supra* note 15, at 12-14.

[21] Cf. I. BERLIN, *supra* note 12, at 133:

> "Once I take this view, I am in a position to ignore the actual wishes of men or societies, to bully, oppress, torture them in the name, and on behalf, of their 'real' selves, in the secure knowledge that whatever is the true goal of man (happiness, performance of duty, wisdom, a just society, self-fulfilment) must be identical with his freedom […]"

[22] The whole burden of Isaiah Berlin's work has been that such tidy packaging is not to be expected.

[23] It is not even to deny that they may enlarge the amount of freedom overall. Isaiah Berlin put the point precisely: "Every law seems to me to curtail *some* liberty, although it may be a means to increasing another. Whether it increases the total sum of attainable liberty will of course depend on the particular situation." I. BERLIN, *supra*, note 10, at xlix n. 1 (emphasis in original).

property system as the basis of a "free" society, for such a boast would be nothing more than tautological. It is true that if we have independent grounds of justification for our private property system, then we can say that interfering with property rights is wrong without appealing to the idea of freedom. In that case, there is nothing question-begging about the claim that preventing someone from violating property rights does not count as a restriction on his freedom. But the price of this strategy is high. It not only transforms our conception of freedom into a moralized definition of positive liberty (so that the only freedom that is relevant is the freedom to do what is right), but it also excludes the concept of freedom altogether from the debate about the justification of property rights. Since most theorists of property do not want to deprive themselves of the concept of freedom as a resource in that argument, the insistence that the enforcement of property rules should not count as a restriction on freedom is, at the very least, a serious strategic mistake.

B. General Prohibitions and Particular Freedoms

I think the account I have given is faithful to the tradition of negative liberty. One is free to do something only if one is not liable to be forcibly prevented from or penalized for doing it. However, the way I have applied this account may seem a little disconcerting. The issue has to do with the level of generality at which actions are described.

The laws we have usually mention general *types* of actions, rather than particular actions done by particular people at specific times and places. Statutes do not say, "Jane Smith is not to assault Sarah Jones on Friday, November 24, on the corner of College Avenue and Bancroft." They say, "Assault is prohibited," or some equivalent, and it is understood that the prohibition applies to all such actions performed by anyone anywhere. A prohibition on a general type of action is understood to be a prohibition on all tokens of that type. Jurists say we ought to value this generality in our laws; it is part of what is involved in the complex ideal of "The Rule of Law." It makes the laws more predictable and more learnable. It makes them a better guide for the ordinary citizen who needs to have a rough and ready understanding (rather than a copious technical knowledge) of what he is and is not allowed to do as he goes about his business. A quick checklist of prohibited acts, formulated in general terms, serves that purpose admirably.[24] It also serves moral ideals of universalizability and rationality: a reason for restraining any particular act ought to be a reason for restraining any other act of the same type, unless there is a relevant difference between them (which can be formulated also in general terms).[25]

All that is important. However, there is another aspect of "The Rule of Law" ideal that can lead one into difficulties if it is combined with this insistence on generality. Legal systems of the kind we have pride themselves on the following feature: "Everything which is not explicitly

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[24] For the connection between generality, predictability, and the rule of law, see F. HAYEK, THE CONSTITUTION OF LIBERTY 148-61 (1960).
[25] *See* R. HARE, FREEDOM AND REASON 10-21 (1963).

prohibited is permitted." If the law does not formulate any prohibition on singing or jogging, for example, that is an indication to the citizen that singing and jogging are permitted, that he is free to perform them. To gauge the extent of his freedom, all he needs to know are the prohibitions imposed by the law. His freedom is simply the complement of that.[26]

The difficulty arises if it is inferred from this that a person's freedom is the complement of the *general* prohibitions that apply to him. For although it is possible to infer particular prohibitions from prohibitions formulated at a general level ("All murder is wrong" implies "This murder by me today is wrong"), it is not possible to infer particular permissions from the absence of any general prohibition. In our society, there is no general prohibition on cycling, but one cannot infer from this that any particular act of riding a bicycle is permitted. It depends (among other things) on whether the person involved has the right to use the particular bicycle he is proposing to ride.

This does not affect the basic point about complementarity. Our freedoms *are* the complement of the prohibitions that apply to us. The mistake arises from thinking that the only prohibitions that apply to us are general prohibitions. For, in addition to the general prohibitions laid down (say) in the criminal law, there are also the prohibitions on using particular objects and places that are generated by the laws of property. Until we know how these latter laws apply, we do not know whether we are free to perform a particular action.

It is *not* a telling response to this point to say that the effect of the laws of property can be stated in terms of a general principle – "No one is to use the property of another without his permission." They *can* be so stated; but in order to apply that principle, we need particular knowledge, not just general knowledge.[27] A person needs to know that *this* bicycle belongs to him, whereas *those* bicycles belong to other people. He needs that particular knowledge about specific objects as well as his general knowledge about the types of actions that are and are not permitted.

At any rate, the conclusions about freedom that I have reached depend on taking the prohibitions relating to particular objects generated by property laws as seriously as we take the more general prohibitions imposed by the criminal law. No doubt these different types of prohibition are imposed for different reasons. But if freedom means simply the absence of deliberate interference with one's actions, we will not be in a position to say how free a person is until we know everything about the universe of legal restraints that may be applied to him. After all, it is not

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[26] For example, Dicey puts forward the following as the first principle of "the rule of law": "no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land." A. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 188 (10th ed. 1959). Hobbes stated the same doctrine more succinctly: "As for other Lyberties, they depend on the silence of the Law. In cases where the Soveraign has prescribed no rule, there the Subject hath the liberty to do, or forbeare, according to his own discretion." T. HOBBES, *supra* note 13, at 271.

[27] For a discussion of how a lay person applies the rules of property, see B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 116-18 (1977).

freedom in the abstract that people value, but freedom to perform particular actions. If the absence of a general prohibition tells us nothing about anyone's concrete freedom, then we should be wary of using only the checklist of general prohibitions to tell us how free or unfree a person or a society really is.

These points can readily be applied to the homeless. There are no general prohibitions in our society on actions like sleeping or washing. However, we cannot infer from this that anyone may sleep or wash wherever he chooses. In order to work out whether a particular person is free to sleep or wash, we must also ask whether there are any prohibitions *of place* that apply to his performance of actions of this type. As a matter of fact, all of us face a formidable battery of such prohibitions. Most private places, for example, are off-limits to us for these (or any other) activities. Though I am a well-paid professor, there are only a couple of private places where I am allowed to sleep or wash (without having someone's specific permission): my home, my office, and whatever restaurant I am patronizing. Most homeless people do not have jobs and few of them are allowed inside restaurants ("Bathrooms for the use of customers only"). Above all, they have no homes. So there is literally no private place where they are free to sleep or wash.

For them, that is a desperately important fact about their freedom, one that must preoccupy much of every day. Unlike us, they have no private place where they can take it for granted that they will be allowed to sleep or wash. Since everyone needs to sleep and wash regularly, homeless people have to spend time searching for non-private places – like public restrooms (of which there are precious few in America, by the standards of most civilized countries) and shelters (available, if at all, only at night) – where these actions may be performed without fear of interference. If we regard freedom as simply the complement of the general prohibitions imposed by law, we are in danger of overlooking this fact about the freedom of the homeless. Most of us can afford to overlook it, because we have homes to go to. But without a home, a person's freedom is his freedom to act in public, in places governed by common property rules. That is the difference between our freedom and the freedom of the homeless.

C. Public Places

What then are we to say about public places? If there is anywhere the homeless are free to act, it is in the streets, the subways and the parks. These regions are governed by common property rules. Since these are the only places they are allowed to be, these are the only places they are free to act.

However, a person is not allowed to do just whatever he likes in a public place. There are at least three types of prohibition that one faces in a place governed by rules of common property.

(1) If there are any general prohibitions on types of action in a society, like the prohibition on murder or the prohibition on selling narcotics, then they apply to all tokens of those types performed anywhere, public or private. And these prohibitions apply to everyone: though it is only

the homeless who have no choice but to be in public places, the law forbids the rich as well as the poor from selling narcotics, and *a fortiori* from selling narcotics on the streets and in the parks.

(2) Typically, there are also prohibitions that are specific to public places and provide the basis of their commonality. Parks have curfews; streets and sidewalks have rules that govern the extent to which one person's use of these places may interfere with another's; there are rules about obstruction, jaywalking, and so on. Many of these rules can be characterized and justified as rules of fairness. If public places are to be available for everyone's use, then we must make sure that their use by some people does not preclude or obstruct their use by others.

(3) However, some of the rules that govern behavior in public places are more substantive than that: they concern particular forms of behavior that are not to be performed in public whether there is an issue of fairness involved or not. For example, many states and municipalities forbid the use of parks for making love. It is not that there is any general constraint on lovemaking as a type of action (though some states still have laws against fornication). Although sexual intercourse between a husband and wife is permitted and even encouraged by the law, it is usually forbidden in public places. The place for that sort of activity, we say, is the privacy of the home.

Other examples spring to mind. There is no law against urinating – it is a necessary and desirable human activity. However, there is a law against urinating in public, except in the specially designated premises of public restrooms. In general, it is an activity which, if we are free to do it, we are free to do it mainly at home or in some other private place (a bathroom in a restaurant) where we have an independent right to be. There is also no law against sleeping-again a necessary and desirable human activity. To maintain their physical and mental health, people need to sleep for a substantial period every day. However, states and municipalities are increasingly passing ordinances to prohibit sleeping in public places like streets and parks.[28] The decision of the Transit Authority in New York to enforce prohibitions on sleeping in the subways attracted national attention a year or two ago.[29]

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[28] Here are some examples. The City Code of Phoenix, Arizona provides: "It shall be unlawful for any person to use a public street, highway, alley, lane, parkway, [or] sidewalk [...] for lying [or] sleeping [...] except in the case of a physical emergency or the administration of medical assistance." A St. Petersburg, Florida ordinance similarly provides that: "No person shall sleep upon or in any street, park, wharf or other public place." I am indebted to Paul Ades for these examples. Comment, *supra* note 1, at 595 n.5, 596 n.7 (quoting PHOENIX, ARIZ., CITY CODE § 23-48.01 (1981); ST. PETERSBURG, FLA., ORDINANCE 25.57 (1973)).

[29] And New Yorkers have grown tired of confronting homeless people every day on the subway, at the train station and at the entrances to supermarkets and apartment buildings.

> "People are tired of stepping over bodies," the advocacy director for the Coalition for the Homeless, Keith Summa, said,
>
> Lynette Thompson, a Transit Authority official who oversees the outreach program for the homeless in the subway, said there had been a marked change this year in letters from riders.

Such ordinances have and are known and even intended to have a specific effect on the homeless which is different from the effect they have on the rest of us. We are all familiar with the dictum of Anatole France: "[L]a majestueuse égalité des lois [...] interdit au riche comme au pauvre de coucher sous les ponts […] ,"[30] We might adapt it to the present point, noting that the new rules in the subway will prohibit anyone from sleeping or lying down in the cars and stations, whether they are rich or poor, homeless or housed. They will be phrased with majestic impartiality, and indeed their drafters know that they would be struck down immediately by the courts if they were formulated specifically to target those who have no homes. Still everyone is perfectly well aware of the point of passing these ordinances, and any attempt to defend them on the basis of their generality is quite disingenuous. Their point is to make sleeping in the subways off limits to those who have nowhere else to sleep.[31]

Four facts are telling in this regard. First, it is well known among those who press for these laws that the subway is such an unpleasant place to sleep that almost no one would do it if they had anywhere else to go. Secondly, the pressure for these laws comes as a response to what is well known to be "the problem of homelessness." It is not as though people suddenly became concerned about *sleeping* in the subway as such (as though that were a particularly dangerous activity to perform there, like smoking or jumping onto a moving train). When people write to the Transit Authority and say, "Just get them out. I don't care. Just get them out any way you can," we all know who the word "them" refers to.[32] People do not want to be confronted with the sight of the homeless – it is uncomfortable for the well-off to be reminded of the human price that is paid for a social structure like theirs – and they are willing to deprive those people of their last opportunity to sleep in order to protect themselves from this discomfort. Thirdly, the legislation is called for and promoted by people who are secure in the knowledge that they themselves have some place where they are permitted to sleep. Because *they* have some place to sleep which is not the subway, they infer that the subway is not a place for sleeping. The subway is a place where those who have some other place to sleep may do things besides sleeping.

> "At the beginning of last year, the tenor of those letters was, 'Please do something to help the homeless,'" Ms. Thompson said. "But since August and September, they've been saying: 'Just get them out. I don't care. Just get them out any way you can.' It got worse and people got fed up."
> […]
> For the homeless, the new restrictions mean it is more difficult than ever to find a place to rest. Charles Lark, 29 years old, who said he had spent the last three years sleeping on subway trains and platforms, left New York on the day the subway-enforcement program began: "This is a cold-hearted city," he said. "I'm going to Washington. I hope it'll be better there."

Doors Closing as Mood on the Homeless Sours, N.Y. Times, Nov. 18, 1989, at 1, col. 2, 32, col. 1, col. 2.

[30] A. FRANCE, LE LYs ROUGE 117-18 (rev. ed. 1923) ("The law in its majestic equality forbids the rich as well as the poor to sleep under the bridges.").

[31] See M. DAVIS, CITY OF QUARTZ: EXCAVATING THE FUTURE IN Los ANGELES 232-36 (1990) for an excellent account of similar devices designed to render public spaces in downtown Los Angeles "off-limits" to the homeless as well as Davis's Afterward which follows this Essay. Davis, *A Logic Like Hell's: Being Homeless in Los Angeles*, 39 UCLA L. REV. 325 (1991).

[32] *See supra* note 29.

Finally, and most strikingly, those who push for these laws will try to amend them or reformulate them if they turn out to have an unwelcome impact on people who are not homeless. For example, a city ordinance in Clearwater, Florida, prohibiting sleeping in public, was struck down as too broad because it would have applied even to a person sleeping in his car.[33] Most people who have cars also have homes, and we would not want a statute aimed at the homeless to prevent car owners from sleeping in public.

Though we all know what the real object of these ordinances is, we may not have thought very hard about their cumulative effect. That effect is as follows.

For a person who has no home and has no expectation of being allowed into something like a private office building or a restaurant, prohibitions on things like sleeping that apply particularly to public places pose a special problem. For although there is no *general* prohibition on acts of these types, still they are effectively ruled out altogether for anyone who is homeless and who has no shelter to go to. The prohibition is comprehensive in effect because of the cumulation, in the case of the homeless, of a number of different bans, differently imposed. The rules of property prohibit the homeless person from doing any of these acts in private, since there is no private place that he has a right to be. And the rules governing public places prohibit him from doing any of these acts in public, since that is how we have decided to regulate the use of public places. So what is the result? Since private places and public places between them exhaust all the places that there are, there is nowhere that these actions may be performed by the homeless person. And since freedom to perform a concrete action requires freedom to perform it at some place, it follows that the homeless person does not have the freedom to perform them. If sleeping is prohibited in public places, then sleeping is comprehensively prohibited to the homeless. If urinating is prohibited in public places (and if there are no public lavatories) then the homeless are simply unfree to urinate. These are not altogether comfortable conclusions, and they are certainly not comfortable for those who have to live with them.

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[33] "Bracing for the annual influx of homeless people fleeing the Northern cold, the police here [in Miami, Florida] have proposed an emergency ordinance that would allow them to arrest some street people as a way of keeping them on the move.

> […]
> The new measure would replace a century-old law against sleeping in public that was abandoned after a similar statute in Clearwater, Fla., was struck down by Federal courts in January. The courts said the statute was too broad and would have applied even to a person sleeping in his car.
> The new proposal seeks to get around the court's objection by being more specific. But it would also be more far-reaching than the original law, applying to such activities as cooking and the building of temporary shelters.
> Terry Cunningham, a 23-year-old who lives on the steps of the Federal Courthouse, asked of the police, 'Where do they expect me to sleep?'
> City and county officials had no answer. 'That's a good question,' Sergeant Rivero of the Police Department said. 'No one is willing to address the problem.'"

Miami Police Want to Control Homeless by Arresting Them, N.Y. Times, Nov. 4, 1988, at AI, col. 1, A16, col. 4.

IV. INTENTION, RESPONSIBILITY AND BLAME

I said the predicament is cumulative. I argued that if an action X is prohibited (to everyone) in public places *and* if a person A has no access to a private place wherein to perform it, then action X is effectively prohibited to A *everywhere*, and so A is comprehensively unfree to do X.

> "However, people may balk at this point. They may argue: Surely prohibition is an intentional notion, and nobody is intending that A not be permitted to do X. We do intend that he should be prohibited from X-ing in public, but we don't intend that he should be prohibited from X-ing in private. That's just the way the distribution of property turns out. We don't intend as a society – and certainly the state does not intend – that there should be *no* place where A is permitted to do X. It just happens that way."[34]

We have already seen that this point about intention cannot be sustained at the level of individual acts. If a homeless tramp tries to urinate in a rich person's yard, the rich person may try to prevent that, and he is authorized to do so. There is no doubt about the intentionality of this particular restraint on this particular violation of property rules. However, the point of the present objection is that the rich person does not intend that there should be nowhere the tramp is allowed to urinate (indeed, he probably hopes that there is somewhere – provided it is not in his back yard). And similarly for each proprietor in turn. None of them intends that the tramp should never be allowed to urinate. That just happens, in an invisible hand sort of way, as a result of each proprietor saying, in effect, "Anywhere but here." Though each particular unfreedom involves an intentional restraint, their cumulation is not in itself the product of anyone's intention.

The objection can be conceded. We can tie judgments about freedom and unfreedom this closely to intentionality if we like. On that approach, all we can say about the homeless person's freedom is that he is unfree to urinate in place X and he is unfree to urinate in place Y and he is unfree to urinate in place Z *and* ... so on, for each place that there is. We refrain from the inference: "So he is unfree to urinate (anywhere)." However, even if we are scrupulous about not making that generalization, still there is *something* we can say at a general level about his predicament. We can say, for example, "There is no place where he is free to urinate." The logic of such a quantified sentence (i.e. "There is no place p such that he is free to urinate at p") does not commit us to any cumulation of unfreedoms, and it is an accurate statement of his position. Anyway, even if no one has intended that there be no place this person is free to urinate, it cannot be said that his predicament, so described, is a matter of no concern. It is hard to imagine

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[34] *Cf.* 2 F. HAYEK, LAW, LEGISLATION AND LIBERTY: THE MIRAGE OF SOCIAL JUSTICE 64 (1976):

> "It has of course to be admitted that the manner in which the benefits and burdens are apportioned by the market mechanism would in many instances have to be regarded as very unjust if it were the result of a deliberate allocation to particular people. But this is not the case. Those shares are the outcome of a process the effect of which on particular people was neither intended nor foreseen by anyone […]"

how anyone could think freedom important in relation to each particular restraint, but yet have no concern about the cumulative effect of such restraints. Moreover, even if our concern about the cumulation is not directly expressed in terms of freedom because freedom is taken to be an intentional notion, still it is at least in part freedom *related*. If we value freedom in each particular case because of the importance of choice and of not being constrained in the choices one makes, then that value ought to lead us to pay some attention to how many choices a person has left after each constraint has been exercised. From any point of view that values choice and freedom of action, it ought to be a matter of concern that the choices left open to a person are being progressively closed off, one by one, and that he is nearing a situation where there is literally nowhere, he can turn.

The fact that no one intended his overall predicament may mean that there is no one to *blame* for it. However, for one thing, each private proprietor will have a pretty good idea about how others may be expected to exercise their rights in this regard. It would be quite disingenuous for any of them to say, "I thought some of the other owners would let him use their property." Moral philosophers have developed interesting models of joint and collective responsibility for outcomes like these, and those models seem quite applicable here.[35] For another thing, those who impose a ban on these activities in public places certainly do know very well what the result of *that* will be: that the homeless will have almost nowhere to go, in the territory subject to their jurisdiction. Indeed, the aim – again, as we all know – is often to drive them out of the jurisdiction so that some other city or state has to take care of the problem. Even where this is not intentional, still the intentional infliction of harm is not the only thing we blame people for. "I didn't mean to," is not the all-purpose excuse it is often taken to be. We blame people for recklessness and negligence, and certainly the promoters of these ordinances are quite reckless whether they leave the homeless anywhere to go or not ("Just get them out. I do not care. Just get them out any way you can.").[36]

In any case, our concern about freedom and unfreedom is not principally a concern to find someone to blame. An intentional attack on freedom is blameworthy in part because the freedom of those who are attacked matters. If freedom is sufficiently important to sustain moral blame for those who attack it, it ought to matter also in other cases where blame is not the' issue. Sometimes we can promote freedom, or make people more free, or organize our institutions so that there are fewer ways in which their freedom is restricted, and we may want to do this even

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[35] *See* D. PARFIT, REASONS AND PERSONS 67-86 (1984); D. REGAN, UTILITARIANISM AND COOPERATION (1980). The tenor of these works is that each person should pay attention, not only to the immediate consequences of her individual actions, but also to the consequences of a certain set of actions (which includes actions by her and actions by others). As Parfit puts it:

> "It is not enough to ask, 'Will my act harm other people?' Even if the answer is No, my act may still be wrong, *because* of its effects on other people. I should ask, 'Will my act be one of a set of acts that will *together* harm other people?' The answer may be Yes. And the harm to others may be great."

D. PARFIT, *supra*, at 86 (emphasis in original).

[36] *See supra* note 29.

in cases where we are not responding with outrage to the moral culpability of an attack on freedom. Freedom is a multifaceted concern in our political morality. Sure, we blame those who attack it deliberately or recklessly. But we are also solicitous for it and do our best to make it flourish, even when there is no evil freedom-hater obstructing our efforts. Blame, and the intentionality that blame is sometimes thought to presuppose, are not the only important things in the world.

V. FREEDOM AND IMPORTANT FREEDOMS

I have argued that a rule against performing an act in a public place amounts in *effect* to a *comprehensive* ban on that action so far as the homeless are concerned. If that argument is accepted, our next question should be: "How serious is this limitation on freedom?" Freedom in any society is limited in all sorts of ways: I have no freedom to pass through a red light nor to drive east on Bancroft Avenue. Any society involves a complicated array of freedoms and unfreedoms, and our assessment of *how free* a given society is (our assessment, for example, that the United States is a freer society than Albania) involves some assessment of the balance in that array.

Such assessments are characteristically qualitative as well as quantitative. We do not simply ask, "How many actions are people free or unfree to perform?" Indeed, such questions are very difficult to answer or even to formulate coherently.[37] Instead we often ask qualitative questions: "How important are the actions that people are prohibited from performing?" One of the tasks of a theory of human rights is to pick out a set of actions that it is thought particularly important from a moral point of view that people should have the freedom to perform, choices that it is thought particularly important that they should have the freedom to make, whatever other restrictions there are on their conduct.[38] For example, the Bill of Rights picks out things like religious worship, political speech, and the possession of firearms as actions or choices whose restriction we should be specially concerned about. A society that places restrictions on activities of these types is held to be worse, in point of freedom, than a society that merely restricts activities like drinking, smoking, or driving.

The reason for the concern has in part to do with the special significance of these actions. Religious worship is where we disclose and practice our deepest beliefs. Political speech is where we communicate with one another as citizens of a republic. Even bearing arms is held, by those who defend its status as a right, to be a special assertion of dignity, mature responsibility, civic participation, and freedom from the prospect of tyranny. And people occasionally disagree about the contents of these lists of important freedoms. Is it really important to have the right to bear

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[37] For a critique of the purely quantitative approach, see Taylor, *What's Wrong with Negative Liberty?* in THE IDEA OF FREEDOM, *supra* note 15, at 183.

[38] *Cf.* R. DWORKIN, TAKING RIGHTS SERIOUSLY 270-72 (rev. ed. 1978) (discussion of the theory that a right to certain liberties can be derived from the "special character" of the liberties).

arms, in a modern democratic society? Is commercial advertising as important as individual political discourse? These are disputes about which choices have this high ethical import, analogous to that attributed, say, to religious worship. They are disputes about which liberties should be given special protection in the name of human dignity or autonomy, and which attacks on freedom should be viewed as particularly inimical to the identity of a person as a citizen and as a moral agent.

On the whole, the actions specified by Bills of Rights are not what are at stake in the issue of homelessness. Certainly there would be an uproar if an ordinance was passed making it an offense to pray in the subway or to pass one's time there in political debate.[39] There has been some concern in America about the restriction of free speech in public and quasi-public places[40] (since it is arguable that the whole point of free speech is that it take place in the public realm). However, the actions that are being closed off to the homeless are, for the most part, not significant in this high-minded sense. They are significant in another way: they are actions basic to the sustenance of a decent or healthy life, in some cases basic to the sustenance of life itself. There may not seem anything particularly autonomous or self-assertive or civically republican or ethically ennobling about sleeping or cooking or urinating. You will not find them listed in any Charter. However, that does not mean it is a matter of slight concern when people are prohibited from performing such actions, a concern analogous to that aroused by a traffic regulation or the introduction of a commercial standard.

For one thing, the regular performance of such actions is a precondition for all other aspects of life and activity. It is a precondition for the sort of autonomous life that is celebrated and affirmed when Bills of Rights are proclaimed. I am not making the crude mistake of saying that if we value autonomy, we must value its preconditions in exactly the same way. But if we value autonomy, we should regard the satisfaction of its preconditions as a matter of importance; otherwise, our values simply ring hollow so far as real people are concerned.

Moreover, though we say there is nothing particularly dignified about sleeping or urinating, there is certainly something deeply and inherently *un*dignified about being prevented from doing so. Every torturer knows this: to break the human spirit, focus the mind of the victim through petty restrictions pitilessly imposed on the banal necessities of human life. We should be ashamed that we have allowed our laws of public and private property to reduce a million or more citizens to something approaching this level of degradation.

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[39] The failure of First Amendment challenges to restrictions on panhandling does not bode well for the survival of even these protections. *See* Young v. New York City Transit Auth., 903 F.2d 146 (2d Cir.), *cert. denied*, 111 S. Ct. 516 (1990). *But see* Hershkoff and Cohen, *Begging to Differ: The First Amendment and the Right to Beg*, 104 HARV. L. REV. 896 (1991) (arguing that begging is protected speech).

[40] *See supra* note 4.

Increasingly, in the way we organize common property, we have done all we can to prevent people from taking care of these elementary needs themselves, quietly, with dignity, as ordinary human beings. If someone needs to urinate, what he needs above all as a dignified person is the *freedom* to do so in privacy and relative independence of the arbitrary will of anyone else. But we have set things up so that either the street person must beg for this opportunity, several times every day, as a favor from people who recoil from him in horror, or, if he wants to act independently on his own initiative, he must break the law and risk arrest. The generous provision of public lavatories would make an immense difference in this regard – and it would be a difference to freedom and dignity, not just a matter of welfare.

Finally, we need to understand that any restriction on the performance of these basic acts has the feature of being not only uncomfortable and degrading, but more or less literally *unbearable* for the people concerned. People need sleep, for example, not just in the sense that sleep is necessary for health, but also in the sense that they will eventually fall asleep or drop from exhaustion if it is denied them. People simply cannot bear a lack of sleep, and they will do themselves a great deal of damage trying to bear it. The same, obviously, is true of bodily functions like urinating and defecating. These are things that people simply have to do; any attempt voluntarily to refrain from doing them is at once painful, dangerous, and finally impossible. That our social system might in effect deny them the right to do these things, by prohibiting their being done in each and every place, ought to be a matter of the gravest concern.[41]

It may seem sordid or in bad taste to make such a lot of these elementary physical points in a philosophical discussion of freedom. But if freedom is important, it is as freedom for human beings, that is, for the embodied and needy organisms that we are. The point about the activities I have mentioned is that they are both urgent and quotidian. They are urgent because they are basic to all other functions. They are actions that have to be performed, if one is to be free to do anything else without distraction and distress. And they are quotidian in the sense that they are actions that have to be done every day. They are not actions that a person can *wait* to perform until he acquires a home. Every day, he must eat and excrete and sleep. Every day, if he is homeless, he will face the overwhelming task of trying to find somewhere where he is allowed to do this.

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[41] I hope it will not be regarded as an attempt at humor if I suggest that the Rawlsian doctrine of "the strains of commitment" is directly relevant here. J. RAWLS, A THEORY OF JUSTICE 175-76 (1971). If the effect of a principle would be literally unbearable to some of those to whom it applies, it must be rejected by the parties in Rawls's contractarian thought-experiment, known as the "original position": "They cannot enter into agreements that may have consequences they cannot accept. They will avoid those that they can adhere to only with great difficulty." *Id*. at 176. As Rawls emphasizes, this is a matter of the *bona fides* of bargaining, not of any particular psychology of risk-aversion.

VI. HOMES AND OPPORTUNITIES

That last point is particularly important as an answer to a final objection that may be made. Someone might object that I have so far said nothing at all about the fact that our society gives everyone the *opportunity* to acquire a home, and that we are all – the homeless and the housed – equal in *this* regard even if we are unequal in our actual ownership of real estate.

There is something to this objection, but not much. Certainly, a society that denied a caste of persons the right (or juridical power) to own or lease property would be even worse than ours. The opportunity to acquire a home (even if it is just the juridical power) is surely worth having. But, to put it crudely, one cannot pee in an opportunity. Since the homeless, like us, are real people, they need some real place to be, not just the notional reflex of an Hohfeldian power.[42]

We also know enough about how the world works to see that one's need for somewhere to sleep and wash is, if anything, greatest during the time that one is trying to consummate this opportunity to find a home. The lack of liberty that homelessness involves makes it harder to impress, appeal to, or deal with the people who might eventually provide one with a job and with the money to afford housing. The irony of opportunity, in other words, is that the longer it remains unconsummated, for whatever reason, the more difficult it is to exploit.

In the final analysis, whether or not a person really has the *opportunity* to obtain somewhere to live is a matter of his position in a society; it is a matter of his ability to deal with the people around him and of there being an opening in social and economic structures so that his wants and abilities can be brought into relation with others'.[43] That position, that ability, and that opening do not exist magically as a result of legal status. The juridical fact that a person is not legally barred from becoming a tenant or a proprietor does not mean that there is any realistic prospect of that happening. Whether it happens depends, among other things, on how he can present himself, how reliable and respectable he appears, what skills and abilities he can deploy, how much time, effort, and mobility he can invest in a search for housing, assistance, and employment, and so on.

Those are abstract formulations. We could say equally that it is hard to get a job when one appears filthy, that many of the benefits of social and economic interaction cannot be obtained without an address or without a way of receiving telephone calls, that a person cannot take *all* his possessions with him in a shopping cart when he goes for an interview but he may have nowhere to leave them, that those who have become homeless become so because they have run out of cash altogether and so of course do not have available the up-front fees and deposits that landlords require from potential tenants, and so on.

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[42] See also the discussion in J. WALDRON, *supra* note 2, at 390-422.

[43] This idea is sometimes expressed in terms of "social citizenship." *See* King & Waldron, *Citizenship, Social Citizenship, and the Defense of Welfare Provision*, 18 BRIT. J. POL. Sci. 415 (1988); *see also* R. DAHRENDORF, THE MODERN SOCIAL CONFLICT: AN ESSAY ON THE POLITICS OF LIBERTY 29-47 (1988).

Everything we call a social or economic opportunity depends cruelly on a person's being able to *do* certain things – for example, his being able to wash, to sleep, and to base himself somewhere. When someone is homeless, he is, as we have seen, effectively *banned* from doing these things; these are things he is *not allowed* to do. So long as that is the case, it is a contemptible mockery to reassure the victims of such coercion that they have the *opportunity* to play a full part in social and economic life, for the rules of *property* are such that they are prohibited from doing the minimum that would be necessary to take advantage of that opportunity.[44]

CONCLUSION

Lack of freedom is not all there is to the nightmare of homelessness. There is also the cold, the hunger, the disease and lack of medical treatment, the danger, the beatings, the loneliness, and the shame and despair that may come from being unable to care for oneself, one's child, or a friend. By focusing on freedom in this essay, I have not wanted to detract from any of that.

But there are good reasons to pay attention to the issue of freedom. They are not merely strategic, though in a society that prides itself as "the land of the free," this may be one way of shaming a people into action and concern. Homelessness is partly about property and law, and freedom provides the connecting term that makes those categories relevant. By considering not only what a person is allowed to do, but where he is allowed to do it, we can see a system of property for what it is: rules that provide freedom and prosperity for some by imposing restrictions on others. So long as everyone enjoys some of the benefits as well as some of the restrictions, that correlativity is bearable. It ceases to be so when there is a class of persons who bear *all* of the restrictions and nothing else, a class of persons for whom property is nothing but a way of limiting their freedom.

Perhaps the strongest argument for thinking about homelessness as an issue of freedom is that it forces us to see people in need as *agents*. Destitution is not necessarily passive; and public provision is not always a way of compounding passivity. By focusing on what we allow people to do to satisfy their own basic needs on their own initiative, and by scrutinizing the legal obstacles that we place in their way (the doors we lock, the ordinances we enforce, and the nightsticks we raise), we get a better sense that what we are dealing with here is not just "the problem of homelessness," but a million or more *persons* whose activity and dignity and freedom are at stake.

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[44] And this is to say nothing about the appalling deprivation of ordinary opportunity that will be experienced by those tens of thousands of *children* growing up homeless in America. To suggest that a child sleeping on the streets or in a dangerous, crowded shelter, with no place to store toys or books, and no sense of hope or security, has an opportunity equal to that of anyone in our society is simply a mockery.

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APPLICABILITY OF LEGAL REGULATIONS TO HIGH ARTIFICIAL INTELLECT – ROBOTS

ABSTRACT

The present paper addresses the necessity of creating legal regulations regarding a technological novelty - robots; it discusses the issues of freedom of religion, freedom of expression and the right to personal development in the context of domestic legislation, as well as international regulations. The paper focuses on the issue of potential applicability of the said constitutional rights to robots, and the role of the Constitutional Court and the Supreme Court of Georgia with respect to this subject. In addition, the paper addresses the case-law of the Supreme Court of the United States and the European Court of Human Rights.

I. NECESSITY OF REGULATING ARTIFICIAL INTELLIGENCE AS A TECHNOLOGICAL NOVELTY

Modern technologies represent the unity of systematized knowledge that can transform societies with maximum, using minimal physical or mental resources.[2] Concurrently with the world of technology, artificial intelligence (hereinafter, "AI") is constantly progressing as one of the technological novelties.

The AI performs functions that are related to human intelligence and is aiming to imitate cognitive functions of a human being, to achieve the level of intelligence that will allow it to demonstrate intelligent actions. The AI is in direct correlation with legal order.

[1] We would like to express our gratitude to the Associate Professor of the Batumi Shota Rustaveli State University Mr. Merab Mgeladze, the editor of the Journal of the Constitutional Court - Mrs. Irine Urushadze and to the Doctor of Ottawa University, Faculty of Law - Mr. Ilia Alexandrov for providing their support and materials during the course of working on this paper.

[2] Hee Jun Choi, *"Technology Transfer Issues and a New Technology Transfer Model"*, The Journal of Technology Studies, p.5. Science, Technology and Innovation in the New Economy, Organisation for Economic Co-operation and Development Policy Brief, September 2000, p.1.

Given the main objectives of legal regulations regarding implementation and conceptualization of technological innovations, it is necessary to create the most convenient conditions and to protect the rights and legitimate interests of individuals, as well as consumer rights and the environment.

Given all of the abovementioned, the issue of subjecting modern technologies and innovations to legal regulations is of utmost importance.

The term "robot" stems from a Czech word "robota".[3] Under the current definition, a robot is a machine, which senses, thinks, acts and has the skills for processing information, which strengthens the cognitive aspect.[4] According to Oxford Dictionary, a robot is a machine resembling a human being and able to replicate certain human movements and functions automatically.[5] The AI technology is an agent that acts autonomously, with its own motives and emotions and has the ability to interact with humans and its environment.[6] It is considered the aforesaid definition should also include such categories as nature, autonomy, purpose, operational environment and interaction between humans and robots.[7] However, as of today, the universal definition of this term cannot be found.

According to Professor Sam Lehman-Wilzig, robots can exhibit curiosity, display self-recognition, be creative and purposive, learn from their own mistakes, imitate the behavior of humans, reproduce themselves and have an unbounded life span. They can read, talk, learn, feel. According to Kemeny, there are "six criteria which distinguish living from inanimate matter: metabolism, locomotion, reproducibility, individuality, intelligence, and a 'natural' (non-artificial) composition".[8] He concludes that robots can meet all of the aforementioned criteria. Moreover, Weizenbaum - a critic of Al - "admits that computers are sufficiently 'complex and autonomous' to be called an 'organism' with 'self-consciousness' and an ability to be 'socialized' members of their own machine species".[9]

The area of robots is very wide and various legal documents have an impact on it. The question is whether it is possible to apply the traditional legal regime to robots or whether it is necessary

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[3] Ivan Margolius, "*The Robot of Prague"*, Newsletter Issue 17, Autumn 2017.
[4] Patrick Lin and others, "Robot ethics: Mapping the issues for a mechanized world", Artificial Intelligence 175 (2011), p.943, George Bekey, "Autonomous Robots: From Biological Inspiration to Implementation and Control", MIT Press, Cambridge, MA, 2005.
[5] The definition of the term is available at: <https://en.oxforddictionaries.com/definition/robot> accessed 20 January 2019. The same definition is also under in the article by Chris Holder and others "*Key legal and regulatory implications of the robotics age (Part I of II)",* computer law & security review 32 (2016), p.384.
[6] Kang-Hee Lee, "*Evolutionary algorithm for a genetic robot's personality",* Applied Soft Computing 11 (2011) p. 2287.
[7] E. Palmerini and others*, "RoboLaw: Towards a European framework for robotics regulation",* Robotics and Autonomous Systems 86 (2016), p.79.
[8] Phil McNally and Sohail lnayatullah, "The Rights of Robots: Technology, culture and law in the 2lst century" (Futures April 1988) p. 125.
[9] *Supra* note 8, pp.125, 134.

to create *lex robotica*. It is considered that the argument for creating *ad hoc* legal regulations for robots is based not only on ontological grounds,[10] but also on the tasks that are performed by them in the society.[11]

It is argued that in the context of full autonomy, robots become legal subjects and obtain rights as well as duties.[12] However, until robots become entirely capable of acting in accordance with their own priorities and aims, based on their own pleasure, they cannot be considered as completely independent and ethical agents.[13]

Legal regulation is necessary given the socio-economic potential of sophisticated robots as well as the potential risks. However, as noted in the Stanford University Journal "Artificial Intelligence and Life 2030", the lack of a legal definition of AI will further complicate regulation of this area, since, given the absence of relevant regulating laws, the issues of the legality of using technological innovations, culpability and liability, safety and the protection of human rights are vague.[14]

Given the specificities and the area of functioning of the laws regarding high performing AI, these laws must meet the requirements of a democratic and legal state and be relevant, sufficient and proportionate to legal aims.[15] According to case-law of the CJEU, the principle of legality encompasses the principles of proportionality, legality, legal certainty, reasonability of legal acts and equality.[16] As for the ECtHR, - it considers that the law must meet the requirements of

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[10] The *rationale* of ontological grounds is based on the independent nature of acting, which also enables a robot to bear responsibility for the harm inflicted as a result of its actions.

[11] A. Bertolini, "Robotic Prostheses as Products Enhancing the Rights of People with Disabilities. Reconsidering the structure of Liability Rules" Law Comput. Technol. 29 (2–3) (2015), pp. 116–136.

[12] Leroux and others "*Suggestion for a Green Paper on Legal Issues in Robotics".* Contribution to Deliverable D.3.2.1 on ELS Issues in Robotics, 2012.

[13] Mathias Gutman and Others, "*Action and autonomy: A hidden Dilemma in artificial autonomous systems*" (in Robo- and Informationethics: Some Fundamentals, eds. Michael Decker and Mathias Gutman, Lit Verlag 2012).

[14] Peter Stone and others, "Artificial Intelligence and Life in 2030." One Hundred Year Study on Artificial Intelligence: Report of the 2015-2016 Study Panel", Stanford University, Stanford, CA, September 2016. <https://ai100.stanford.edu/sites/default/files/ai100report10032016fnl_singles.pdf> [accessed 15 July 2018].

[15] *Patyi and Others v. Hungary* App no. 5529/05 (ECtHR 7 October 2008) paras. 38-39.

[16] Konstantine Korkelia, Human Rights and the Rule of Law (Tbilisi 2013), p. 33, available at: <https://www.tsu.ge/data/file_db/faculty-law-public/Adamianis%20Uflebebi_%202013.pdf > [accessed 25 April 2019]. The author relies on different judgments, such as *Hermann Schräder HS Kraftfutter GmbH & Co. KG v. Hauptzollamt Gronau*, Case No.265/87 (CJEU 11 July 1989); The principle of proportionality was further codified in Article 5(3) of the Treaty on European Union (after the entry into force of the Lisbon Treaty - in Article 5(1), *Hoechst AG v. Commission*, Case No. 46/87 and 227/88 (CJEU 21 September 1989). *Deuka, Deutsche Kraftfutter GmbH, B. J. Stolp v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, Case No. 78/74 (CJEU 18 March 1975); *Racke v. Hauptzollamt Mainz*, Case No. 98/78 (CJEU 25 January 1979); Ralf-*Herbert Kühn v. Landwirtschaftskammer Weser-Ems*, Case No. C-177/90 (CJEU 10 January 1992); *Agricola Tabacchi Bonavicina v. Ministero per la Politiche Agricole*, Case No. C-402/98 (CJEU 6 July 2000). *Koninklijke Scholten-Honig NV and De Verenigde Zetmeelbedrijven "De Bijenkorf" BV v. Hoofdproduktschap voor Akkerbouwprodukten*, Case No. 25/77 (CJEU 25 October 1978); *Albert Ruckdeschel & Co. und Hansa-Lagerhaus Ströh & Co. v. Hauptzollamt Hamburg-St. Annen*, Case No, 117/76 (CJEU 19 October 1977); *Peter Überschär v. Bundesversicherungsanstalt für Angestellte*, Case No. 810/79 (CJEU 8 October 1980); *EARL de Kerlast v. Union régionale de coopératives*

publicity, accessibility and foreseeability.[17] Hence, laws regarding technological innovations shall meet the following criteria:

- serving legitimate aims;
- be non-discriminate, proportionate, transparent and fair;
- a link shall exist between the normative content concerting regulations of technological innovations and existing legal reality;
- relation between technologies, regulations and the normative nature of laws should be balanced and harmonized;[18]
- laws should create the mechanisms for intervention for the purposes of balancing "protected value" and "inflicted harm";
- they should consider the needs of a given society, its experience and/or relation with technological innovations. Laws should be amendable and they should address existing challenges and the needs of the society;
- they should not serve as an artificial obstacle and they should not obstruct the implementation or development of new technologies. They should not legitimize fears of the society, ungrounded superstitions, religious or other viewpoints and sensitive views.

Sophisticated AI are implemented in public and private sectors. Application of AI makes legal consulting online possible, which is why it represents a know-how for many fields of law.[19] Creating a legal AI platform with codification of current laws, case-law and legal literature will completely change the rules of the game and will make legal services exclusive, innovative, progressive and flexible. A legal AI platform is capable of handling complex and lengthy processes by using cognitive, rational and analytic skills of technology.[20] Accordingly, it is necessary for relevant legal regulations to exist on domestic, as well as on international level. Under the principle of separation of power, it is the legislative branch that should create main guiding principles with respect to regulating AI. As of today, none of the countries has addressed the

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agricoles and Coopérative du Trieux, Case No. C-15/95 (CJEU 17 April 1997); *Kjell Karlsson v. Jordbruksverk*, Case No. C-292/97 (CJEU 13 April 2000); *Tanja Kreil v. Germany*, Case No. C-285/98 (CJEU 11 January 2000).

[17] *Sunday Times v The United Kingdom*, App No 6538/74, A/30, [1979], paras. 46, 47, 51, 52, 67 <https://globalfreedomofexpression.columbia.edu/cases/the-sunday-times-v-united-kingdom/> accessed 25 April 2019.

[18] We bring to the reader's attention the fact that, normative nature of the law, neither technologies nor regulations, is a not solid and sustainable substance themselves; they are transforming, rapidly changing and growing in time and environment.

[19] Richard Susskind, Artificial Intelligence and the Law Conference at Vanderbilt Law School <https://law.vanderbilt.edu/academics/academic-programs/law-and-innovation/activities.php> accessed 15 April 2019.

[20] Pamela V. Grey, *"Artificial Legal Inteligence, Harward Journal of Law and Technology*", Volume 12, Number 1, 1998, p. 247.

issue of legal capacities and legal status. Clearly, the courts cannot intrude into the existing legally protected sphere *sua sponte*, independently, without legal grounds and procedures.

The skills and functions of sophisticated AI - robots are almost the same as those of a human being, which makes it possible to consider them as independent contractors for legal purposes.

There is a number of problematic issues, which should be addressed by the existing law. Namely:

– whether a person acting under orders and commands of AI technology - a robot - should be liable before the law or whether liability should rest upon robots in such cases;

– to what extent shall rights and liberties apply to robots;[21]

– how should the issue be resolved when damaged has occurred as a result of action or inaction of a robot;

– what should be the legal status of robots, which are not deemed as the subjects of law under the existing legal order;

– whether it is possible to establish legal liability of a robot.

As a result of technological changes, today robots can create, analyze and send information just like human beings.[22] They are interactive and have emotions. Upon creating them, scientists are giving robots emotional intelligence and capacities, which makes it impossible to clearly distinguish computers from a human being.[23] Robots address societies and make speeches, which

[21] Would it be possible to apply rights and liberties by the method of analogy just like in case of legal entities?

[22] Furthermore, a US national Matt McMullen has created the first female intimate robotic AI "Harmnony" for the purposes of sexual satisfaction, and presentation of a similar male robot is planned in 2018. Robots are already available for purchase and their market price is USD 11,000 <https://realbotix.com/>, <https://www.mirror.co.uk/tech/male-sex-robots-bionic-penises-11818283> accessed 20 January 2019; Robots for medical servicies and conducting surgeries have also been developed <https://www.nbcnews.com/mach/science/these-tiny-robots-could-be-disease-fighting-machines-inside-body-ncna861451> accessed 20 January 2019; Chinese governmental news broadcaster Xinhua has presented robot anchors to its audience. The agency stated that they will deliver information to their audience "tirelessly", every day and from any part of the country <http://netgazeti.ge/news/318325/?fbclid=IwAR2Ch8Pv5fe2uuKSO6qgjT6WywFudJazTkmTvPevgNY5o3YpnPJXE8Yq6k>; accessed 25 November 2018; On the International Conference on Robots in 2016, the Chinese University of Science and Technology presented robots with a human body and sophisticated artificial intelligence, which could communicate with people and perform various functions and tasks <http://www.ieee-ras.org/component/rseventspro/event/988-wrc-2016-world-robot-conference> accessed 25 November 2018. Besides, a Japanese robot Erica developed at the Osaka University is now engaged in journalism <https://www.livescience.com/61575-erica-robot-replace-japanese-news-anchor.html> accessed 25 November 2018. In addition, the following robots are also engaged in active communications with public: Actroid, Asuna, Chihira Kanae, Jia Jia which was presented at the Tokyo Game show in 2017 and others. A short list is available at <https://www.hexapolis.com/2017/04/04/advanced-robots-humanoid/> accessed 25 November 2018.

[23] Rafael A.Calvo and Dorian Peters, *"Positive Computing: technology for wellbeing and human potential"* (2014); Klaus R.Scherer, and others, "*Blueprint for affective Computing A Sourcebook"* eds.,2010; The Oxford Hanndbook of Affective Computing (Rafael A.Calvo, Sidney D'Mello, Jonathan Gratch and Arvid Kappas eds., 2015).

spontaneously results in the exercise of freedom of speech, thought and religion, protected under Article 19 of the Constitution of Georgia. The said article represents the foundation of a democratic society and serves as a prerequisite for the development of a state.

It has been argued that recognizing the freedom of expression of robots will become an inseparable part of democratic culture.[24] Democratic culture guarantees the recognition of a robot as a legal subject. The freedom of expression is an instrumental value not only for a listener, but also for the one who is exercising it.

We should also consider counterarguments that are opposing the issue of granting freedom of expression to robots, based in particular on the premise that robots are not human beings. According to one part of the society, in order for robots to have equal rights as humans, they need something that can only be a characteristic of a human being.

Professor Lawrence B. Solum of Georgetown University notes that if scientists discover similarities between the actions and cognitive abilities of robots and human beings, we will have sufficient grounds for approaching robots in the same manner as human beings. They are developing not only from the emotional point of view, but their cognitive abilities are also evolving, as well as the level of their independence, autonomy.[25] If we agree upon Prof. Solum's claim and the progress of AI, the issue of applying freedom of expression exclusively to human beings will no longer be relevant.

To a certain extent, technological progress makes the satisfaction of the requirements of legal subjectivity possible. For example, having a body had been considered one of main distinctions between technology and a human being, however, the progress has eliminated this distinction. Robots are capable of processing ambiguous information, conducting various actions within the frame of their program, inflicting harm, performing useful or unlawful commands. Given the aforementioned, Associate Professor at the Washington University Law School - Ryan Calo argues that unlike previously existing technologies, robots are social actors.[26]

Jane Bambauer, who has examined whether data can be considered speech, argues that whatever is performed, produced (saved, synthesized, organized, analyzed, connected, shared) by robots, shall be deemed as free speech for the purposes of the First Amendment of the US Constitution.[27]

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[24] Jack M.Balkin, *"Cultural Democracy and the First Amendment*", 110 Nw.U.L.Rev.1053, 1060.
[25] Lawrence B. Solum, "*Legal Personhood for Artificial Intelligences",* 70 N.C. L. REV. note 10, 1, 1258–79 (1992),
<https://scholarship.law.unc.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=3447&context=nclr>.
[26] Ryan Calo, "*Robotics and the Lessons of Cyberlaw"*, 103 Calif.L. Rev. 515 (2015), p.4.
[27] Jane Bambauer, "*Is data Speech?"*, Vol. 66, Stanford Law Review, (2014), pp .57, 77-86, 91-105.

Stuart Benjamin asserts that since the products of algorithms contain "receivable and sendable messages",[28] they should be considered speech.

According to Tim Wu, the First Amendment implies that the speech should carry an intellectual choice. Hence, robots will have to pass the functionality test in order to demonstrate the ability to make intellectual choices.[29]

Discussions regarding the potential and skills, as well as potential legal subjectivity of sophisticated AIs have begun since 20th century. Isaak Asimov has developed fundamental ethical principles on treating robots.[30] Today, in the 21st century, we can hear discussions about improving and further developing their physical and cognitive skills. Robots are involved in various social fields, including business, health-care, jurisprudence, media, etc. Potential skills of these technologies in other fields are constantly growing, which makes them right-holders. However, they still are not considered as independent subjects. This is based on a claim that a robot is a machine and does not have a relevant level of independence. Moreover, supporters of this approach share the view that robots can only achieve progress upon the demand of a specific person who gives orders through the program support. This is why robots are not deemed to be bearing liability in accordance with the law, i.e. if they act against the law or inflict harm upon an individual, liability will be borne by the developers/owners of the program. It can also be said that another thing preventing robots from becoming legal subjects is the fear of substitution as well as traditional conservative views.

Given the aforementioned, robots are social actors and the time has come for the fact of them exercising rights to be recognized. Clearly, recognizing the rights and liberties of an individual as universal value had to do with limitation of power, civil disobedience, conflict, and war. Without this experience, we would not have been able to talk about *jus cogens* norms and international instruments of fundamental rights and liberties. Today, the first-ever form of rights and liberties has been transformed, and they consolidate drastically different rights. A few centuries ago, nobody would have talked about the access to internet, right to food, right of women to education, their voting rights or other rights. Slavery was abolished only after years of fighting, which now is considered to be *jus cogens.* Clearly, it is difficult to change the perception on robots in the "human and human centric" society, and recognizing their rights will be linked to very complex procedures.

As of today, existing law leaves the question of robots' rights open. We believe that given a great variety of ways in which robots can be adapted in the society and given that they function-

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[28] Stuart Minor Benjamin, "*Algorithms and Speech*", Vol.161, U. PA. L. Review, pp.1445, 1461-71 (2013), Andrew Tutt, *"Software Speech"*, 65, Stanford Law Review Online 73 (2012), p. 77.
[29] Tim Wu, *"Machine Speech"*, 161, U PA. L. Review (2013), pp. 1495, 1503.
[30] Isaac Asimov, "*I, ROBOT"*, Canada:Doubleday 1950, p. 40 and Issac Asimov, "*The Rest of Robots"*, Canada:Doubleday 1964, p. 43; the rationale of ethical principle implies programing a robot in accordance with universally recognized ethical norms, as well as in accordance with the values of universal declaration on human rights, equality, fairness, non-stigmatization, and personal and social responsibility.

ally are exercising rights recognized by law, existence of legal regulations is essential for determining legitimacy of their actions and consequences thereof. Defining legal status and recognition of rights of robots by law would be an important step forward by a State, because it makes no sense to ignore the existing reality merely because robots are machines. At the same time, it is necessary to enact regulations that would correspond to potential illegal actions, that can occur within the course of their exploitation. An important aim is that the legislation be able to react adequately and in a timely manner, with due regard to the existing risk factors.

Clearly, large-scale implementation of a sophisticated AI - robots would affect a number of legal conventions. Furthermore, this will dictate the courts to change or adopt new interpretation of the concept of legal subjects. We think that constitutional changes are inevitable. The exercise of freedom of expression by robots will make it necessary to interpret this phenomenon in a new manner in a Georgian reality as well. Hence, we believe that neither normative nor practical examples are sufficient for denying robots the freedom of expression.

II. STATE PRACTICE WITH RESPECT TO HIGH PERFORMING AI - ROBOTS

Generally, the existence of robots does not automatically alter the existing scope of rights recognized by law at the international and regional level. The Supreme Court of the United States has noted that "the main principles of freedom of speech protected under the First Amendment do not depend on the creation of new media or innovations in technology". In case of *Brown v. Entertainment Merchants Association*,[31] the Court ruled that video games were within the scope of the First Amendment. It noted that just the same way as books and movies serve the purpose of expressing ideas, video games also represent the means of communicating ideas - it encompasses various social messages (characters, dialogues, plot and music). They create a space where gamers interact with virtual world and this suffices for the First Amendment to apply to video games as well. The First Amendment and the doctrine of free speech applies regardless of who is the speaker. In its judgment on *The First Nation Bank of Boston v. Bellotti*,[32] the Court ruled that free speech does not depend on identification of a speaker or a source, and this right is granted not only to individuals, but also to corporations, associations, and unions. The Supreme Court of the United States considers that the First Amendment is about the speech, not about a speaker as such.[33] Corporations, as legal entities, have freedom of speech.[34] The First Amendment applies to those speakers as well, who are not private individuals.[35] Under the precedent,

[31] Brown v. Entertainment Merchants Association, 564 U.S. 786, 790 (2011).
[32] The First Nation Bank of Boston v. Bellotti, 463 U.S. 765, 777 (1978).
[33] *Citizens United v. FEC*, 558 U.S. 310, 392–93 (2010).
[34] *ibid*.
[35] Toni M. Massaro, Helen Norton and others, "*SIRI-OUSLY 2.0: What Artificial Intelligence Reveals About the First Amendment"*, (101 Minnesota Law Review 2481, 28 June 2017) p. 2496.

algorithms (as a result of the action of a developer) are considered to be speech.[36] In case of *Zhang v. Baidu.com Inc.,*[37] the Court ruled that results of a search engine fall within the ambit of the First Amendment as well. Regardless of identity or the format, the First Amendment protects equally nontraditional speakers and speech as well. We believe that, based on the case-law of the US Supreme Court, the possibility of application of the First Amendment to AI technology is not excluded. Accordingly, given this precedent of the Supreme Court, it can approach the free speech of robots in the same manner as it addresses free speech of an individual. Given all the above mentioned, we cannot reject the speech produced by high-performing AI solely because we cannot see a human in it and that it does not satisfy the criteria of "personhood".

Some researchers are of the opinion that freedom of expression applies to speech of robots as well, including algorithmic speech. David Skover and Ronald Collins argue that the audience of free speech under the First Amendment is everyone, regardless of who or what exercises it.[38]

Article 9 of the European Convention of Human Rights protects the freedom of thought, conscience and religion.[39] Under the first paragraph of the said Article, everyone has the right to freedom of thought, conscience and religion. The right to freedom of thought, conscience and religion is among those fundamental rights, without which a democratic state based on the rule of law cannot exist. While the first paragraph of Article 9 provides for the said right, paragraph 2 prescribes certain limitations. These limitations shall be prescribed by law, necessary in a democratic society and they must serve one of the legitimate aims (public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others). This paragraph is aiming to balance the right of an individual to freedom of thought, conscience and religion against the interests of public, whenever the two of them come into contradiction.[40]

The right to freedom of thought, conscience and religion, including the freedom to change one's religion or belief cannot be restricted by the State. Article 9 of the ECHR imposes on States Parties not only negative, but also positive obligations to protect the right to freedom of thought, conscience and religion. States Parties have an obligation to ensure the peaceful enjoyment of

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[36] *Zhang v. Baidu.com, Inc*., 10 F. Supp. 3d 433, 435 (S.D.N.Y. 2014) (search results manifested in algorithm represents "in essence an editorial judgment about which political ideas to promote"; See also *Langdon v. Google, Inc*., 474 F. Supp. 2d 622 (D. Del. 2007); *Search King, Inc. v. Google Tech., Inc.*, No. CIV-02-1457-M, 2003 WL 21464568 (W.D. Okla. 27 May 2003).

[37] *Zhang et al v. Baidu.Com Inc. et al*, No. 1:2011cv03388, 10 F. Supp. 3d 433 (S.D.N.Y. 2014).

[38] Toni M. Massaro and others *supra* note 35; Arizona Legal Studies Discussion Paper No. 17-01; Ohio State Public Law Working Paper No. 374; Colorado Law Legal Studies Research Paper No. 17-3.

[39] Council of Europe, European Convention of for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, Article 9.

[40] Konstantine Korkelia, Irine Kurdadze, *International Human Rights Law under the European Convention on Human Rights* (Tbilisi 2004) p. 193, <http://www.nplg.gov.ge/gsdl/cgi-bin/library.exe?e=d-01000-00---off-0samartal--00-1----0-10-0---0---0prompt-10---4-------0-1l--11-ka-50---20-about---00-3-1-00-0-0-11-1-0utfZz-8-00&a=d&cl=CL4.5&d=HASHb07e4e79354e15c4f86d59.9.5>, accessed 25 April 2019. See also *Wingrove v. The United Kingdom,* 25 November 1995, 24 EHRR 1, 1996-V, para. 53 cited in "International Human Rights Law under the European Convention on Human Rights".

the right to freedom of religion.[41] Article 9 is the only right that does not list "national security" as one of the legitimate aims for restricting the right at hand.[42]

"The right to freedom of thought, conscience and religion means that a person cannot be subjected to a treatment which is aiming to forcibly change one's way of thinking. This means that a person can not only practice its religion and beliefs, but also abstain from doing so. The right to freedom of thought, conscience and religion 'entails, *inter alia*, freedom to hold or not to hold religious beliefs and to practice or not to practice a religion'".[43] "The freedom of practicing a religion of a belief is not only an individual right, - it can be exercised collectively 'together with others'".[44]

Under Article 10 of the ECHR, everyone has the right to freedom of expression. However, this right is not absolute in nature. According to the European approach, freedom of expression is one of the most important rights; it can, however, be limited.

The First Amendment of the US Constitution concerns not only verbal and written speech, but speech that is communicated by actions as well. The First Amendment says that Congress shall make no law abridging the freedom of speech. With respect to hate speech and free speech in general, the US Supreme Court uses a so-called "clear and present danger" test, which has first been set forth in the case of *Schenck v. United States*.[45] The US Constitution as well as the analysis of the US Supreme Court's case-law[46] demonstrate that the right to free speech plays one of the most important roles and that it can only be limited under very exceptional circumstances.[47]

Comparative analysis of the First Amendment and Articles 9 and 10 of the ECHR demonstrates that the audience under these provisions is everyone, regardless of the group of the subjects of these rights. The case-law of the US Supreme Court makes it possible of the AI technology to be considered the right holders under the First Amendment.

At the same time, it is noteworthy that the European Union does not have special regulations and definitions with respect to robots. As a product, it is regulated by different legislation and

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[41] *supra* note 40, 196.
[42] *ibid* 194.
[43] *ibid* 194; *Buscarini v. San Marino*, European Court of Human Rights, 18 February, 1999, 30 EHRR 208, para. 34 cited in "*International Human Rights Law under the European Convention on Human Rights*".
[44] *ibid* 196.
[45] *Schenck v. United States* 249 U.S. 47 (1919). According to the judgment, if a "clear and present danger" is not at hand, restrictions on free speech shall be not be justified.
[46] See e.g. *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) where the US Supreme Court ruled that the protection of human rights is a state interest, however, the Court found that the said aim could have also been achieved without restricting free speech.
[47] Georgian Democracy Initiative, *Hate Speech* (PROLOG 2014), p. 8 <https://www.gdi.ge/uploads/other/0/190.pdf> accessed 25 April 2019.

directives[48] and should meet the ISO and CEN standards.[49] Given the tendencies in technological development of robots, some consider that it is necessary to reevaluate the EU law in order to set minimal standards.[50]

In order to create legal regulations applicable to robots, the EU Parliament adopted a resolution based on FP7 project RoboLaw.[51] The regulation underlined the necessity to define terms and as a conclusion, the Parliament called for the EU Commission with studying specific criteria in order to determine the legal status and regime applicable to robots.[52] Besides, it is essential that the Commission was called for to develop and implement regulating legal acts and policies with respect to the form of civil liability, harmonized technical standards of safe product as well as the creation of a supervisory body on AI research and innovations.[53] The Commission expresses its willingness to address the issues of robots' liability and registration systems within the document EC/2015/2103 (INL).[54]

In the resolution, the EU Parliament underlined the necessity to create legal regulations, which stems from the robots' ability to perform specific functions, tasks, operations, aims, complex issues and make decisions in real time. Besides, robots with high social intellect, independence and autonomy already exist, which is why the European Parliament is of the opinion that they should be granted a special status of electronic personality. Moreover, recommendations with respect to civil liability, compensation funds, strict rules on liabilities and compulsory insurance scheme,[55] as well as registration numbers and special legal status have been adopted.

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[48] EN ISO 12100, Safety of machinery – General principles for design – Risk assessment and risk reduction; EN ISO 10218-1:2011 Robots and robotic devices – Safety requirements for industrial robots – Part 1: Robots; EN ISO 10218-2:2011 Robots and robotic devices – Safety requirements for industrial robots – Part 2: Safety of Robot integration; EN ISO 13482:2014 Robots and robotic devices – Safety requirements for personal care robots.

[49] Directive on Liability for Defective Products and the Product Safety Directive; Machinery Directive; Medical Devices Regulation (e.g., for surgical robots) or the Low Voltage Directive (e.g., for vacuum cleaners); Electromagnetic Compatibility and Radio Equipment Directives.

[50] Kritikos Mihalis, "*Legal and ethical reflections concerning robotics*", STOA Policy Briefing, June 2016 – PE563.501, Brussels, European Parliament Research Service.

[51] Regulating Emerging Robotic Technologies in Europe: Robotics facing Law and Ethics', funded by the European Commission and conducted between 2012 and 2014; Nevejans N., "*European civil law rules in robotics, Directorate General for Internal Policies*". Policy Department C: Citizens' Rights and constitutional Affairs, Study PE 571.319, Brussels, European Parliament, (2016).

[52] It is noteworthy that the resolution does not give the definition of "sophisticated robots". However, it stipulates that the following criteria should be taken into account: autonomy, exchanging data with its environment (interconnectivity), analyses data, self-learning from experience and by internation, at least a minor physical support, the adaptation of robot's behavior and actions to the environment, ***absence of life in the biological sense*** (para. 1)

[53] *Rosa Oyarzabal, "What is a Robot under EU Law?",* <https://www.natlawreview.com/article/what-robot-under-eu-law> accessed 11 November 2018.

[54] P8_TA (2017) 0051 Civil Law Rules on Robotics-European Parliament resolution of 16 February 2017 with recommendations to the Commission on Civil Law Rules on Robotics (2015/2103(INL)); European Parliament 2014-2019; Palmerini E. et al. (2014) Guidelines on regulating robotics. RoboLaw Deliverable D6.2.

[55] Art. 59(a), (b) and (c) of the resolution address the issues of compulsory insurance scheme and compensation funds.

The European Parliament has underlined the necessity of defining liability given the functional capacities of robots. Under Articles 59(f) and 31(f) of the Draft Report with the recommendation to the Commission on Civil Law Rules on Robotics[56], the Parliament called upon the European Commission to assess the legal risks and results of creating a specific legal status of electronic personality which grants robots special rights and obligations whenever they inflict harm on or otherwise interact with third parties as a result of independent actions.[57] The status prescribed by the resolution can be applied in cases where robots interact with persons, environment or make independent decisions. As of today, EU law is not familiar with the concept of electronic personhood, and the resolution has not been followed by any specific changes in the EU legislation.

Based on his research, Samir Chopra concludes that by establishing the status of electronic persons, robots will eventually be considered as law subjects and thus join the circle of legal subjects.[58] However, others argue that this recognition will end the debates on slavery, which will remind us of unwanted past experience.[59]

According to Friedrich Carl von Savigny, only human beings have rights and obligations, however, the law can attribute subjectivity to anything. Ugo Pagallo argues that even though robots do not satisfy the established criteria, their regulation is necessary. Even more so, it is impossible to prohibit legislatures from converting robots into citizens and to altering existing standards without any rational judicial grounds.[60]

According to Aïda Ponce Del Castillo of the European Trade Union Institute, the electronic person statues envisaged in the EU Parliament's resolution has to do with granting certain rights and obligations, which is not a new idea.[61] Robert Gaizauskas, - a Professor in Computer Science at the Sheffield University and William Sweet, - Professor in Philosophy at St. Francis Xavier University argue that robots are electronic persons and thus they have certain rights. A Professor at the Sheffield University Tony Prescott explains that a person is an individual which

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[56] Draft Report with recommendation to the Commission on Civil Law Rules on Robotics, (2015/2103(INL)), European Parliament, Committee on Legal Affairs, 2014-2019, p. 11.

[57] Nathalie Nevejans, European Civil Law Rules in Robotics, Directorate- General for Internal Policies, Policy Department C: Citizens Rights and Constitutional Affairs Legal Affairs, PE 571.379, p. 17 <http://www.europarl.europa.eu/committees/fr/supporting-analyses-search.html> accessed 11 November 2018.

[58] Samir Chopra, "*Rights for autonomous artificial agents?* Communications of the ACM", 53 (8), (2010), pp. 38-40.

[59] Samir Chopra and White, Laurence F. White, "*A Legal Theory for Autonomous Artificial Agents"* (University of Michigan Press: Ann Arbor, MI, USA 2011) p.186.

[60] Ugo Pagallo, Vital, Sophia, and others., "*The Quest for the Legal Personhood of Robots",* September 2018. pp. 9-10; Bendert Zevenbergen, Mason Kortz and others, "*Appropriatness and feasibility of legal personhood for AI systems",* July 22, 2018, p. 7; Solum, L.B., "Legal personhood for artificial intelligences". NCL Rev., 1991. 70: p. 1231; LoPucki, L.M., "*Algorithmic Entities",* Washington University Law Review, 2018. 95(4).; Bayern, S., "*The Implications of Modern Business–Entity Law for the Regulation of Autonomous Systems",* European Journal of Risk Regulation, 2016. 7(2): pp. 297-309; Bayern, S., Of Bitcoins, "*Independently Wealthy Software, and the Zero-Member LLC",* Northwestern University Law Review, 2013. 108: p. 1485.

[61] L. B. Solum, N.C. L. Rev. 70, 1231 (1992); S. Chopra and L. White, "*Artificial agents: Personhood in law and philosophy",* in Proc. 16th Euro. Conf. on Artif. Intell., 2004.

has the purpose of existing, language, beliefs, the ability to communicate and is morally responsible for its decisions and actions. In his opinion, it is unnecessary to have a human body. Hence, sophisticated AI are ethical agents and right holders,[62] which means that they should have the same fundamental rights as human beings. [63]

According to Professor Sam Lehman-Wilzig, robots cannot be denied the legal status given their ability to relocate, make choices, study, analyze, interpret, make decisions and feel.[64]

According to Robert van den Hoven van Genderen, German law does not define the term "person" at all, however it can imply having rights and obligations, legal capacity, the right to perform legal actions and the capacity to be a subject to legal liabilities. He underlines that robots need a positive legal status, just like physical and legal entities. Legislative changes are inevitable and necessary, which can be done either through making relevant changes to existing laws, or by applying *sui generis* standards to robots in order to determine their place in a legal system. Clearly, these changes would also affect the status of non-physical entities in positive law.[65]

In his book "Homo Deus", Yuval Noah Harari notes that science will develop in such a direction whereby all organisms are deemed to be algorithms, forms of life - as databases; intellect will be separated from consciousness and those possessing hyper-intellect will know more about us, than we know about ourselves.[66]

The issue of recognizing robots as subjects of law does not lose its relevance and this recognition is merely a matter of time. We believe that for determining legal subjectivity of robots, not only we need a relevant legal basis, but also to accept that their ability to act and make decisions without human supervision and bearing responsibility for the harm inflicted, as well as recognizing their moral and legal liability.

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[62] Szollosy, M. (2017). "*Robots, AI, and the question of 'e-persons3"*, a panel at the 2017 Science in Public conference, 10–12 July 2017'. JCOM 16 (04), C05, pp. 3; 5.
[63] Filipe Maia Alexandre, "The Legal Status of Artificially Intelligent Robots Personhood", Taxation and Control, p.25.
[64] Hartini Saripan and others, *"Are Robots Human? A Review of the Legal Personality Model*", World Applied Sciences Journal 34 (6); p. 826. "What is it to be a person? It can hardly be argued that it is to be human. Could an artifact be a person? It seems to be the answer is clear and *the first R.[Robot] George Washington* to answer 'Yes' will qualify. A robot might do many of the things we have discussed: moving and reproducing; predicting and choosing; learning; understanding and interpreting; analyzing (translating, abstracting and indexing); deciding; perceiving; feeling– and not qualify. It could not do them all and be denied the accolade."
[65] Robert van den Hoven van Genderen, "*Legal personhood in the age of artificially intelligent robots"* (28 December 2018) p. 250.
[66] Yuval Noah Harari, "*Homo Deus: A Brief History of Tomorrow"*, Harper Collins, 2017.

III. POSSIBLE APPLICATION OF RIGHTS UNDER GEORGIAN LAW TO HIGH-PERFORMING AI - ROBOTS

Article 16 of the Constitution of Georgia encompasses the sphere of individual autonomy; the right to change one's religion or beliefs; the right to practice one's religions and beliefs individually as well as collectively through teachings, evangelism, performing rituals etc. It also encompasses negative liberty - to be an atheist and not to become a follower of any religion, not to recognize specific beliefs or refuse to state one's beliefs or philosophical views.

The Constitutional Court of Georgia has noted that the aim of the Constitution is to establish the guarantees for inviolability of the right to freedom of thought, conscience and religion, as a *forum integrum* and the inner world of a person, - one's personal autonomous sphere.[67]

In its judgment on the case of *Public Defender of Georgia v. The Parliament of Georgia*, the Constitutional Court of Georgia ruled that the right to freedom of religion is linked to the foundations of an individual's personal self-determination and noted that freedom of religion implies one's liberty to choose their own religious, philosophical and moral-ethical priorities, live in the society with an opportunity exercise individual self-determination and find his/herself in this sense. From this point of view, freedom of religion represents the grounds for an individual's views, feelings and living in accordance with them.[68]

Freedom of expression is protected under Article 17 (1) of the Constitution of Georgia, which determines the constitutional legal scope of the freedom of expression and prohibits persecution based on one's expression; besides, the Constitutional Court has ruled that it is prohibited to force someone to express their views.[69]

Under Article 3 of the Law of Georgia on "Freedom of Speech and Expression", the State shall recognize freedom of speech and expression as eternal and supreme human values.[70] Article 8 of the said law stipulates that "any restriction of the rights recognized and protected by this Law may be established only if it is prescribed by a clear and comprehensive, narrowly tailored law and the benefit protected by the restriction exceeds the damage caused by the restriction".[71]

It is well-known that robots can talk. Hence, in the era of technological innovations, it is important that States have the power to regulate a relevant right in order to protect the rights and legal interests of others. Technology and robots should be programmed in such a manner that

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[67] Judgment of the Constitutional Court of Georgia №1/1/477 dated 22 December 2011 in the case of "The Public Defender of Georgia v. The Parliament of Georgia", para. II-7.
[68] Judgment of the Constitutional Court of Georgia №2/1/241 dated 11 March 2004 in the case of "Citizen of Georgia Akaki Gogichaishvili v. The Parliament of Georgia", para. II-5.
[69] Judgment of the Constitutional Court of Georgia №2/482,483,487,502 dated 18 April 2011 in the case of "Political Union of Citizens "Movement for Unified Georgia", Political Union of Citizens "Conservative Party Of Georgia", Citizens Of Georgia - Zviad Dzidziguri and Kakha Kukava, Georgian Young Lawyers' Association, Citizens - Datchi Tsaguria And Jaba Jishkariani, Public Defender of Georgia v. The Parliament of Georgia", para. II-10.
[70] Law of Georgia on Freedom of Speech and Expression, Article 3.
[71] *Supra* note 70, Article 8.

they do not violate constitutionally protected values. Especially, given that under Article 17 of the Constitution of Georgia, limiting freedom of speech is only allowed if it is prescribed by law, is necessary in a democratic society and serves at least one of the following legitimate aims: national or public security, protection of territorial integrity, protection of the rights of others, prevention of publication of confidential information and safeguarding impartiality and independence of courts. Besides the aforementioned, according to the case-law of the Constitutional Court, limitation of freedom of speech can also be allowed if such an expression violates the rights of others.[72] Essentially, the conflict of values that arises in cases of limitation of a right shall be resolved through reasonable balancing of private and public interests and proportionate limitation of the right.[73] Moreover, systematic reading of the Constitution of Georgia demonstrates that the logic and legal grounds for limitation of the said right are prescribed by the Constitution itself. The State does not have the duty to regard as lawful any action of an individual, that is conducted on grounds of their beliefs.

In separate cases, the State has an authority and even a duty to interfere within the right to freedom of religion in order to secure the respect of others' autonomy or to protect legitimate interest of another individual or the society.[74] The grounds for limitations prescribed by paragraph 2 of Article 16 of the Constitution differ from those prescribed by Article 9 of the ECHR. Under the latter, freedom of expression can be limited in order to protect the interests of public safety, public order, health or morals, or the rights and freedoms of others.[75] The grounds for limiting freedom of expression shall be prescribed by law, shall serve a legitimate aim, should be proportionate and necessary in a democratic society.

In a legal state, "everyone" is the subject of the right to freedom of thought, conscience and religion, regardless of race, color, language, sex, religion, political or other views, national, ethnic or social origin, property or titular status, place of residence. The right applies not only to physical persons, but to legal entities as well. In *First National Bank of Boston v. Bellotti*,[76] the US Supreme Court ruled that the freedom of expression is exercised not only by physical persons, but also by legal entities, regardless of whether this is a corporation, association or a union.

Legal entities can enjoy constitutionally protected rights and liberties by the virtue of Article 45 of the Constitution, considering the nature of specific rights.[77] Accordingly, depending on the substance of specific rights, they apply also to legal entities. It should be underlined that the AI

[72] Judgment of the Constitutional Court of Georgia №2/1/241 *supra* note 68, para. I.
[73] Hate Speech *supra* note 46, p. 11; See also Judgment of the Constitutional Court of Georgia №1/1/477 *supra* note 67, paras. II-45-49, cited in "Hate Speech".
[74] Judgment of the Constitutional Court of Georgia №2/1/241 *supra* note 68, para. I.
[75] European Convention *supra* note 39.
[76] *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), No. 76-1172, p. 435 U. S. 777.
[77] Constitution of Georgia, Article 45.

do not meet the criteria set forth by Georgian legislation neither with respect to physical persons nor with respect to legal entities.[78]

On 19 April 2015, Hanson Robotics Ltd. created the first social robot named "Sofia",[79] which was presented to the public in the US at the South by Southwest Festival (SXSW) in March 2016 and which holds a citizenship. Each right enshrined in Chapter 2 of the Constitution of Georgia defines the circle of subjects of the rights and liberties. The Constitution utilizes terms such as "persons", "individual", "everyone" and "a citizen". The formulation of paragraph 1 of Article 17 of the Constitution is that the freedom of speech and expression is protected. Is it possible that constitutional legal grounds of the said right encompasses the freedom of speech and expression of "Sofia" and other robots? Clearly, there are skeptics who argue that robot "Sofia" is not a physical person or a human being and thus there is no possibility of applying human rights. In this regard, it would be relevant to invoke the judgment of the Constitutional Court where it defined the terms "physical person" and "citizen". The Court ruled that the term "physical person" is broader then the term "citizen" and that in the context of disputed provisions, the term "citizen" by substance was of the same meaning as the term "physical persons".[80] A simple analysis of the given definition demonstrates that the term "physical person" also encompasses the citizens. It is essential citizenship produces the legal connection with the state and represents the link with legal order of the state, as well as with rights and liberties the protection of which is upon the state authorities, through the Constitution and through the People. If robot "Sofia" is a citizen, and the Constitutional Court considers that the term "physical persons" encompasses citizens as well, it means that nothing prevents application of Articles 16 and 17 of the Constitution to robot "Sofia". Furthermore, Article 17 does not specify the subjects of the right protected therein, - it merely states that no one shall be persecuted because of his/her opinion or for expressing his/her opinion. We believe that by evoking the aforementioned definition provided by the Constitutional Court, the argument that Article 17 of the Constitution cannot be applied to robots shall not stand.

The right to freedom of speech and freedom of expression has to do not only with expression as such, but also with communication. Speech expressed by robots is also part of communication. Any term expressed with this aim shall be regarded as constitutionally protected speech, since

[78] Under Article 11(1) of the Civil Code of Georgia, The capacity for rights of a natural person is the ability to have civil rights and duties that arise from the moment of the person's birth, and under Article 24, A legal person is an organised entity created to accomplish a certain purpose that owns property, is independently liable with its own property, acquires rights and duties in its own name, enters into transactions and can sue or be sued. A legal person may be organised as a corporation, based on membership, dependent or independent of the status of its members, and engage or not engage in entrepreneurship.

[79] Hanson Robotics company, <http://www.hansonrobotics.com> 20 January 2019.

[80] Judgment of the Constitutional Court №2/2/180-183 dated 5 November 2002 in the case of "Georgian Young Lawyers Association and Zaal Tkeshelashvili, Maia Sharikadze, Nino Basishvili, Vera Basishvili and Lela Gurashvili v. The Parliament of Georgia".

no matter in what form or how information is produced, the one exercising the right is providing the audience with knowledge about the truth for the purposes of exchanging the ideas.[81]

Even though there are no such examples in the existing Georgian reality, tailored literature does address the issue of creating religious robots, whereby the robots can have specific religious beliefs or have no such beliefs.[82]

While religion dictates human beings the decisions concerning his or her personal identity and defines their "personal Me", it is interesting what could the religion be for robots. The Constitutional Court of Georgia has noted that the freedom of religion implies sharing, choosing, identifying (positive liberty) with or negating, changing (negative liberty) one's religion without state interference, i.e. protection of the inner aspect of individual's reasoning. At the same time, the liberty of an individual to conduct his or her life in accordance with their beliefs can be limited in order to protect the rights of others.[83] The belief of robots can be a program, information on religion and religious dogmas, which is developed by the "architect of the robot", the program developer. Robots have the ability to process received information and make relevant conclusions quickly. Thus, we believe that in case robots are given the right and the ability to make choices, it will be necessary to address the issue of limitation of the rights in order to protect the rights of others as well.

Do robots have the ability to define their identity? Are they capable of acting in accordance with their beliefs? Would proselytism or religious service by robots be deemed unlawful? How can we assess the actions of robots? We believe that religious service conducted by religious robots shall not be deemed unlawful. Technological development of high performing AI will make it possible to program religious robots based on processing information database, which will change the existing reality. It has been mentioned that robot Sofia already has the ability to define their own identity, as well as the skills for perception and logical reasoning. If all these elements are at hand, why would we create artificial obstacle is law we believe that not changing the existing reality is the result of fear that humans will lose their power, which is groundless and leads to "rightless", unequal environment.

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[81] Tomas I. Emerson, "First Amendment Doctrine and the Burger Court", 62, California Law Review, pp. 422, 423; Federick Schauer, "The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Silence", 117 Harvard Law Review (2004);, pp. 1765, 1786,Ronals K.L. Collins & David M.Skover, "Intentionless Free Speech: Robots & Receivers", pp. 1,3.

[82] James F. McGrath, *"Robots, Rights and Religion, Scholarship and Professional Work – LAS*", Butler University Digital Commons, Butler University, 2011, pp.32,36, Leiber, Can Animals and Machines, "*Be Persons?"*, pp. 19-21, Masahiro Mori, "*The Buddha in the Robot"*, 1981 p. 13 writing: "I believe that Buddha has a nature - this is a great accomplishment for those who follow Buddha". In his "Spiritual Robots", Robert M. Geraci notes that he wants to study what impact can Japanese religious ideas - including shinto - have on robots in the context of implementation of robots in the society, p. 230, 240. Sidney Perkowitz, "*Digital People*", Washington DC: Joseph Henry Press, 2004, pp. 215-216., Foerst, *"God in the Machine*", pp.161-162, Dinello, "Technophobia", pp.75-78.

[83] Judgment of the Constitutional Court of Georgia №2/1/241 *supra* note 68, para. I.

Under the existing law, religious robots do not fall within the sphere of legal protection. According to the current Georgian law, subjects of the right to freedom of religion are only humans. Clearly, it is not unlawful for a program developer to create a robot with religious views (in doing so, a developer will be exercising his or her right to personal development), which would perform the functions of an abbot, priest, imam, or other holders of religious titles. If this is true, then how can a line be drawn, and who should draw the line between the rights of others on one hand, and good faith, morals, ethics and public trust on the other? Is it reasonable to preserve the classic legal framework? We believe that it will be difficult to regulate these issues both for the government and for the society.

Given the existing circumstances, we are of the opinion that there is nothing that would prevent application of Articles 16 and 17 of the Constitution to robots. Otherwise, we will have to deal with the issue of unregulated speech. In this case, the necessity to create regulations is stemming not only from public interests, but also from the standards of a democratic state. We believe that in accordance with the principle of secularism, it should not be impossible to grant certain rights to robots. It is also logical that, given the existing reality, the current legal order be altered.

Sophisticated AI - robots also exercise the right to personal development, which is protected under Article 12 of the Constitution of Georgia. This right "in the first place, implies right of one's personal self-determination and autonomy. It is personality that defines one's essence, indicates his/her individuality and distinction from others".[84] In essence, Article 12 represents a fundamental guarantee for exercising the rights and liberties of an individual; it provides the guaranties for the free personal development, and the freedom of living one's life in a fair state, which represents the most important and the broadest aspect of one's private life.[85]

For the purposes of Article 12 of the Constitution of Georgia "special importance is attached not only to freedom to independently define the relations with outer world, but also to physical and social identity of an individual, inviolability of his/her intimate life".[86] The Constitutional Court of Georgia noted that "Article 12 of the Constitution is auxiliary in nature and protests the most general aspects of personal development, that are not given in independent sections of other constitutionally protected rights. Thus, any law that restricts the principle of the individual personal development, autonomous nature of actions as well as the principle of defining the

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[84] Judgment of the Constitutional Court of Georgia №2/1/536 dated 4 February 2014 in the case of "Citizens of Georgia Levan Asatiani, Irakli Vacharadze, Levan Berianidze, Beka Buchashvili and Gocha Gabodze v. The Minister Labor, Health and Social Defense, para. II-54.

[85] Judgment of the Constitutional Court of Georgia №1/2/622 dated 9 February 2017 in the case of "Citizen of Georgia Edisher Goguadze v. The Minister of Interior of Georgia", para. II-12.

[86] Judgment of the Constitutional Court of Georgia №2/4/532,533 dated 8 October 2014 in the case of "Citizens of Georgia Irakli Kemoklidze and Davit Kharadze v. The Parliament of Georgia" para. II-3;Judgment of the Constitutional Court of Georgia №2/4/570 dated 4 August 2016 in the case of "Citizen of Georgia Nugzar Jakeli v. The Parliament of Georgia", para. II-9. Judgment of the Constitutional Court of Georgia №1/2/622 *supra* note 85, para. II-15; The Court reiterated this finding in its judgment №1/13/732 dated 30 November 2017 in the case of "Citizen of Georgia Givi Shanidze v. The Parliament of Georgia", para. II-(b)10.

relation of the state and the society on one hand, and an individual on the other based on the chooses of the latter, is related to constitutionally protected rights of freedom of personal development and private life."[87]

The right to personal development can be subjected to certain legal limitations; Article 12 of the Constitution is not absolute in nature. The right protected therein can be limited whenever its exercise is infringing upon the interests of others or is contrary to public interests. A State has an obligation to create a free space for personal development, to guarantee the effective exercise of the said right and at the same time, take important public interests into account.[88] "The State should recognize and respect freedom of conduct and development in such a manner, that it does not result in disproportionate and unjust limitation of others' constitutional rights and freedoms, violation of constitutional order and prejudice of valuable legitimate aims."[89]

Robot "Sofia" can express 62 different kinds of human emotions. They are studying issues such as happiness, disappointment, world history, literature etc. They can talk about issues such as music, art, and can define its own identity, as well as skills of perception logical reasoning, making speeches before large audiences; they also take part in different social campaigns, talks and has the ability to answer questions an express their views on different issues. Technologies are capable of developing their own skills, which is why we believe that robot "Sofia" is exercising the right to personal development, although, they are limited in doing so given the lack of independence. We believe that the legal framework of the said right should also encompass non-personal elements.

Robots do functionally exercise the right to freedom of speech. They can develop not only positive, but also dangerous speech, that can be accessible by various means. One of the problems that has to do with the freedom of expression and the speech of robots if hate speech, whereby robots can publicly engage in such a speech. Can a State regulate robots' speech that is harmful for the rights and legitimate interests of others? A number of researchers are already addressing the harm caused to the society due to robots' manipulation, lies, forcing, misinformation and discrimination.[90] Can the content of the robots' speech be regulated given the existing legal reality, and will the government interference be in breach of the principles of democracy and fairness? How should we determine culpability and who should bear the liability? In our opinion, the said issue shall be considered with respect to Article 17 of the Constitution.

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[87] Judgment of the Constitutional Court of Georgia №1/2/622 *supra* note 85.

[88] Judgment of the Constitutional Court of Georgia №2/4/570 dated 4 August 2016 in the case of "Citizen of Georgia Nugzar Jakeli v. The Parliament of Georgia", para**.** II-13**.**

[89] Judgment of the Constitutional Court of Georgia №2/1/536 *supra* note 82, para. II-65**.**

[90] Woodrow Hartzog, "*Unfair and Deceptive Robots"*, 74 MD. L.Review, 2015, pp. 785, 790- 797 <https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=3675&context=mlr> accessed 15 October 2018 (noting that robots' speech might include lies, fraud, manipulations, intrusion into one's private life).

Article 17 protects, in general, the right to freedom of expression.[91] The case-law of the Supreme Court of Georgia suggests that the freedom of expression is one of the foundations of the democratic society, as well as the main prerequisite for its development and self-determination of persons, which is why its limitation can only be necessary under exceptional circumstances.[92]

Under the case-law of the Constitutional Court of Georgia, the purpose of Article 17 of the Constitution is to "ensure the process of the free exchange of ideas in a democratic society"[93] and is a "prerequisite for the existence of democratic society, as well for its full-fledged development".[94]

Article 17 of the Constitution is not absolute and it can be limited only in accordance with law, insofar as is necessary in a democratic society for ensuring national security, public safety or territorial integrity, for the protection of the rights of others, for the prevention of the disclosure of information recognized as confidential, or for ensuring the independence and impartiality of the judiciary. In the context of the necessity of limitations, the Constitutional Court ruled that "the Court has to assess violated right or the risk of violation caused by a specific program or information against the necessity to interfere within the freedom of expression. The Court should have the possibility to examine the value of the form and the content of expression, its social importance on one hand, and on the other hand - the harm caused by realization of this right".[95]

It is physical persons who hold the rights enshrined in Article 16 and 17 of the Constitution. Under the existing law, sophisticated AI - robots are not within the subjects of constitutionally protected rights. However, in order to establish liability, they "just as human beings, should be able to benefit from the results of the development of the law and the society and the positive results of the progressive and humanistic development of thought; they should be held responsible for committing acts that are actually dangerous for the society, and this should be done in accordance with the rules and to the extent that is objectively necessary and sufficient for the purposes of achieving the goals of imposing liability for specific offences".[96]

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[91] Teimuraz Tughushi and Others, Protection of Human Rights and the Case-law of the Constitutional Court of Georgia (Tbilisi 2013), p. 292.

[92] Judgment of the Civil Chamber of the Supreme Court of Georgia dated 20 February 2012 in the case of "A. F. v. Asaval-Dasavali, Ltd." <http://www.supremecourt.ge/files/upload-file/pdf/ganmarteba7.pdf> accessed 15 October 2018.

[93] Judgment of the Constitutional Court of Georgia №2/2-389 dated 26 October 2007 in the case of "Citizen of Georgia Maia Natadze and Others v. The Parliament of Georgia", para. II-16.

[94] Teimuraz Tughushi and Others, *Protection of Human Rights and the Case-law of the Constitutional Court of Georgia* (Tbilisi 2013) p. 292. Judgment of the Constitutional Court of Georgia №1/1/468 dated 11 April 2012 in the case of "Public Defender of Georgia v. The Parliament of Georgia", para. II-26.

[95] *ibid*, p. 300. Judgment of the Constitutional Court of Georgia №1/3/421,422 dated 10 November 2009 in the case of "Citizens of Georgia Giorgi Kipiani and Avtandil Ungiadze v. The Parliament of Georgia", para. II-6.

[96] Judgment of the Constitutional Court of Georgia №1/6/557, 571, 576 dates 13 November 2014 in the case of "Citizens of Georgia Valerian Gelbakhiani, Mamuka Nikolaishvili and Aleksandre Silagadze v. The Parliament of Georgia", para. II-62-64.

IV. ROLE OF THE CONSTITUTIONAL AND SUPREME COURTS

Inclusion of sophisticated AI - robots within the sphere of law protected by human rights, their recognition them as right holders and adoption of interpretations that are not dependent on personal elements can be accomplished by institutionally independent bodies such as the Constitutional Court or the Supreme Court. We believe it is necessary that the Constitutional Court change the interpretation of the rights protected under the Constitution, recognize separate rights of robots and allow relevant legal procedures. Constitutional and Supreme courts can recognize the rights, the same way as the US Supreme Court rule that racial segregation (*Brown v. Board of Education*) as well as gender discrimination were unconstitutional and as it upheld the gay marriage. The Constitutional Court of Georgia has noted that it interprets constitutional norms not only in the light of a specific provision whereby the right is envisaged, but also in the light of the entire essence of this right.[97] In addition, the Constitutional Court noted that the aim and purpose of the Court is such an interpretation of constitutional rights, that complies with the aims of the constitution, the values promoted therein as well as the essence of the right itself, which, on the other hand, ensures the practical, real and effective exercise of a right and does not make it merely theoretical or illusory.[98] Thus, not only does the Court define rights, but it provides such an interpretation that makes the exercise of this right more efficient. In the given case, recognition of AI as legal subjects will also raise the issues of violation/illegitimate restriction of this right, interference therein and the issue of respective determining liability.

Essentially, robot "Sofia" is already exercising the right to freedom of speech. Is the existing legal order ready to accept innovative technology as legal subjects? Will the Court be able to avoid this issue? Robots do not have access to the Constitutional Court in the existing legal reality. We believe that the Court is capable of discussing the issue of recognizing robots as subjects of protected rights and widening the protected sphere of constitutional rights. Even more so, when there are no arguments that would bar robots from becoming legal subjects. In this regard, it is essential that the law unify not only personal, but also non-personal characteristics; otherwise, the result will be having the dependence of "vassalage" with respect to high technologies. It will be interesting to observe whether the Constitutional or Supreme Court will play the role of promoting progress, or will they maintain the classical legal approach.

Lastly, we believe that the legal system is capable of resolving difficulties brought about by implementation of high performing AI - robots in the society. Applying certain rights to them and addressing the issue of broadening the scope of legal subjects will prepare legal systems for such innovations. Moreover, it will strengthen the democratic culture in legal systems.

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[97] Teimuraz Tughushi and Others *supra* note 91, p.161.
[98] Judgment of the Constitutional Court of Georgia №1/1/477 *supra* note 67 para. I.

CONCLUSION

In Georgia, as well as in the rest of the modern world, large-scale implementation of robots and their progress makes changing of existing international legal conventions as well as numerous legal fields inevitable. This will raise the need to redefine the sphere of legal subjects.

Widening the scope of legal subjects and recognizing the exercise of human rights by robots is linked to a number of issues, and among others - to whether robot is an independent subject of law and whether the actions of AI are considered to be actions of a subject under the existing law, or whether it is necessary at all to convince the courts, the jury or a "neutral observer" in that robots should be recognized as legal subjects.

Under the current Georgian law, legal subjectivity is related to the issues of capacity for rights and legal capacity. Georgian law defines and sets forth the list of legal subjects with rights and obligations. Sophisticated AI technologies - robots do not satisfy these criteria within the existing Georgian legal order and regulations. Hence, they cannot be held liable under the existing law. Under the current legal framework, nor do they have access to international legal instruments and today robots are perceived merely as products.

Essentially, robots do functionally exercise the right to freedom of expression and free speech. This fact makes them a subject to such rights and hence it is necessary to make relevant legislative adjustments. For this reason, we are of the opinion that the legislature should unify personal as well as non-personal elements.

Robots have a unique ability to develop its cognitive abilities without any human supervision or outside control. Given the inexistence of independence, their ability to enjoy the constitutionally protected freedom of personal development is limited.

Robots exercise the right to freedom of religion. Considering the existing legal doctrine regarding the freedom of religion and based on relevant data, potentially it is possible to program religious robots, which will make it necessary to enact legislative changes.

In the techno-nation, the growing application of AI and robots, as well as considering the reality that robots will be given the ability to act and make choices, it will be necessary to address the issue of restricting their rights in order to protect the rights of others. This will inevitably lead to the adoption of relevant technical, ethical and legal regulations and recommendations.

Recognizing legal subjectivity of robots and making relevant changes to the legislation is natural, logical and inevitable. All is just a matter of time.

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THE INSTITUTION OF SUSPENSION OF THE DISPUTED ACT WITHIN THE CONSTITUTIONAL REVIEW

ABSTRACT

Suspension the operation of a disputed act is an essential instrument, which aims to serve efficient protection of human rights and fundamental freedoms in the process of constitutional review. According to the case law of the Constitutional Court of Georgia, this particular role of the mechanism of suspension of the norm is caused by several important factors. Most importantly, suspension the operation of a disputed act is the ability to establish the basis (legal capacity) for the Constitutional Court of Georgia, to provide an instant response when there is an urgent need. Irreplaceable nature of this instrument gains particular importance, not only in practical terms but academic as well. Within this paper the basic essence of suspension, the certain precondition for suspension well-established by the case law of the Constitutional Court of Georgia case law, particular issues such as the interrelation between entail irreparable consequences to one of the parties and the restriction of the rights of the others is discussed. Further, the paper analyses the non-systematic approach of the legislator in the legislative amendments to the instrument and the shortcomings identified in the constitutional review of the court.

INTRODUCTION

The literature dedicated to human rights is usually characterized by an extremely high-sounding terminology. Hence, it seems that the authors are trying to emphasize the utmost importance of individual liberties by utilizing the most high-flown comparisons. The phrase "vitally important" can frequently be found in such works, however its meaning is not always as literal as it is in the case at hand. In order to demonstrate that the mechanism of suspension of the norm is indeed vital for carrying out essential tasks of the Constitutional Court of Georgia and guaranteeing the performance of its activities, it would suffice to examine just one case from the practice of the Court. In one of such cases, the Court had to suspend a norm, which was

directly affecting the human life.[1] Simplicity and pragmatism are typical to such clear examples, whereby the Court is bound to act within the frames of an unambiguous area, and where there are almost no alternatives to the decision. However, other practical examples illustrate that the complexity of the adoption of the mechanism of suspension of the norm consists, on the one hand, in achieving the balance of interests, namely - the protection of the political equilibrium, and on the other hand - in insufficient efficiency of the aforementioned instrument.

In parallel to the importance of the mechanism of suspension of the norm, in a practice of judicial review of the Constitutional Court of Georgia is to increase its purpose. In the vast majority of cases, the applicants submit a motion to the suspension of the norm but not so successfully. The number of suspended norms is scarce. Conceivably, this result, on the one hand, may be explained by the cautious approach of the Court, or by understanding the complexities of the accompanying risks, and on the other hand, by an inconsecutive and unsubstantiated claim of the complainants. In both cases, it is crucial to understand the purpose, basic standards and practical characteristics of the suspension of the norm. In addition, the viability of any mechanism essentially depends on the vision and formulation of its user, as well as the legislative author. Despite the fact that, at first glance, the Constitutional Court of Georgia develops a sequential practice, in certain decisions cases decided by the Court leaves the space for a divergent, contradictory opinion.

I. The Instrument of Suspension The Operation of A Disputed Act as The Sole And Exclusive Protection of The Right

The actual effectiveness of the right of the fair trial set forth in the Constitution is of great importance for the Rule of Law and the Democratic State. “The most important guarantee for securing the full enjoyment of this or that right is exactly the possibility to protect it before the court. If there is no possibility to avoid the breach of a right or restoration of breached right, if there is no legal leverage, enjoyment itself of the right will be questioned”.[2]

According to the interpretation of the Constitutional Court, the right to a fair trial, among others, protects fair hearing and deciding in the Constitutional Court. Furthermore, "the right to access to the court, which also entails the right to access to the Constitutional Court, cannot be illusionary, but should create a real possibility of restoring the right in a due manner and provide for an efficient tool of protecting the right."[3] Judicial review (Constitutional Justice) is effective if the

[1] Citizen of Georgia Levan Gvatua v. the Parliament of Georgia Recording Notice №3/9/682, the Constitutional Court of Georgia, November 25, 2015.
[2] Public Defender of Georgia v. the Parliament of Georgia Decision №1/466, the Constitutional Court of Georgia, June 28, 2010. Pharagraph II-14.
[3] Non-Commercial Entity “Human Rights Education and Monitoring Centre (EMC)” and the Citizen of Georgia Vakhushti Menabde v. the Parliament of Georgia Decision №3/2/577, the Constitutional Court of Georgia, December 14, 2014. Pharagraph II-30.

complainant has an expectation and a real possibility to protect his rights - through the way of effective prevention or prevention of violation of the right. In order to ensure effective protection of the rights of the complainant, the legislation envisages suspension the operation of a disputed act. It is noteworthy that the existing legislation on Constitutional Proceeding for preventive means of protection of rights envisages only one mechanism - Suspension of a disputed act. In this respect, the legislation of other countries is, in some cases, more flexible. Under Article 59 of the Law of the Republic of Albania "On the organization and functioning of the Constitutional Court" the Constitutional Court may decide to suspend the activity of the political party or organization until it will provide the final decision.[4] Under article 64 of "Rules of the Constitutional Court of Bosnia and Herzegovina", The Constitutional Court may, of its own motion or at the request of an applicant or appellant, adopt an interim measure it deems necessary in the interest of the parties or the proper conduct of the proceedings before the Constitutional Court.[5] Under article 32 of Act "on the Federal Constitutional Court of Germany," in a dispute, the Federal Constitutional Court may provisionally decide a matter by way of a preliminary injunction if this is urgently required to avert severe disadvantage, to prevent imminent violence or for another important reason in the interest of the common good.[6] The preliminary injunction is also understood as a court's right to suspend the entry into force of the law.[7]

Moreover, in some countries, the constitutional courts enjoy competence to direct state authorities to carry out positive actions to prevent damage to the applicant (e.g Federal Republic of Germany, Malta, Liechtenstein, South Africa, Swiss Confederation). The main purpose of the mechanism of suspension of the disputed act, as already noted, is to prevent the irreparable violation of the person's right. The disputed norm, in some cases, may cause irreversible damages to the plaintiffs, when the timely and principled response of the court is given to the essentially valuable force of life. The disputed norm may, in some cases, cause irreparable damage to the claimant, in such a time the timely, principled response of the court is given to life-saving valuable power.[8]

According to the interpretation of the Constitutional Court of Georgia "suspending the force of a disputed provision is an extremely relevant preventive measure for protecting a right and signif-

[4] Article 59, Law of the Republic of Albania "On Organization and Functioning of the Constitutional Court", July 15, 1998, accessible here: http://www.gjk.gov.al/web/law_nr_8577_date_10_02_2000_84.pdf [last visited on June 1, 2019].
[5] Article 64, "Rules of Proeedings of the Constitutional Court of Bosnia and Herzogovina", November 17, 2014, N569/14, accessible here: http://www.ccbh.ba/osnovni-akti/pravila-suda/drugi-dio/?title=poglavlje-ii-odluke-i-drugi-akti-ustavnog-suda [last visited on June 1, 2019].
[6] Article 32, Law of Germany "On the Federal Constitutional Court", August 11, 1993, BGBl. I S. 1473. 8373 accessible here: https://www.gesetze-im-internet.de/bverfgg/BJNR002430951.html [last visited on June 1, 2019].
[7] Anita Rodiņa, 'Content and problematic aspects of interim measure: jurisprudence of the Constitutional Court of Latvia' (2013) 6 Constitutional Law Review 118 in Act on the Federal Constitutional Court. Legal texts, 29. Bonn: Internationes, 1996, p. 29.
[8] Citizen of Georgia Levan Gvatua v. the Parliament of Georgia (n 1).

icantly conditions the efficiency of the Constitutional court".[9] Consequently, use of the institution at the necessary time and required scale it is necessary and indispensable for the claimants who are in danger of violating fundamental rights. Thus, the existence of this preventive institution for the protection of the rights acquires a particular assignment for its importance and the circumstances that the legislation does not provide other preventive measures to protect the rights.

II. PRECONDITIONS OF SUSPENSION OF OPERATION OF A DISPUTED ACT AND ASSOCIATED RISKS

Under Article 25(5) of the Organic Law of Georgia on Constitutional Court of Georgia, "if the Constitutional Court finds that operation of a normative act may entail irreparable consequences to one of the parties, can suspend the operation of a disputed act or its relevant part until a final judgement on the case is adopted or for a less period of time". Mentioned norm requires the fact of causing irreparable damage to one of the parties as a precondition of suspension. However, this mechanism is not only related to the satisfaction of these circumstances. In other words, the Constitutional Court's practice established the preconditions, in case of which the conflict of values between legal safety and effective protection of human rights will be decided in favor of the latter.

The Constitutional Court decides the issue of suspension of the disputed act *ex officio*[10] or by the request of the parties. In a number of cases, the Constitutional Court declared that according to article 25(5) of the organic law of Georgia "On the Constitutional Court of Georgia" established crucial mechanism of constitutional jurisdiction ensuring preventive protection of rights or public interest in case there is a danger that the disputed norm may result in irreparable consequences. According to the interpretation of the Constitutional Court of Georgia, "an irreparable consequence means a situation where the norm can cause irrevocable violation of the right and consequences cannot be corrected even if the norm is recognized as unconstitutional. Further, the person has no other legal capacity to avoid such an outcome".[11]

At the same time, according to the Constitutional Court, "motion on the suspension of the disputed act may be met if such a decision can prevent the irreparable consequence of the appli-

[9] Non-Commercial Entity "Human Rights Education and Monitoring Centre (EMC)" and the Citizen of Georgia Vakhushti Menabde v. the Parliament of Georgia (n 3). Paragraph II-35.

[10] On its own initiative, the Constitutional Court suspended the disputed norm just once. See the group of the members of the Parliament (Zurab Abashidze, Giorgi baramidze, Davit Baqradze and others, totally 39 deputes) v. the Parliament of Georgia Recording Notice N3/6/668, the Constitutional Court of Georgia, October 12, 2015. Paragraph II-26-28.

[11] Georgian young lawyers' association v. the Parliament of Georgia Recording Notice № 1/3/452,453, the Constitutional Court of Georgia, May 20, 2008. Paragraph II-2.

cant's side".[12] Based on the above, the grounds for suspension of the disputed norm may only be in the exceptional case if their suspension changes the legal status of the complainant, it is possible to prevent damage that could result by operation of the disputable norm.

Furthermore, in deciding the issue of suspension of the disputed act, the Court also takes into consideration the interests of third parties. "In each specific instance when deciding to suspend a disputed provision the court should evaluate the threat of violating the right of the others caused by suspension".[13] Therefore "the Court applies suspension measure solely in extreme circumstances, only in the cases, when the threat of irreparable damage to a party is clear and there are no risks of unjustified limitation of a third party or public interest".[14]

Accordingly, the suspension of the disputed norm is related to the number of conditions, which should be present cumulatively: 1. The threat of irreparable consequence to the plaintiff, which can not be eradicated if the Court satisfies the claim; 2. This threat should be actual and instant; 3. The person has no other legal capacity to avoid such consequences; 4. The suspension of the disputed norm shall result in the prevention of the damage to the applicant (prevention); 5. Suspension of the norm shall not constitute an unjustified restriction on the rights of others.[15]

The suspension of the norm on the basis of these preconditions is well established in the legislation of other countries and in the international courts. The Venice Commission suggests, that the suspension conditions should not be too strict.[16] However, especially in the case of normative acts, when applying the suspension measure, it should be taken into consideration the damage that can not be remedied.[17]

However, when there is a presumption of constitutionality of the disputed act, suspension of the norm is more precarious, because the norm in the legal area will be terminated without the substantive study of the issues. Prolonged "legal vacuum" created by the suspension of a disputed provision and thus violation of third party interest were the threat seen by the Constitutional Court.[18] According to the interpretation of the Constitutional Court of Georgia, "generally com-

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[12] "Television Compani Sakartvelo Ltd" v. the Parliament of Georgia Recording Notice №1/7/681, the Constitutional Court of Georgia, November 13, 2008. Paragraph II-34.

[13] Citizen of Georgia Sophio Ebralidze v. the Parliament of Georgia Recording Notice № 1/509, the Constitutional Court of Georgia, November 7, 20012. Paragraph II-9.

[14] Non-Commercial Entity "Human Rights Education and Monitoring Centre (EMC)" and the Citizen of Georgia Vakhushti Menabde v. the Parliament of Georgia (n 3). Paragraph II-34.

[15] Ketevan Eremadze, *Freedom guardians in search of Freedom,* (Meridiani 2018) 406.

[16] European Commission for Democracy Through Law (Venice Commission), *Comments on the Draft Law on the Constitutional Court of the Republic of Serbia* <www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2007)039-e> 'accessed 20 November 2018'

[17] European Commission for Democracy Through Law (Venice Commission), *Study on Individual Access to Constitutional Justice,* <www.venice.coe.int/WebForms/documents/default.aspx?pdffile=CDL-AD(2010)039rev-e > 'accessed 25 November 2018'

[18] Non-Commercial Entity "Human Rights Education and Monitoring Centre (EMC)" and the Citizen of Georgia Vakhushti Menabde v. the Parliament of Georgia (n 3). Paragraph II-19.

pulsory rule of behavior determined by normative act serves the correcting the relevant areas of public life and achievement of the Specific legitimate aim, defending public and private sector's interest. In some cases, Suspension the operation of a disputed act may limit both public and private interests and may damage the value of which is to be protected".[19]

In view of this, special attention should be given to the scope of the regulation, the aims and legal condition of the people who have interest in norm maintenance. Suspension of the disputed norm is a significant threat to legal security. On the grounds of legal security the legislation of some states does not envisage the mechanism of suspension of a disputed act (e.g.: Algeria, Andorra, Armenia, Azerbaijan, Belarus, Bulgaria, Czech Republic, France, Hungary, Latvia, Luxembourg, Moldova, Montenegro, Portugal, Russia, Sweden, Ukraine). Apart from legal security, the suspension tool is also the subject of politically motivated criticism, since the Constitutional Court can solve the matter without consideration on merits and can influence the political processes through these and other leverage.

However, rejection of the use of this mechanism based on the fear of negative consequences of the suspension of the norm has the same risk of damaging the benefits of the constitution as it does at every time, with a thoughtless use. Statistically, constitutional courts final judgments take months, in some cases years. In this process the suspension of disputed provision is the only way, on the one hand, for complainant not to suffer irreparable damage and, on the other hand, to give the Constitutional Court a sufficient, objective time for a reasonable decision on the case. Therefore, the Constitutional Court has to take special care during decision making to correctly evaluate opposed interests, associated risks of suspension or denial of suspension and to decide in a matter, when absolute realization and protection of fundamental rights to be unquestionable.

III. LEGISLATIVE FORMATION OF THE INSTITUTE OF SUSPENSION OF NORMATIVE ACT

The initial edition of the suspension instrument has been the subject of legislative changes twice. On both occasions, the Constitutional Court found the newly established norms unconstitutional with respect of Article 42 of the Constitution of Georgia (edition of the Constitution till the 16th of December 2018), on the grounds of effective protection of human rights.

In the first case, the legislator restricted the terms of suspension of the normative act and after the expiration of the time limit ensured suspended act automatically to become valid.[20] The court simply should have evaluated constitutionality of the norm, in the "regime of counting down stopwatch". The legitimate aim of this regulation of the legislator was to prevent the negative consequences of the suspension of the norm for the third parties. The Court shared the

[19] *supra* note 20, Paragraph II-22.
[20] The Law of Georgia (649-IIs) on Amendments to the Organic Law of Georgia on the Constitutional Court of Georgia, Article 1(3).

mentioned legitimate aim and recognized that the normative act served the protection of the third party from negative consequences due to the suspension of a disputed act. However, the Court declared the provision unconstitutional on the grounds of blanket, absolutely restricting character and *a priori* prioritized the third-party interests. The Court's ability to balance opposing interests, which is the main element of the function of the Constitutional Court, was taken by the Parliament and in this way the Court's flexibility was significantly reduced.[21] The Court considers, that achieving the legitimate aim was possible by less limiting measures. In particular, suspending the force of a disputed provision with respect of certain individuals. Due to the Constitutional Court's interpretation, in certain instances, when, for instance, the possibility of damage caused by the suspension of the normative act is high, such mechanism could indeed represent a more accurate, better fitted tool for solving a problem, which on one hand protects the interests of a plaintiff to avoid violation of his/her rights and on the other hand suspension of the normative act less likely causes reducing the risk of violation of public interests or reducing the threat of violation of third persons rights.[22]

Allegedly, this kind of explanation and approach provided by the Court should help the legislator in understanding the importance of the suspension instrument, as well as in the process of finding the best ways to form a new edition.[23] However, second, the newly formed regulation, was still not viable.

In the new model of suspension, again based on the grounds of protecting the interests of third parties the flexibility of the instrument was limited. The first difficulty in the legislative change was the stages of the use of the institute of suspension. The Court was authorized to suspend the norm at the Stage of Preliminary Session. In connection with this, the plaintiff's position has been shared that, as a result of the enforceability of a disputed normative act, irreparable damage could be caused at any stage of the hearing.[24] As for the second issue, the legislator considered that in some cases the effect of temporary suspension was consistent with the recognition of the norm as unconstitutional, and based on this motive, the use of this instrument was subject to the Plenum competence. The Constitutional Court declared a new edition of the norm unconstitutional, as it considered the unjustified prohibition of suspension of the norm for the Chamber, under conditions where the Chamber was authorized to recognize disputed act unconstitutional. Furthermore, it was pointed out that deciding the issue by the Chamber and later by the Plenum

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[21] Non-Commercial Entity "Human Rights Education and Monitoring Centre (EMC)" and the Citizen of Georgia Vakhushti Menabde v. the Parliament of Georgia (n 3). Paragraph II-43-44.
[22] *ibid* Paragraph II-25.
[23] The Law of Georgia (5161-RS) on Amendments to the Organic Law of Georgia on Constitutional Court of Georgia, Article 9(a).
[24] Members of Partlament of Goergia (Davit Bakradze, Sergo Ratiani, Roland Akhalaia, Levan Bejashvili and other 38 parlamentarians), Citizens of Georgia – Erasti Jakobia, Karine Shakhparoniani, Nino Kotishadze, Ani Dolidze, Elene Samadbegishvili and others, also members of Parlament of Goegia (Levan Bejashvili, Giorgi Ghviniashvili, Irma Nadirashvili, Petre Tsiskarishvili and other 38 parlamentarians) v. the Parliament of Georgia Decision № 3/5/768,769,790,792, the Constitutional Court of Georgia, December 29, 2016. Pharagraph II-132.

adopted by majority of the full list of members, was unreasonable for the general rule of decision making by the Constitutional Court.[25]

If the Constitutional Court indicated that the new regulation was unreasonable and was making the instrument (suspension of the norm) illusory, the Venice Commission considered the same issue strange and illogical. The newly formed edition was completely rejected by the Commission's conclusion.[26]

It should be noted that the amendments made by the legislature were preceded by the suspension of the norm in two important cases such as "Rustavi 2"[27] and "National Bank".[28] The presumption of a conscientious legislator gives us the reason to think that his motivation to make changes to the existing rule and to somehow limit the limits of the mechanism must have been determined by the difficulties seen in practice, reducing the risk of violation of the interests of third parties and not dictated by the fear of suspension of the disputed norms in the above mentioned cases. However, it is also clear that in the best case, the legislator could at least share the position expressed in the pre-judicial decisions of the court and insured the risks in the individual cases allowed for individual suspension. It is worth mentioning that the legislative amendment was not supported by the part of the Parliamentarians from the very beginning and this opposing part was the plaintiff in the case. By addressing the Constitutional Court, the Plaintiff successfully continued the fight, which was lost at the legislative level.[29] As a result, they defended the effectiveness of the Constitutional Court, in other words, human rights and freedoms.

Nowadays, the reform of the Organic Law of Georgia on "Constitutional Court of Georgia" is not related to the mechanism of suspension of the norm. The position of the legislator to leave this instrument unchanged, may be a result of sharing a convincing argument of the Court, as well as a result achieved by the enforceability of the decision of the Constitutional Court.

Undoubtedly, the role of the legislator in the effective functioning of the instrument of suspension is visible in presenting the adequate model for the Constitutional Court, and afterwards its practical efficacy is the Court's burden. This, seemingly natural process from the legislative body, is seriously obstructed by the deficiency of the right decisions. Generally, the defective or more likely unconstitutional norms adopted by the Parliament on the Constitutional Court, are a threat not only to the legal order but also the functioning of the Court itself, the protection of human rights. Taking into consideration the above-mentioned assumption and previous changes,

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[25] *Supra* note 24, paragraph II-163.

[26] European Commission for Democracy Through Law (Venice Commission), *Georgia Opinion on The Amendments to The Organic Law on The Constitutional Court And to The Law on Constitutional Legal Proceedings* <https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)017-e> accessed 25 November 2018.

[27] "Brodcasting Compani RUSTAVI 2 LTD" AND "Television Compani SAKARTVELO LTD" v. the Parliament of Georgia Recording Notice №1/6/675, the Constitutional Court of Georgia, November 22, 2015.

[28] Members of Partlament of Goergia (Zura Abashidze, Giorgi Baramidze, Davit Bakradze and other 39 parlamentarians), v. the Parliament of Georgia (n 7).

[29] *Andras Sajo, Limiting Government: An Introduction to Constitutionalism* (M Maisuradze tr, T Ninidze (ed) Sezanne Print 2003) 291.

it is important that the Parliament of Georgia make any subsequent amendment more scrupulously, proportionally to the objective of the goal.

In addition, it is clear that equipping the Constitutional Court with an adequate instrument and creating mechanisms that will ensure the purposeful functioning of the court is not only the prerogative of the legislative body but also, its obligation.

IV. DEFICIENCIES IN PRACTICE IDENTIFIED WHILE SUSPENDING THE OPERATION OF THE NORM

The Constitutional Court used a temporary measure in practice – suspension of the operation of the disputed norm – several times (six times). The aim of the present article is not a detailed review of each of them, but the attention will be paid to the deficiencies that the authors think are in practice.

A. Assessment Criteria for Irreparable Damage to One of The Parties

As already mentioned, one of the preconditions for the suspension of the operation of the disputed norm is the fact of causing irreparable damage to the party. At the same time, this is the circumstance that the Court assesses in the first place (in case of its absence, there is no need to evaluate other preconditions for suspension of the norm). The obligation to indicate the damage and to assert it is the burden of the complainant. Although the Court has the competence to suspend the norm by its own initiative, in the absence of sufficient reasoning, it always refuses the final suspension of the norm. On the one hand, such an approach may be justified with the objective caution of the Court, but on the other hand, the absolute transfer of the burden of proof to the claimant reduces the role of the court, which ultimately raises questions about the efficiency of justice.

B. The Danger of Deprivation of Liberty as a Reparable Damage

A number of complainants apply to the Constitutional Court with demand to suspend the disputed norm. This is especially true in relation to the criminal norms. After the Constitutional Court of Georgia made its first decision on the proportionality of the penalty set for certain acts,[30] the claims to assess the constitutionality of the punishments and motions on suspension of the provisions establishing responsibility have increased. However, the Constitutional Court does not uphold the claim regarding the suspension of the disputed norm of the complainants who have faced a particular threat to deprivation of liberty, or who are already imprisoned, based on the same argument. In particular, according to the firmly established practice, the provisions of criminal liability in the form of deprivation of liberty (which may be unconstitutional) are not

[30] Citizen of Georgia Beka Tsikarishvili v. the Parliament of Georgia Judgment №1/4/592, the Constitutional Court of Georgia, October 24, 2015.

causing irreparable damages to the complainant. In other words, the Court notes that the judgement of the Constitutional Court is the basis for the revision of the judgment, including the part of the imposed sentence. For this reason, the fact that the applicant may be imposed a punishment in the form of deprivation of liberty on the basis of disputed provision, can not be used for justification of the irreparable result.[31] Consequently, the fact that the decision of the Constitutional Court creates a legal basis for revising the criminal case, gives the complainant a chance to get the unfairly restricted freedom based on unconstitutional norms back. The Constitutional Court itself creates comfort in the absence of additional justification to refuse the suspension of the disputed norm.

Naturally, the relevant justification for each act adopted by the Court and the objective reasoning of the decision is essentially important for the authority of the Court. According to the interpretation of the Constitutional Court, "the part of a right to a fair trial is the right to reasoned judgment […] Unreasoned, unclear and general formulations may create impression to the parties that the justice was arbitrary and lacked transparency. The Court needs to demonstrate the reasoning the judgment is based on with enough clarity."[32] Moreover, "the decisions of the Constitutional Court shall promote development of the law. Whether each decision is in accordance to this goal, ho effective and fair the judiciary is; objective responses to these questions are in the decisions itself".[33]

Consequently, in the justification of certain acts the Court shall be required to be consistent, adequate and should not invoke the feeling of injustice and bias in the society (especially for the claimant party). As already mentioned, when the Court reviews the constitutionality of the punishments, it does not uphold the applications on the suspensions of the operation of the norm on the grounds of absence of irreparable damage. The Court notes that if the disputed norm is recognized as unconstitutional, the decision of the Constitutional Court as the newly revealed circumstance will become the basis for the complainant's release.

It seems paradoxical that the Constitutional Court develops such an argument in relation to the right that the Court describes in the following manner: "it represents one of the cornerstones of the fundamental rights and, according to the Constitution, is subject to special protection."[34]

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[31] Citizen of Georgia Paata Cherkezishvili v. the Parliament of Georgia Recording Notice №1/17/882, the Constitutional Court of Georgia, October 13, 2017; Citizen of Georgia Lasha Bakhutashvili v. the Parliament of Georgia Recording Notice №1/2/696, the Constitutional Court of Georgia, February 6, 2017; Citizen of Georgia Jambul Gvianidze, Davit Khomeriki and Lasha Gagishvili v. the Parliament of Georgia Recording Notice №1/21/701, 722, 725 the Constitutional Court of Georgia, December 20, 2016; Citizen of Georgia Giorgi Putkaradze v. the Parliament of Georgia Recording Notice №1/11/657, the Constitutional Court of Georgia, June 17, 2016.

[32] Non-Commercial Entity "Human Rights Education and Monitoring Centre (EMC)" and the Citizen of Georgia Vakhushti Menabde v. the Parliament of Georgia (n 3). Paragraph II-10.

[33] Ketevan Eremadze, 'Topical problems related to legal effect of decision of the Constiutional Court of Georgia' (2013) 6 Constitutional Law Review 3.

[34] Citizens of Georgia – Levan Izoria and Davit-Mikheili Shubladze v. the Parliament of Georgia Judgment №1/2/503,513, the Constitutional Court of Georgia, April 11, 2013. Paragraph II-1.

Moreover, the Court clarifies that "the restriction of physical freedom and especially the most intense form of it - deprivation of liberty hinders and sometimes completely excludes the realization of other rights and freedoms by an individual".[35] Consequently, it is incomprehensible and unexplained in the light of this fact what gives the Court underlying basis to say that the deprivation of the liberty of persons based on the unconstitutional norm is not causing irreparable damage to them. It is true that if the Constitutional Court declares the disputed provision unconstitutional, revision of the judgment will be done to prevent human rights violation in the future, but from a submission of a constitutional complaint to the Court before the final judgment (which is often related to a long-term perspective) on the basis of unconstitutional norm, unconstitutionally deprived liberty will always be irreversible for the complainant. In this regard, parallel can be drawn to a completely opposite practice of the Constitutional Court of Germany, according to which depending on the unconstitutional basis deprivation of a person's freedom is a threat of irreparable damage to a person based on the argument that freedom has a special weight in the constitutional values.[36]

Consequently, the reasoning provided by the Constitutional Court of Georgia does not comply with the actual content of the restriction while evaluating the threats of irreparable damage to the complainant. The reasoning developed by the Court in the process of suspension of the norm of criminal responsibility is causing injustice for the complainants, which should be considered logical and rational in the case at hand. In the case of deprivation of liberty people are deprived of other rights, hence, deprivation of liberty based on an unconstitutional norm is one of the most intense forms of violation of human rights. Accordingly, it is a significant gap in the practice of the Constitutional Court, that there is no space for the suspension of norms of responsibility. In this regard, it is interesting to rely on the decision of the Constitutional Court of Germany in the light of which the Court's assessment of the use of the temporary measure is the composition of the specific crime and the risks of the person. In contrast to the Constitutional Court practice for the effects of the judgment of the Constitutional Court in the criminal law, without consideration danger of the crime, threats from the person and other related issues, the impossibility of restoring damages are excluded. This approach significantly degrades the basic human rights, which is why it is necessary to improve the practice of the Constitutional Court of Georgia in this regard.

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[35] Public Defender of Georgia v. the Parliament of Georgia Judgment №2/1/415, the Constitutional Court of Georgia, April 6, 2009. Pharagraph II-6.

[36] Order of 19 May 2010 BvR 769/10, Pharagraph 2, available is here: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2010/05/rk20100519_2bvr076910.html accessed on November 20, 2018. However, in this case the Court refused to decide a matter provisionally by way of a preliminary injunction indicating the circumstance that the complainant was a significant threat. In particular, he was convicted of committing crimes like human trafficking, body injury, illegal deprivation of liberty and sexual violence. Taking this into consideration there was a risk that he would commit a crime that could cause physical and psychological damage to the victims.

C. The Appointment of Judges Based on Possible Unconstitutional Norms as Reparable Damage

An interesting example of the refusal to suspend the norm is found in the №3/2/717 Recording Notice of the Constitutional Court.[37] The complainants requested to suspend norms that regulate the appointment of judges.[38] However, the Court did not consider a possibility of the arbitrary decision on appointment of judges and subsequent impossibility to appeal as an irreparable damage to the applicants. Public goals such as the efficiency of the justice and the interests of other candidates were named by the respondent in order to justify a necessary increase of the number of judges at the court.[39] The difficulty of this decsion is caused by the high political price of the issue and complexity of damage. However, since there was no legal possibility to dismiss already appointed judges or to reverse the appointment procedure, it was quite obvious that the Court's refusal to suspend the disputed norm would have caused an irreparable damage to the applicants. This is true, especially, when considering the legal effect of the judgement of the Constitutional Court. Even if the Court declared the disputed norms unconstitutional, it might have still been impossible to alter the decision on the appointments already made on judges.

In that case, the Court could take into consideration the interests of the judiciary not being under a potential, but under a real threat. In that regard, instead of formal approach, the Court should have taken more accurate way when balancing conflicting interests.

The focal point of the case was the analysis and subsequent evaluation of the interests that allegedly confronted the interests of the complainant. In particular, according to the Court's assessment, there were two interests in conflict with the complainants' interest. Firstly - the interest of other judges who participated in the competition and secondly – public interest to a speedy trial. Unfortunately, the Court did not consider that the danger the disputed norms were creating for the complainant were equivalently problematic to other judges as well. As for the public interest, increase of the number of judges for the purpose of achieving speedy trial, could not outweigh the public interest of appointment of the judiciary pursuant to the constitutional norms. In addition, it should be noted that any mistake made in the judiciary system related to the appointment of the judges or termination of their authority, is irreperable *ipso facto*.[40] If the Court had shared the above-mentioned reasoning, the difficulty of suspending the norms under the established standards would have remained in the part of the complainant's irreparable damage. In particular, the claimant party was damaged by a possible unsubstantiated decision and impos-

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[37] Citizens of Georgia – Mtvarisa Kevlishvili, Nazi Dotiashvili and Marina Gloveli v. the Parliament of Georgia Recording Notice №3/2/717, the Constitutional Court of Georgia, June 1st, 2016.
[38] *ibid* paragraph II-16.
[39] *ibid* paragraph I-21.
[40] The same arguments were mentioned by judges in the dissenting opinion. See, Dissenting opinion of the members of the Constitutional Court – Ketevan Eremadze and Maia Kopaleishvili on the Recording Notice №3/2/717 of the Constitutional Court of Georgia of 2 June, 2016.

sibility of appeal, however, we can not exclude with absolute probability that this damage could be restored in the future. In that regard, since no damages were present for the third parties and the fact that appointment of the judges on constitutional norms would definitely overweight the public interest of speedy trial, the Constitutional Court was obliged to share above-mentioned logic and suspend the legal force of the disputed norm. Thus, the efficiency of the mechanism of suspension should not be reduced by indicating the possibility of future hypothetical remediation. It is noteworthy that the Constitutional Court was allowing with the previous practice the existence of a normative act that could not contain the threat of damage to the interests of third parties and that it would not be justified to assess the suspension with the strict framework.[41] The Court could have balanced the opposing interests with such an approach.

Knowing its own slow decision-making pace the Court should have predicted the possible negative consequences if it declared the norms unconstitutional. Alternatively, the Court could decide the case rapidly, which also would have saved the interest of the claimants. Taking into consideration the arguments, it is arguable if there was a mistake when the Court did not suspend the norm or the solution itself is correct, though "strictly formalistic". In any case, it is unequivocal that the appointment of judges on the grounds of disputed norms has not been helpful for the justice system and human rights at all.

D. Practical Shortcomings Related to Balancing of The Third-Party Interests

As already noted, when deciding on the suspension of the operation of the disputed norm, the Constitutional Court assesses the negative legal effects caused by the suspension of the norm. In other words, the norm will be suspended only in the case of exemption, when the benefit protected by the suspension of the act (irreparable damages to the complainant) exceeds the risk of violation of the rights of others. In accordance with the practice of the Constitutional Court, "in each case while making the decision on suspension of the disputed norm the Court shall assess a threat to the violation of the rights of others".[42] In this sense, however, the Court is not consistent with regard to the risk assessment of third parties and/or public interest.

With regard to this issue the Recording Notice of the Constitutional Court of Georgia of 22 November, 2015 in the case of "Broadcasting Company Rustavi 2 Ltd" and "TV Company - Sakartvelo Ltd" v. the Parliament of Georgia" is interesting. In this case, the Constitutional Court of Georgia granted complainants' motion and suspended article 268.z of the Civil Procedure Code of Georgia pending final decision. The disputed provision set out a rule on immediate enforcement of a judgment of the court of first instance. In particular, if the delay of enforcement of the judgement caused by extraordinary circumstances may inflict substantial damage to

[41] Non-Commercial Entity "Human Rights Education and Monitoring Centre (EMC)" and the Citizen of Georgia Vakhushti Menabde v. the Parliament of Georgia (n 3). Paragraph II-40-41.
[42] Citizens of Georgia – Giorgi Okujava, Elene Skhirtladze, Giorgi Ghlonti and others v. the Parliament of Georgia Recording Notice №1/5/860, the Constitutional Court of Georgia, February 7, 2017. Paragraph II-13

the party requesting payment, or if the delay may make the enforcement impossible, at the request of the parties, the court may, in full or in part, order immediate enforcement of judgements.

The Constitutional Court suspended the operation of the disputed norm on the grounds that the immediate execution of the decision of the common court against the complainant might have caused the loss of the right to the disputed property. At the same time, the complainant had no foreseeable legal opportunity to return the property, which would cause irreparable damage.[43] However, in the Recording Notice, the Constitutional Court did neither assess the scope of the disputed provision, nor the legal relationship regulated on its basis. The Court suspended the disputed norm without referring to any of its normative content (it is noteworthy that the Constitutional Court declared only the normative content of the disputed norm unconstitutional, in particular, the normative content of sub-paragraph "g" providing for the immediate enforcement of a court judgement on the transfer of disputed property). In addition, the Court does not assess the threats of violation of the rights of others due to the suspension of the norm operation in its acts. Consequently, the Court, without additional argumentation, deviated from the standards of suspension established by its own case-law.

Special attention should be paid to the difficulties that emerged from this recording notice of the Constitutional Court and the elimination of which has since become a problem for the common courts. In order to demonstrate the scope of the problem, we will briefly review the suspended norm and the risks that the Constitutional Court had not (could not) foreseen and were left beyond the legal assessment. More specifically, in the practice of the common courts the immediate enforcement was used with respect to various disputes, for example, the disputes related to the non-performance of contract and other property disputes, including the cases where immediate performance of the action agreed by the liable person is essential and vital for the complainant. In addition, this provision was also actively used in reviewing family matters, in particular, juvenile cases, where the issue was related to granting the right to take a child abroad, as well as determining the place of residence of a child and the regulation of parental and child relations. In addition to civil disputes, immediate execution was also applied to administrative cases, including the claims on annulment of an individual administrative act, on issuing of an administrative act and on performing an action.

In this respect, the practice of the common courts and the circumstances of how the judicial body tried to define/modify the legal vacuum for human rights is interesting. The ruling of the Supreme Court of 20 May 2016 (Case No. 260-248-2016) reflects the reasoning of Tbilisi City Court and the Court of Appeal, according to which, despite the fact that the Constitutional Court suspended the norm of the immediate enforcement, the courts ordered immediate enforcement on judgment, including the reference to international conventions and indication of how im-

[43] "Brodcasting Compani RUSTAVI 2 LTD" AND "Television Compani SAKARTVELO LTD" v. the Parliament of Georgia (n 24).

portant it can be for the development of the child and its relationship with the parent (in most cases) the immediate execution of the decision made on this issue. Consequently, the common courts tried to bring in action the suspended norm in the specific case through the references and analogy of the international conventions and other arguments. However, decisions made by the common courts in favor of human rights and informal approach to the issue may be assessed positively. The protection of human rights is the primary function of the Constitutional Court. However, according to certain opinions in scholarly literature, the protection of human rights is primarily a function of the common court.[44] The Federal Constitutional Court of Germany notes that the Common Courts are obliged to tackle the facts of violation of the fundamental rights enshrined in the Constitution.[45] In terms of the protection of the basic rights, both Common Courts and the Constitutional Court perform parallel functions.[46]

IN LIEU OF CONCLUSION

Assessment and adjudication of the case to the Constitutional Court is often related to the long-term perspectives.[47] Due to the objectives of restoration of the violated rights or prevention thereof, long-term perspectives of adjudication on the dispute in some cases is sufficient ground for considering the Court as an inefficient mechanism for defending complainant's constitutional rights. Such assumption is obvious during acute disputes, especially when the timely reaction from the Court is decisive to neutralize the risks of irreversible violation of complainant's rights.

Suspension of operation of contested provision is a significant competence of the Constitutional Court, in which the Court has the capacity to suspend the operation of possibly unconstitutional provision, before it adopts final judgment. The purpose of this competence is to avoid the irreparable harm for complainants, in order the constitutional justice to be sensible for them. Despite of functional importance of this competence, the Court should be considerate of the negative consequences, which can be caused in some cases by the suspension of legal provision. Therefore, the Constitutional Court faces challenge to balance the opposing interests.

The particular examples discussed in this article give us the possibility to conclude that there are cases in the Court's practice that can be characterized by certain shortcomings. These shortcomings are the subject not only to discussions but to objective criticism. Besides, another problem is derived from the uniform reasoning of the Court in assessing the possible damage. The appli-

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[44] Giorgi Khubua, Constitutional Court as Constitutional Authority, G in Nona Todua (ed) Guram Nachkebia – 75 Anniversary Collection (Meridiani 2016) 462 in Sodan, H., Staat und Verfassungsgerichtsbarkeit, 2010, S. 61, BVerfGE 96, 27.

[45] *ibid* BVerfGE 49, 2525.

[46] Schlaich, Das Bundesverfassungsgericht, 4. Aufl. 1997, Rn. 19 in *supra* note 44.

[47] Monitoring Results of the Constitutional Court of Georgia, 26 May, 2018, available here: <https://idfi.ge/public/upload/IDFI_Photos_2018/Rule_of_law/final_monitoring_results_of_the_constitutional_court_of_georgia_geo.pdf> accessed on November 25, 2018.

cant party cannot be convinced by the Court's reasoning when it indicates merely the fact that possible damage is not serious enough. In addition, it is also uncertain and arguable what is the quality of possible damage that can acquire the standard of seriousness and what test can be used to evaluate its seriousness in each particular case. In the light of the above-mentioned questions, the legal acts of the Court should be more well-founded, and the Court is obliged to resolve different legal issues in a more convincing manner. It is indisputable, that for the purpose of the effectiveness of the instrument of suspension of the operation of the disputed act, the Court is required to evaluate the interests of the applicant party in each individual case, as well as the quality of the damage caused by its suspension and motivated by cautiousness, not to deny the real needs of individuals. At the same time, in the absence of judicious perception to the instrument of suspension of operation of disputed act from the Parliament, the Court, within the realm of the basic principles and article 31 of the Constitution of Georgia, should try to find the resources to make this instrument more flexible and effective.

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EFFECTIVENESS OF INDIVIDUAL CONSTITUTIONAL COMPLAINTS DURING LEGAL PROCEEDINGS BEFORE THE COMMON COURTS

ABSTRACT

The current Civil Procedure Code of Georgia does not determine the courts' competency or their obligation to suspend legal proceedings whenever the Constitutional Court is considering the constitutionality of the law applicable to the said legal proceedings. Similarly, the law does not specify grounds for suspension of legal proceedings in cases where during the proceedings before common courts, a party to the case believes that an applicable legal norm does not comply with the constitution and hence, the party brings a claim before the Constitutional Court.

The present article addresses the effectiveness of individual constitutional complaints, as of a mechanism aiming to guarantee the protection of violated rights in the context of the lack of definition of the suspension of legal proceedings before the common courts.

I. CONSTITUTIONAL COURT OF GEORGIA, AS AN INDEPENDENT BODY OF CONSTITUTIONAL REVIEW

Under the Constitution of Georgia, constitutional review is conducted by the Constitutional Court of Georgia, whereas justice is administered by the common courts.[1] "While the task of the common courts is to resolve issues between parties to a case, constitutional control is aiming to protect the constitutional order and prevent breaches of the constitutional provisions".[2]

On the other hand, "constitution is the highest law in a democratic state, it underpins legal foundations of the state and at the same time determines, to a significant extent, political course of the country […]. Ensuring the supremacy of the constitution is vital [for the citizens of demo-

[1] Article 59, Constitution of Georgia, 24 August 1995, 24/08/1995.
[2] Maia Kopaleishvili and others, A Guide to Administrative Procedural Law (ed. Paata Turava, Bona Causa 2016) p. 64.

cratic countries] and, Georgia, clearly, is no exception".[3] According to Georgian legislation, it is the Constitutional Court of Georgia that ensures the supremacy of the Constitution, constitutional legality and protection of human constitutional rights and freedoms.[4] As the body of constitutional judicial control, the Constitutional Court of Georgia is tasked with assessing the compliance of various legal norms with the Constitution. In cases where the Constitution is violated, relevant measures are to be taken. "This very task defines the essence and substance of constitutional review, as well as its main purpose. By exercising the said task, bodies of constitutional review ensure the protection of such principles of the legal state as the supremacy of the constitution".[5]

It is noteworthy that according to the current legislation of Georgia the Constitutional Court is an independent body of constitutional review. In his book "The Struggle for Constitutional Justice in Post-Communist Europe", a renowned scholar in the field of the constitutional law and the Professor at the Washington College of Law, Herman Schwartz notes that, "this issue was influenced by an experience of Germany and other Western countries with respect to specialized constitutional courts and judges. By the 1990ies, the institution of constitutional control had existed for over than decades in most of Western European countries. Almost in all of them, this authority was exercised by a special constitutional court, which was distinct from the system of general courts".[6]

II. CONSTITUTIONAL PROCEEDINGS ON GROUNDS OF INDIVIDUAL CONSTITUTIONAL COMPLAINTS AND CONSTITUTIONAL SUBMISSIONS

Constitutional review in Georgia is conducted on the basis of individual constitutional complaints and constitutional submissions.

A. Individual Constitutional Complaint

The right of an individual to bring a constitutional complaint before the constitutional court is envisaged by legislations of numerous countries worldwide (e.g. Austria, Germany, Spain, Czech Republic).

[3] Giorgi Papuashvili, Human Rights and the Case-law of the Constitutional Court of Georgia (Sezani Ltd. 2013) p. 11.
[4] Article 1, Organic Law of Georgia "On the Constitutional Court of Georgia", 31 January 1996, 27/02/1996.
[5] Giorgi Kakhiani, *Constitutional Control in Georgia and the Challenges of Its Functioning* (Tbilisi State University Publishing 2008), p. 20.
[6] Herman Schwartz, The Struggle for Constitutional Justice in Post-Communist Europe (Sezani Ltd. 2003), p. 63.

The Georgian model grants individuals a direct access to constitutional justice, wherein physical and legal entities have the right to bring constitutional complaints before the Constitutional Court when the violation or a threat of violation of individual rights arises".[7]

Legal literature distinguishes two types of direct individual constitutional complaint in the contexts of abstract and concrete review. Georgian legislation introduces only concrete model of direct individual constitutional complaint.

In this case, "individuals are entitled to address the Constitutional Court only where their rights have been or will be violated".[8] The same is envisaged by the German legislation.[9]

Direct individual complaints within the scope of concrete control consist of several subcategories, out of which only one – so-called normative individual constitutional complaint is found in Georgian legislation. "In this case, individuals can only bring claims regarding normative acts".[10] The same is prescribed by legislations of Austria, Belgium, Poland, Latvia.

It is noteworthy that the Constitutional Court of Georgia does not have an authority to assess constitutionality of provisions upon its own initiative. Therefore, the Court determines and defines the content of rights in judgments delivered with respect to specific individual constitutional claims.

B. Constitutional Submissions by Common Courts

It can be said that by virtue of bringing constitutional submissions before the Constitutional Court, judges of the common courts also become parties to constitutional proceedings. In this case, constitutional submission serves as grounds for assessing the compliance of a normative act with the Constitution.

The Law of Georgia on the Constitutional Court of Georgia enumerates the list of issues, which shall be considered by the Constitutional Court on the basis of constitutional complaints or submissions.[11] In addition, constitutional submissions, similar to constitutional complaints, must satisfy the requirements enshrined in the Law on the Constitutional Court of Georgia. If these requirements are not met either from the point of view of formality or substance, constitutional submission will not be considered by the Court.[12] In numerous rulings, the Constitutional Court has noted that "in order for the constitutional complaint to be deemed substantiated, claims

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[7] Tinatin Erkvania, *Shortcomings of the Concrete Constitutional Control in Georgia* (in "Protection of Human Rights, Constitutional Reform and the Rule of Law in Georgia", ed. Konstantine Korkelia EWMI 2017) p. 43.
[8] *ibid*, p. 43.
[9] For the Georgian example, *see* the Judgment №2/7/779 of the Constitutional Court of Georgia of 19 October, 2018, in the case of "Citizen of Georgia Davit Malania v. The Parliament of Georgia". Article 39, Organic Law of Georgia "On the Constitutional Court of Georgia", 31 January 1996, 27/02/1996.
[10] See *supra* note 7, p. 43.
[11] Article 19, Organic Law of Georgia "On the Constitutional Court of Georgia", 31 January 1996, 27/02/1996.
[12] Articles 31^1, 31^3, Organic Law of Georgia "On the Constitutional Court of Georgia", 31 January 1996, 27/02/1996.

presented therein shall in substance be linked to the disputed provision".[13] Moreover, constitutional complaints should demonstrate evident and clear substantive link between the disputed provision and the constitutional provision with respect to which the Applicant is requesting to declare the norm unconstitutional.[14]

C. Importance of Individual Constitutional Claims and Constitutional Submissions by Judges of the Common Courts

As demonstrated by the practice, "the main course of exercising the powers of the Constitutional Court is reviewing constitutional claims".[15] This is also supported by statistical data, which indicate that the number of constitutional submissions is significantly smaller than that of constitutional claims. Within the last 10 years (according to the data of year 2017), the latter has reached 776, whereas the number of constitutional submissions was 62. According to the same statistics, there is a visible tendency of the growth of the number of constitutional complaints. In year 2017, 381 constitutional claims were brought before the Constitutional Court. As for the submissions, - in some years, there were no constitutional submissions before the Court at all. The highest number of constitutional submissions – 44, was recorded in 2016.[16]

The aforementioned statistics demonstrate that the common courts refer to the Constitutional Court quite rarely. "There is practically no legal dialogue (interaction) between the Constitutional Court and common courts, [...] [whereas] the aim of integration of the proceedings regarding individual constitutional complaints within the system of constitutional justice is to protect human rights".[17] It is exactly the high standard of the protection of human rights that makes the formation of democratic and legal state possible. In my opinion, in order to achieve this goal, it would be more efficient to increase the use of constitutional submissions before the Constitutional Court.

III. THE COMMON COURTS' USE OF THE RIGHT TO BRING CONSTITUTIONAL SUBMISSIONS BEFORE THE CONSTITUTIONAL COURT

According to the definitions enshrined within the Civil Procedure Code of Georgia as well as the Law of Georgia on the Common Courts, the common courts have the following right: if, in the opinion of a reviewing court, the applicable law fails to comply with the Constitution, the

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[13] Ruling №2/3/412 of the Constitutional Court of Georgia dated 5 April, 2007 in the case of Citizens of Georgia – Shalva Natelashvili and Giorgi Gugava v. The Parliament of Georgia", para. 9. Ruling №2/2/438 of the Constitutional Court of Georgia dated 17 June, 2008, in the case of "Citizen of Georgia – Vakhtang Tskipurishvili v. The President of Georgia", para. 8.

[14] Ruling №1/3/469 of the Constitutional Court of Georgia of 10 November, 2009 in the case of "Citizen of Georgia Kakhaber Koberidze v. The Parliament of Georgia".

[15] Giorgi Kakhiani *supra* note 5, p. 21.

[16] Statistical data available at: http://constcourt.ge/ge/legal-acts/statistics [accessed 30 January 2019]

[17] Tinatin Erkvania *supra* note 7, p. 46.

Court shall suspend the hearing until the Constitutional Court makes a decision on this issue. The hearing shall be resumed after the Constitutional Court makes a decision on the issue.[18] The new edition of the Constitution of Georgia and, accordingly, of the Organic Law of Georgia on the Constitutional Court has changed the formulation of the said definition and as of now, reasonable assumption serves as grounds for bringing a constitutional submission before the Constitutional Court.[19]

In my opinion, the phrase "reasonable assumption" reflects the opinion expressed in the legal literature that the phrase "sufficient grounds" creates tension and reduces the cases of bringing constitutional submissions before the Constitutional Court by the common courts, because common courts might have a misperception that "the Constitutional Court will not agree with their view regarding the unconstitutionality of the provision at hand. Common courts should have the right to bring constitutional submissions before the Constitutional Court not only where a reasonable conclusion exists, but also in cases of a mere assumption".[20] Hence, the new edition of the law increases the possibility of using the said discretion.

A. The Grounds for Using the Right to Bring Constitutional Submissions before the Constitutional Court by the Common Courts

Judges of common courts can bring a constitutional submission before the Constitutional Court in the process of reviewing a specific case. In addition, the said decision should be based on specific circumstances and facts of the case, the assessment of which in relation to the disputed provision should create a reasonable assumption with respect to unconstitutionality of the norm. It is noteworthy that besides the common courts using this competency, the issue with respect to which they address the Constitutional Court is also important. An object of constitutional submissions can be the law or other normative act. In addition, it is necessary that the law or normative act at hand has to be applicable for a specific case. Thus, "there should be an assumption that in case of absence of the norm at hand or in case of its compatibility with the Constitution, the Court would have delivered a different judgment on a case".[21]

For example, in accordance with the exiting grounds, a constitutional submission brought by the Rustavi City Court was registered within the Constitutional Court on November 13, 2015 (registration №684) and, under the Recording Notice dated December 14, 2016, the said submission was declared admissible for its consideration on merits with regard to the part of the claim concerning the constitutionality of Article 197[1] of the Code of Administrative offences and its

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[18] Article 6, Civil Procedure Code of Georgia, 13 November 1997, 31/12/1997. Article 7, Organic Law of Georgia "On General Courts", 4 December 2009. Legislative Herald of Georgia, 41, 08/12/2009.

[19] Article 60.4.c, the Constitution of Georgia, "on the basis of a submission by a common court, review the constitutionality of a normative act to be applied by the common court when hearing a particular case, and which may contravene the Constitution according to a reasonable assumption of the court";
Article 19, Organic Law of Georgia "On the Constitutional Court of Georgia", 31 January 1996, 27/02/1996.

[20] Maia Kopaleishvili and others *supra* note 2, pp. 69-70.

[21] Giorgi Kakhiani *supra* note 5, p. 143.

note with respect to Article 14 (of the edition in force before an incumbent President of 2018 presidential elections took an oath) of the Constitution of Georgia.[22] Similarly, on September 18, 2018, submission №1352 of the Tbilisi City Court was registered within the Constitutional Court.[23] The said submission concerns constitutionality of Article 426(4) of the Civil Procedure Code of Georgia with respect to Article 42(1) of the Constitution of Georgia (of the edition in force before an incumbent President of 2018 presidential elections took an oath).

The analysis of the current Georgian legislation demonstrates that there might be a legal norm the unconstitutionality of which has not become an issue, however, while considering a specific case, given the factual circumstances, judges might have a suspicion that it is necessary to exercise the right to address the Constitutional Court with respect to the provision at hand. It can be said that the aforementioned mechanism can be deemed as one of the tools for developing the legal system. Hence, in order to achieve this goal, I believe that broadening the grounds for the competence of the common courts' judges to bring constitutional submissions before the Constitutional Court should be welcomed. Judging, among others, based on the statistical data, the legislature should encourage the common courts to engage in the dialogue with the Constitutional Court in order to ensure the protection of violated rights. The existing formulation "reasonable assumption " which was the result of a legislative amendment, gives judges more liberty and increases their engagement. However, I believe that this does not suffice for changing current statistics. Moreover, the use of the aforementioned mechanism by judges of the common courts and their engagement in the promotion of constitutional review is crucial.

B. The Competency of the Common Courts' Judges to Bring Constitutional Submissions before the Constitutional Court, as a Sphere of Judicial Discretion

It is considered that "Georgia is considered to be part of the Romano-Germanic legal system, which defines a legal culture of continental Europe".[24]

Accordingly, it is important to address the manner in which German law regulates the issue of constitutional submissions.

Under the Basic Law of the Federal Republic of Germany, "if a court concludes that a law on whose validity its decision depends is unconstitutional, the proceedings shall be stayed, and a decision shall be obtained from the Land court with jurisdiction over constitutional disputes, where the constitution of a Land is held to be violated or from the Federal Constitutional Court, where this Basic Law is held to be violated. This provision shall also apply where the Basic Law

[22] Recording notice №3/8/684 of the Constitutional Court of Georgia of 14 December 2016 in the case of the Rustavi City Court's Constitutional Submission Regarding the Constitutionality of Article 197[1] of the Administrative Offences Code of Georgia and Its Note.
[23] Constitutional Submission №1352 of the Chamber of Civil Cases of the Tbilisi City Court, 18 September 2018.
[24] Giorgi Papuashvili, *Judgment of the Constitutional Court of Germany,* Jürgen Schwabe, Supreme Court of Georgia, Constitutional Court of Georgia, German Society for International Cooperation (GIZ), 2011, p. 9.

is held to be violated by Land law and where a Land law is held to be incompatible with a federal law".[25]

The analysis of the given Article demonstrates that, similar to Georgia, in Germany judges refer to the Constitutional Court and suspend the proceedings whenever they believe that the law does not comply with the Constitution. In such cases, legal proceedings are suspended until the Constitutional Court delivers its decision with respect to the relevant provision.

On one hand, under the Organic Law on Common Courts, the competency to bring a constitutional submission before the Constitutional Court falls within the discretion of the judiciary, however, what happens during legal proceedings before the common courts is that parties to a case file a motion requesting a judge to bring a submission before the Constitutional Court.

For further clarity, I will demonstrate a specific example regarding administrative legal proceedings before Tbilisi City Court, where a person subjected to administrative liability argued, that the norm which formed grounds for initiation of administrative proceedings against him was incompatible with the freedom of expression – the right guaranteed under Chapter 2 of the Georgian Constitution. Thus, the claim was that administrative sanctions be lifted. In the same case, a person subjected to administrative sanctions has filed a motion before the Court wherein they requested a reviewing judge to bring a constitutional submission before the Constitutional Court. The said motion was not satisfied on grounds of the discretionary nature of constitutional submissions. The Court ruled that it did not agree with the party on unconstitutionality of the provision and that there were no sufficient grounds for bringing a constitutional submission before the Constitutional Court.[26]

I believe that the reason for filing such motions is that after a dispute before the common courts is resolved, the parties are unable to change the result of the judgment even if they bring a constitutional complaint before the Constitutional Court, and even if that claim is satisfied. To a certain extent, this makes constitutional review for the parties less efficient.

It is also important to add that realizing the right to bring a constitutional submission before the Constitutional Court has to do solely with the opinion of the Court. This "constitutes a part of the sphere of judicial discretion insofar as the court is free in determining the necessity to refer to the Constitutional Court and does not depend on sustaining the motions of parties to the case".[27] Furthermore, "when refusing to grant the motion, [courts do not have an obligation to justify] constitutionality of a given norm, since it is only the Constitutional Court that is authorized to examine whether the law is compatible with the Constitution or not".[28]

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[25] Article 100, "Basic Law of the Federal Republic of Germany", 1949.
[26] Ruling of the Administrative Chamber of the Tbilisi City Court in the case №4/3070-18 regarding "Tbilisi City Hall's Municipal Supervision Service v. A. G.", 2 May 2018.
[27] Maia Kopaleishvili and others *supra* note 2, pp. 67-68.
[28] *ibid*, p. 68.

I believe that by placing constitutional submissions entirely within the sphere of judicial discretion, the legislature has considered such legitimate aims as economic reasonableness, prevention of lengthy proceedings, promotion of legal stability, providing the protection of human rights in a timely manner, etc. However, it is noteworthy that these rights are counterpoised by the necessity of constitutional review which, given the inexistence of relevant definitions in civil and administrative proceedings, becomes formal in nature.

The following case would be another example: the Appellant who brought an appeal against a judgment of the first instance court before Tbilisi Appellate Court was arguing that Tbilisi City Court had addressed the issue of the constitutionality of the applicable law without bringing a constitutional submission before the Constitutional Court, whereby it exceeded the scope of its competency. This case has raised the issue of the failure to distinguish between the competenties of common courts and the Constitutional Court. The Tbilisi Appellate Court ruled that nowhere in its decision had Tbilisi City Court discussed the compatibility of Article 68 of the Law of Georgia on Normative Acts with the Constitution, and that it had not concluded unconstitutionality of the said Article. Obviously, unconstitutionality of the provision could not have been established, since this issue most definitely falls within the competency of the Constitutional Court, and not the common courts.[29]

IV. Potential Inefficiency of Individual Constitutional Complaints during or before the Proceedings in Common Courts for the Purposes of Protecting Violated Rights

The examples provided above demonstrate that, given the inexistence of the definition of suspending legal proceedings before the common courts on grounds of constitutional submission, bringing individual constitutional complaints before the Constitutional Court for defending violated rights during or before the initiation of legal proceedings in common courts might be inefficient. In both cases, common courts are not under an obligation to wait for the decision of the Constitutional Court. Thus, an individual is facing the risk that the common courts might render their judgment based on a potentially unconstitutional norm.

Parties appear before common courts in order to remedy violated rights. Hence, after the dispute is resolved, they might lose an interest in whether an individual constitutional complaint is satisfied. Especially, given that under the Organic Law on Common Courts, recognition of a law or other normative act as unconstitutional does not mean annulment of judicial sentences and

[29] Ruling N3ბ/985-15 of the Chamber of Administrative Cases of the Tbilisi Court of Appeals in the case of " 12 November, 2015; Ruling of the Administrative Chamber of the Tbilisi Appellate Court in the case of "LEPL Public Services Development Agency v. "N.M." and "D.K.", 12 November, 2015.

decisions previously adopted on the basis of this act but shall entail only suspension of their enforcement under the procedures established by the procedural legislation.[30]

For example, I would like to address a judgment of the Constitutional Court, whereby the normative content of Article 273 of the Code of Administrative Offences prescribing that the court order regarding administrative offences can appealed within 10 days after it is issued was declared unconstitutional with respect to Article 31 of the Constitution of Georgia. Here the Constitutional Court ruled that, in cases where a resolution has not been served in a timely manner, the possibility of entirely and effectively protecting the right to appeal the court's judgment in the courts of higher instance, which forms an important component of the right to fair trial under Article 31 of the Constitution, is being unreasonably limited.[31]

Regardless of the said decision, given the absence of relevant legal norms, the Applicant is unable to remedy his or her violated right and the said decision has no effects with respect to disputes that have already been resolved before the common courts.

In the case of *Davit Malania v. Parliament of Georgia,* a disputed phrase "which shall be final" of Article 272 (a), (c) and (d) of the Administrative Offences Code of Georgia was declared unconstitutional by the Constitutional Court on grounds that it restricted the possibility of appealing even in cases where it was necessary to establish uniform case-law. Furthermore, unconstitutionality of the words of paragraph (a) were also based on impossibility to access the Appellate Court in cases of grave offences.[32]

Notwithstanding the substance of this decision, the Applicant does not have the possibility to appeal the common courts' decision that has already been rendered.

It is noteworthy that the issue of compatibility of Article 20 of the Organic Law of Georgia on Common Courts with Article 42 of the Constitution was raised in the case of "*Broadcasting Company Rustavi 2 Ltd" And "Television Company Sakartvelo Ltd" v. Parliament of Georgia.* The Applicants argued that "declaration of unconstitutionality of a normative act by the Constitutional Court shall be followed by efficient legal consequences. [...] Although enforcement and finality of the acts of the common courts, as well as the rights of others represent an important value in a democratic society, [...] these values cannot override the protection of fundamental rights and liberties of an individual. The Applicant argues that the Constitution of Georgia clearly grants primacy to fundamental rights, which is expressed by limiting the activities of state organs by fundamental rights and liberties, as by directly applicable laws. The constitutional complaint also indicated that the principle of the legal state requires that the laws of State recognize and protect fundamental human rights and liberties to the full extent, by creating all the

[30] Article 20, Organic Law of Georgia "On the Constitutional Court of Georgia", 31 January, 1996, 27/02/1996.
[31] Judgment №1/3/1263 of the Constitutional Court of Georgia of 18 April, 2019 in the case of "Citizen of Georgia Irakli Khvedelidze v. The Parliament of Georgia", para. 34.
[32] Judgment №2/7/779 of the Constitutional Court of Georgia of 19 October, 2018 in the case of "Citizen of Georgia Davit Malania v. The Parliament of Georgia", paras. 52-53.

necessary guarantees. In this regard, the Constitutional Court represents the most essential constitutional guarantor. The Applicants argued that if, while administering justice, the common courts keep applying a legal norm that had been declared unconstitutional by the Constitutional Court, judgments of the latter will only be declaratory in nature and will have no effect whatsoever with respect to individuals whose rights were violated by a State - including by (common) courts - by virtue of the unconstitutional normative act".[33] It is noteworthy that the said constitutional claim has been declared admissible by recording notice of the Constitutional Court dated February 25, 2016 with respect to Article 42(1) of the Constitution.[34]

Unlike civil and administrative proceedings, the Georgian Code of Criminal Procedures prescribes that, in certain cases, a judgement that has entered into force shall be reviewed due to newly found circumstances. One of such cases is where there exists a decision of the Constitutional Court of Georgia that has found that a criminal law applied in a specific case is unconstitutional.[35]

For instance, the Constitutional Court of Georgia found unconstitutional the normative content of the words "illegal consumption without medical prescription" of Article 273 of the Criminal Code of Georgia that prescribed criminal liability for consumption of narcotic substance – marijuana which is indicated in 92nd horizontal cell of the second appendix of the law of Georgia "On Narcotic Drugs, Psychotropic Substances And Precursors and Narcological Assistance". The said normative content was declared incompatible with Article 16 of the Constitution.[36] Afterwards, a convicted person filed a motion before the Tbilisi Appellate Court, requesting to review his case due to newly found circumstances, - in particular due to the judgment of the Constitutional Court dated 30 November 2017, whereby he argued that his conviction should have been reconsidered. Under the ruling of the Criminal Chamber of the Tbilisi Appellate Court, due to the said judgment of the Constitutional Court, criminal sanction for committing an offence prescribed by Article 273 was lifted and the Appellant and both imprisonment and an unserved sentence were annulled.[37]

It is clear that the possibility prescribed under the Criminal Procedure Code to review a judgment due to newly found circumstances is one of the means for the protection of the rights of defendants. Due regard shall be given to the aim of the legislature not to allow conviction on grounds of a norm that was declared unconstitutional. However, a question stands as follows:

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[33] Recording notice №3/1/719 of the Constitutional Court of Georgia of 25 February 2016 in the case of "Broadcasting Company Rustavi 2 Ltd" and "Television Company Sakartvelo Ltd" vs. The Parliament Of Georgia", paras. 6-7.
[34] *ibid*, pp. 11-12.
[35] Article 310, Criminal Procedure Code of Georgia, 9 October 2009. სსმ, 31, 03/11/2009.
[36] Judgment №1/13/732 of the Constitutional Court of Georgia of 30 November 2017 in the case of "Citizen of Georgia Givi Shanidze v. The Parliament of Georgia".
[37] Judgment №1/აგ-371-18 of the Criminal Chamber of the Tbilisi Appellate Court dated 5 June 2018, motion filed by G. Sh.

was it because of fundamental differences between the principles of criminal and civil/administrative law that the judgments of the Constitutional Court are not given a retroactive effect in civil and administrative cases?

We should also consider that the Criminal Procedure Code allows the review of unconstitutional or unjust convictions due to a judgment of the Constitutional Court at any given time.[38] As for the Code of Civil Proceedings, - it prescribes a temporary limit, whereby the action for the renewal of proceedings due to annulment of the judgment or due to newly found circumstances shall be submitted within one month. This period shall commence on the day when the party becomes aware of the grounds for annulment or retrial.[39]

In my opinion, giving the judgments of the Constitutional Court retroactive effect in civil and administrative cases, similar to criminal cases, will ensure the effective protection of human rights and liberties. However, this might not be compatible with procedural principles such as equality, adversariality and stability of the rights obtained on grounds of the judicial decision.

A. Efficiency of Giving the Common Courts an Authority to Suspend Legal Proceeding whenever an Individual Constitutional Complaint is Brought before the Constitutional Court

Under the current Georgian legislation, bringing the common courts' constitutional submissions before the Constitutional Court entirely falls within the sphere of judicial discretion, which, in my opinion serves the purpose of avoiding artificial prolongation of proceedings in common courts by submitting individual constitutional complaints. It is clear that, given the special nature of the tasks of the Constitutional Court, it would be inappropriate to address the Court for examining any laws and norms without any limits. Similarly, it would be unjustified to ignore the necessity of temporary limits imposed on consideration of cases before the common courts. However, I believe that for an increased efficiency of the constitutional control, it would be better to broaden judicial discretion of common courts whereby they are competent to make a decision on whether to suspend or not the proceedings whenever a party to the case brings an individual constitutional claim before the Constitutional Court, requesting to examine constitutionality of the law or the norm applicable to the given proceedings, or in cases where the Constitutional Court is considering an individual constitutional complaint.

Clearly, in order to avoid the aforementioned risk, this would be justified in the context of introduction of high standards by the legislature. Such standards might be giving the common courts the right, and not an obligation to suspend judicial proceedings, provided that the assessment of the criteria for the grounds of suspension falls within the judiciary discretion as well. Such criteria can be as follows: (a) what the subject of the dispute is and whether or not it is substantial for deciding a given case; (b) what stage the case is at the Constitutional Court; (c) whether

[38] See *supra* note 37.
[39] Article 423, "Civil Procedure Code of Georgia", 14 November 1997, 47-48, 31/12/1997.

the claim has been declared admissible; (b) to what extent the claim has been declared admissible; (d) whether or not the Constitutional Court has rendered its decision on the same issue; (e) the significance of the Constitutional Court's future decisions with respect to cases regarding Chapter 2 of the Constitution, etc.

It should be noted that the administration of legal proceedings, examining and assessing factual circumstances, interpretation and application of the law is the prerogative of the courts that are authorized to do so. However, it is also noteworthy that, within the scope of his or her inner conviction, a judge might be given a certain autonomy for considering special circumstances of certain cases whenever an individual claim is brought before the Constitutional Court. In this regard, judges of the common courts can make a decision to suspend legal proceedings even if they do not believe that the applicable law is unconstitutional. Giving them such a possibility is necessary and important also given the fact that the common courts' interpretation/application of the fundamental rights given in the Chapter 2 of the Constitution goes beyond the constitutional control in Georgia, because the existing classical model of normative individual constitutional complaint does not allow it.

CONCLUSION

This paper addressed one of the means of incorporating individual constitutional complaints into the system of constitutional justice. In particular, giving the common courts a discretionary power to suspend legal proceedings whenever a claim questioning the constitutionality of law or a norm applicable to the case at hand is brought before the Constitutional Court, or whenever the latter is considering such a case.

As of today, Georgian legislation does not prescribe the aforementioned possibility on the said grounds. The Court will only stop legal proceedings if, in the process of reviewing the case, it concludes that there are sufficient grounds indicating that the law or other normative act in question will possibly be declared incompatible with the Constitution.

I believe that leaving the possibility to bring constitutional submissions before the Constitutional Court entirely within the judicial discretion serves the purpose of avoiding artificial prolongation of legal proceedings. On the other hand, however, such a regulation puts parties to a case before the risk that common courts will deliver a judgment based on a potentially unconstitutional norm.

In my opinion, this raises some questions with respect to efficiency of bringing individual constitutional claims before the Constitutional Court in order to remedy violated rights. The legislature has ignored the purpose of individual constitutional claims. Upon the completion of judicial proceedings before the common courts, parties lose legal interest in the results of individual complaints, especially given that under the law On Common Courts, declaring the norm uncon-

stitutional will not lead to nullification of the results of judgments and rulings delivered on grounds of the said norm.

I believe that in order to increase efficiency of the constitutional control, we should welcome the broadening of the judicial discretion of common courts, whereby they are competent to make a decision on whether or not to suspend legal proceedings whenever a party to a case brings an individual constitutional complaint before the Constitutional Court with respect to the applicable provision, or whenever the Court is considering such an individual complaint. In addition, given that interpretation/application of the rights given in Chapter 2 of the Constitution by the common courts goes beyond constitutional control, I believe that this proposition will ensure integration of the courts in a manner that would lead to the establishment of democratic state, which is highly developed from the legal point of view.

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THE REMEDIES OF ELIMINATION OF A STATUTORY PRIVILEGE INCOMPATIBLE WITH THE RIGHT TO EQUALITY AND NON-DISCRIMINATION BY THE CONSTITUTIONAL COURTS

ABSTRACT

While performing the constitutional review, constitutional courts often have to assess the constitutionality of legal provisions, which grant a privilege concerning social benefits, tax exemptions or similar matters to a certain group of the society. Such cases can be problematic with regard to the right to equality when a particular group of people are excluded from above-mentioned privileges without appropriate rational justification. The main challenge for constitutional courts in these cases is to declare the provision granting a privilege unconstitutional in such manner, that does not go beyond the scope of its authority and role as a negative legislator. To resolve this issue, constitutional courts apply various mechanisms established by the relevant legislation or the case law and the Constitutional Court of Georgia is no exception for that matter.

INTRODUCTION

People tend to be particularly susceptible to discriminatory regulations. Therefore, application to the constitutional courts on the ground of violation of the right to equality is frequent.[1] While applying to the court, a complainant's desirable outcome is obvious – to fully ensure the equality before that law, meaning to extend a privilege granted by the legislator to a certain category of people on a complainant too. However, in some cases, the actual outcome of the judgment, concerning a complainant's case does not fully reflect his motivation/wishes and is a reason/basis for his/her dissatisfaction. According to the Austrian model of constitutional review, the constitutional court is a negative legislator, which means that it's entitled to discuss discrim-

[1] For example, according to the statistics published on the website of the Constitutional Court of Georgia, for 1996-2017 years, assessment the constitutionality of impugned provision was one of the most frequently requested with respect to the right to equality.

inatory nature of the law, but it lacks the authority to restore equality between persons, by extending a privilege granted to a certain group to all, including a complainant. Though it is not the sole solution to the abovementioned legal dilemma. In some jurisdictions, constitutional courts have the authority to comprise the role of a positive legislator. Namely, while assessing a possibly discriminatory nature of a disputed provision, courts are able to grant a preferred privilege to a complainant by expending the group of those who were already eligible for receiving such privilege according to the disputed provision.

"Citizen of Georgia Lali Lazarashvili v. The parliament of Georgia" became an important precedent, a turning point in the case law of the Constitutional Court of Georgia since the Court had to define the scope of its authority concerning with discriminatory nature of legal provisions granting a privilege to a certain group of society.[2] But Georgia was not the exception, as constitutional courts of other jurisdictions faced a similar challenge. Consequently, such challenges laid a ground for introducing various legal techniques for solving the above-mentioned important legal dilemma.

This paper is dedicated to identification of the legal dilemmas concerning the elimination of a statutory privilege incompatible with the equality and non-discrimination and its remedies. Furthermore, the paper deals with the comparative analysis of appropriate models from different jurisdictions and the relevant case law of the Constitutional Court of Georgia.

I. Problems with the Elimination of a Statutory Privilege Incompatible with the Equality before the Law

There are two types of legislative omissions in legal doctrine - absolute and relative. Absolute omission means that there is no statutory regulation to enforce a constitutional provision, whereas in the case of relative omission, a regulation exists, but it is incomplete. Thus, absolute omission is related to "silence of the legislator" whereas the case of relative omission deals with "silence of the law". Eventually, both cases create an unconstitutional situation.[3]

A particular case of relative omission is a statutory provision, which grants a privilege to only a certain group of people. These types of regulations directly refer to the particular beneficiaries of a privilege while remaining "silent" towards others. In this case, while assessing the discriminatory nature of such provisions, it is only unconstitutional to exclude certain group of individuals from granting a privilege [without proper constitutional justification] (it is not problematic itself to grant a privilege to a particular group).[4]

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[2] Citizen of Georgia Lali Lazarashvili v. the Parliament of Georgia judgement 3/6/642, the Constitutional Court of Georgia, November 10, 2017.
[3] Allan R. Brewer-Carías ed., *Constitutional Courts as Positive Legislator, A Comparative Law Study,* Cambridge University Press, 2011. pp.125-126.
[4] Werner Heun,*Verfassung und Verfassungsgerichtsbarkeit im Vergleich*, Mohr Siebeck , 2014. p. 206.

Constitutionality of statutory provisions, which grant a privilege to a certain group of society, may be assessed with regard to the particular substantive constitutional right as well as to equality before the law. Nevertheless, it is the latter that is rather interesting for the purposes of this paper. Normally, establishing the discriminatory nature of such regulation is not particularly problematic itself, but the challenge mainly concerns articulating the legal outcome in a manner that enables the court to stay in the role of a negative legislator.

The Constitution of Georgia establishes the fundamental constitutional principle of equality before the law. As the Constitutional Court of Georgia has defined "limitation of the right of equality will take place only if it is obvious that essentially equal individuals are treated unequally (or essentially unequal individuals are treated equally)".[5] In addition, differential treatment is not *a priori* considered to be a discriminatory treatment. "[…] [D]iscrimination will take place, if the reasons for differentiation are unexplained and lacked reasonable grounds".[6] Thus, any regulation, which treats equal people with respect to a specific legal relationship unequally without proper justification, violates the principle of equality.

Generally speaking, while adjudicating on the discriminatory nature and constitutionality of regulations granting a statutory privilege to a certain group of the society, equality before the law can be ensured by two different outcomes: extending such privilege on the whole society or annulling it altogether for everyone. While choosing from these two opposite options the central matter of discussion becomes the separation of powers between the legislator and the constitutional court.

In constitutionalism, constitutional courts are generally considered to be negative legislators since their "primal authority is to ensure that existing national legislation is compatible with the constitution/constitutional requirements".[7] "The Court's authority is bound to invalidate the already existing legal provisions which violate the requirements of the Constitution and it is beyond the court's constitutional mandate to adopt a different regulation, even if it is fully compatible with the Constitution".[8] Therefore, the constitutional courts are unable to ensure equality before the law by granting a privilege to people beyond the group defined by the disputed provision. It is undoubtedly the exclusive part of legislative authority.

As mentioned above, another possible outcome of declaring a discriminatory statutory provision granting a privilege to a certain group of the society unconstitutional is by invalidating it in such a manner that barres anyone from getting such entitlement and thereby ensures the equality of

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[5] Citizens of Georgia – Levan Asatiani, Irakli Vatcharadze, Levan Berianidze, Beka Buchashvili and Gocha Gabodze v. the Ministry of Labour, Health and Social Affairs of Georgia judgement 2/1/536, the Constitutional Court of Georgia, February 4, 2014. Paragraph II-10.

[6] Political Unions of Citizens "New Rights" and "Conservative Party of Georgia" v. the Parliament of Georgia judgment 1/1/493, the Constitutional Court of Georgia, December 27, 2010. Paragraph II-3.

[7] Citizen of Georgia Lali Lazarashvili v. the Parliament of Georgia judgement 3/6/642, the Constitutional Court of Georgia, November 10, 2017. Paragraph II-10.

[8] *ibid*.

all. But this possible legal solution is also considered the sign of an excessive authority of a court by some.[9] In particular, it is pointed out that correction/reform of discriminatory nature of statutory provisions granting a privilege to some and bringing them into harmony with the constitution is achievable by several alternative ways. Namely, a privilege can be granted to all by expanding the group of people who were initially entitled to get it by the disputed provision or a privileged group of the society can be stripped off such privilege and a new law can be adopted for both groups (for privileged and non-privileged).[10] Therefore, as the legislator undoubtedly has various options for making disputed regulations in compliance with the constitution, it is argued that considering the principle of separation of powers, constitutional courts should show some institutional respect and "clear the arena" for the legislative branch for creating the new order.

It should be noted, that the case law of constitutional courts in different jurisdictions is not uniform concerning the abovementioned matter. Some courts declare a regulation granting a privilege for a certain group fully unconstitutional, while others invalidate a part of the disputed provision, so that the circle of groups, entitled to such advantage, expands. Moreover, in some jurisdictions, statutory regulations providing a privilege are declared as incompatible with the constitution without their invalidation. In such cases, in order to eliminate the unconstitutional situation, constitutional courts issue guidelines and instructions for the legislator and, thereby, determine its future actions.[11]

It should be emphasised that the abovementioned reasoning concerns the regulations that in a discriminatory manner grant a privilege not a right to a certain group. In other words, an entitlement that is given to such group is a statutory privilege, not a substantive right guaranteed by the constitution. Therefore, the legislator will not violate the supreme law by refusing to grant such privilege to anyone. The only guarantee the constitution considers for the latter is that a regulation granting a privilege should be in full compliance with the right to equality. But it is a different scenario when an entitlement given to only a certain group is guaranteed to all by the substantive constitutional right. In so far as the supreme law is the basis for such entitlement, the legislator cannot determine its beneficiaries in different manner by the ordinary law. Such regulation would be not only contrary to the equality but to the substantive guarantees prescribed by the constitution itself. In conclusion, these two scenarios create different legal consequences and, therefore, different methods to eliminate discrimination are needed. For more clarity, it is convenient to refer to the relevant case law.

The Federal Supreme Court of Switzerland delivered the judgment regarding the discrimination in suffrage based on sex. More specifically, the Constitution of Canton of Appenzell Innerrhoden allowed only men to participate and vote in parliamentary elections of the canton

[9] Werner Heun, *supra* note 4, p. 206.
[10] Pieroth/Schlink, *Grundrechte Staatsrecht II*, 23., neu bearbeitete Auflage, C.F. Müller, 2007. p. 116.
[11] Allan R. Brewer-Carías, *supra* note 3, p. 149.

(*Landsgemeinde*). Federal Supreme Court held that such normative order violated the right to equality among men and women and it granted the right to vote to women too.[12] In the Swiss National Report Zurich University Professor Tobias Jaag indicated that the suffrage granted to women by the Court is an example of the judiciary being a positive legislator.[13] This position cannot be shared due to several reasons. Namely, when assessing the discriminatory nature of the regulation granting a statutory privilege, the constitutional court, may deprive the privileged group of their right to receive benefit or extend such group of beneficiaries (some constitutional courts also apply this means, but it's not shared by the author of the article) or create a mechanism that will give the legislator a reasonable time to choose from alternative constitutional solutions and ensure equality. However, while assessing the discriminatory nature of the provision regulating enjoyment of a particular substantive constitutional right (discrimination in constitutional right), a constitutional court does not have a freedom to apply all of abovementioned methods, since the court does not have the authority to deprive someone of his constitutionally guaranteed substantial rights. A constitutional court cannot invalidate discriminatory provisions which let only a certain group enjoy their constitutional rights as well as it cannot postpone the invalidation of discriminatory provisions, which allows the legislator to ensure equality on its own. When a court establishes that "privilege imposed by law" is also a constitutional right, its constitutional duty is to grant everyone the equal opportunity to enjoy such right by its judgment. Therefore, a court's refusal to grant an entitlement recognised by the constitution to everybody is not an example of it acting within its competence, but an example of its refusal to fulfil its mandate. Similarly, unlike a privilege created by the law, conferring constitutional right is a case, when the legislator has no freedom of action. It lacks the authority to choose from several alternative solutions and the sole solution in compliance with the Constitution is "granting" a constitutional right to its subject. Constitution is the legal basis of a constitutional right. Constitutional rights are directly applicable law and they exist/operate independently without additional regulation adopted by legislator. Therefore, a reason for passivity of a constitutional court and its willingness of entrusting legislator with making of such decision, is ill-founded.

From the perspective of effective protection of fundamental human rights, it is unreasonable to fully block the judicial branch from the authority to modify disputed regulations in order to ensure their compliance with the constitution. Nevertheless, having such authority can only be justified when the only way to restore the constitutional *status quo* is to modify the impugned regulation with addition of new normative content, namely, when the subject of dispute is substantive constitutional right, including, discrimination in substantive constitutional right.

As noted, the abovementioned scenario is to some extent different from the case when the disputed provision grants a statutory privilege (not a substantive right) to a certain group in a dis-

[12] Tobias Jaag, *Swiss National Report*, in book Allan R. Brewer-Carías, *supra* note 3, p.794.
[13] *ibid*.

criminatory manner. In such situation, there is not one, but several ways of how disputed provision can be made compatible with the constitution and choosing one goes beyond the authority of the judicial branch and interferes with the authority of the legislator. Therefore, with keeping in mind the mandate of constitutional review authorities and constitutional rights being directly applicable law, whenever a constitutional court deals with a disputed provision "granting" particular substantive right (not only a statutory privilege) in a discriminatory manner, modifying such provision and expanding the group of "beneficiaries" by restoring them in their fundamental rights should be the solution compatible with the constitutional requirements.

Along with the substantive solutions of the above discussed legal dilemma, it is equally important to find and establish a proper "technical form" of judgments about discriminatory regulations concerning substantive constitutional rights. Some courts have found solution in abolishing only the normative content of such regulations instead of fully invalidating them so that every group is able to enjoy its substantive constitutional right, which some of them have been deprived of by the disputed regulations.[14] This is the model used by the Constitutional Court of Georgia in its case law. Namely, in one of the cases, complainants challenged the provision, which exhaustively defined the category of people whose general education were funded by the state. According to the Court's assessment, the impugned norm excluded the complainants - foreign citizens residing in Georgia, from the opportunity to receive such funding. According to the Court's judgement, funding general education of foreign citizens residing in Georgia was protected by the right to education guaranteed by the Constitution of Georgia and, accordingly, disputed provisions were declared unconstitutional with regard to the right to education. At the same time, the norms were assessed in relation to the right to equality and they were declared as discriminatory. Unlike other cases, in this case, the Court could not have completely abolished the impugned regulation (the persons mentioned in the impugned provisions could not be deprived of education funding), since, general education funded by the state was everybody's constitutional right. That is why, impugned regulation was invalidated with such normative content, that excluded foreign citizens residing in Georgia, from receiving such funding. As the result, the Court "granted" complainants the right to exercise their right to education and to get their general education funded by the state in a non-discriminatory manner.[15]

It is equally interesting to see the resolution of the case, where, according to the Court's assessment, the disputed provision granting a statutory privilege to a certain group, does not have a normative content of prohibiting others from receiving such benefit. In this case, the subject of the discrimination claim is to establish that granting a privilege to others is unconstitutional,

[14] In some cases, it may be disputed, if norms with the nature of entitlement, at the same time, have the right-restrictive content for others. Discussing this issue is not the purpose of the foregoing article. The author of the article is referring to case law, where norms with the nature of entitlement include such normative content (exclusion/prohibition of any privilege).

[15] Citizens of Russia – Oganes Darbinian, Rudolf Darbinian, Sussanna Jamkotsian and Citizens of Armenia – Milena Barseghian and Lena Barseghian v. the Parliament of Georgia judgement N2/3/540, September 12, 2014.

which is equivalent to deprive a privileged group of such entitlement. This formulation of a claim is admissible only with regard to norms granting a statutory privilege. But when the subject of the discrimination claim is the substantive constitutional right not just a statutory privilege, the complainant cannot argue about the constitutionality of others being able to enjoy their constitutional right but can argue on him/her not being able to do so. In such a case the court is left with the solution of invalidating the provision which has obligatory/prohibitory nature towards the complainant or invalidating the institution-setting provision.[16] Lastly, if the legislation does not contain either of these kinds of regulations, then invalidating the provision granting a privilege can be the effective remedy for protecting the complainant's rights.

II. Comparative Analysis of the Models for Eliminating Statutory Discriminatory Privileges

A. "Additive Decisions"

The case law of the constitutional courts has established the diversity of the Decisions of the judgments. One of such examples is "additive decisions". With such decisions the Court declares a provision of part thereof unconstitutional not on the grounds of the very wording being unconstitutional, but on the grounds that the disputed regulation is not faultless and needs "completing". Such decisions are mainly adopted for ensuring the right to equality by adding the provision to the disputed norm, which is "missing" or through making other type of amendment to it. In other words, with such decisions the constitutional court expands the normative content of the disputed provision.[17] It is recognised, that such decisions are contrary to Kelsenian Model, according to which the constitutional court should be a negative legislator.[18] Additionally, in this context the scope of action of the constitutional court should be taken into consideration. Specifically, through the "additive decisions" the discretionary evaluation system of the legislator is not being evaluated with regards to the disputed provision, since the constitutional court cannot interfere when there is one decision to be made out of multiple choices and, simultaneously, all of them are permissible. It is recognised, that in such instances, there is only the discretion of the legislator at hand. Therefore, if the constitutional court expands the scope of disputed provision or fully invalidates it and restores the equality of persons through one of these ways, the legislator can, with its discretionary powers and within the scope of ensuring the principle of equality, regulated this relationship differently and in this regard the judgment of

[16] Cases, where the Constitutional Court of Georgia has given the complaint similar instructions, may be applied by analogy. see, for example, Citizen of Georgia Giorgi Dgebuadze v. The Parliament of Georgia ruling №1/23/824, the Constitutional Court of Georgia, December 28, 2017. Paragraph II-6.

[17] Allan R. Brewer-Carías, *supra* note 3, pp. 80-81.

[18] Tania Groppi, *The Italian Constitutional Court: Towards a 'Multilevel System' of Constitutional Review?*, 3, Journal of Comparative Law, 2008. p. 108.

the constitutional court (expansion of the circle of persons or invalidation of a privilege to all subjects) shall not be binding for the legislator.

The practice of "additive decisions" is characteristic to, including but not limited to, the Constitutional Tribunal of Spain. For instance, the Tribunal has adjudicated on the provision, according to which, in case of the death of a lessee, the rights and duties thereof are transferred to the spouse. The Tribunal considered such regulation discriminatory, since the provision excluded from the legal relationships the persons, who cohabited with the deceased within *more uxorio* the relationship similar to the matrimony. As a result of the judgment the disputed provision also expanded to the mentioned persons.[19] On January 14, 1993 the same Tribunal declared the rule unconstitutional with regards to the right to equality, according to which the social welfare pension was given to the daughters and sisters of the pensioner, while the sons and brothers were not capable of receiving such benefit. The Tribunal expanded the circle of persons and entitled the latter group the right to such benefit.[20] It can be stated, that when adjudicating mentioned decisions, the Spanish Constitutional Tribunal acted as a "real positive legislator". The model of "additive decisions" is also used by the Constitutional Tribunal of Portugal. For example, the Tribunal, with the Judgment N449/87 declared discriminatory the regulation, which envisaged different amount of allowance to the widows and widowers of the persons deceased by labour-related trauma. The Tribunal expanded the allowance existing for the widows to the widowers.[21] Similarly to the mentioned case, the Tribunal Judgment N359/91 considered contrary to the principle of equality the rule envisaged by the Civil Code, which provided for the transmission of a lessor status in the event of divorce and did not cover the *de facto* couples, who had an underaged child. In this Judgment the Tribunal issued an obligatory declaration and stated, that the disputed provision was unconstitutional as it caused the discrimination of children born beyond the matrimonial relationships.[22] The practice of "additive decisions" is followed by the Supreme Court of Canada and in some cases grants the disputed provision the content unforeseen by the legislator. The mentioned Court notes that it is entitled to define the means, which can most efficiently eliminate the discriminatory condition. Among such means is the transformation of the content of the law through adding a new rule to it. Additionally, before the Court expands the content of the disputed provision, it analyses/evaluated the factors, such as the accuracy and the clarity of the means chosen by the Court, the financial outcomes thereof, the impact of the selected measure to the legislative space and its relevance to the aims of the legislator.[23] The Constitutional Court of Hungary uses the so called "mosaic annulment"[24]

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[19] Judgment of the Constitutional Tribunal of Spain №222/1992, December 11, 1992. See F. Fernández Segado, *Spanish National Report*, in Allan R. Brewer-Carías ed., *supra* note 3, p. 83.
[20] Judgment of the Constitutional Tribunal of Spain №3/1993, January 14, 1993. See F. Fernández Segado, *Spanish National Report*, in Allan R. Brewer-Carías ed., *supra* note 3, p. 83.
[21] *ibid*.
[22] *ibid*, p. 730.
[23] Judgment of the Supreme Court of Canada on the Case №25285 Vriend v. Alberta, April 2, 1998.
[24] Annulment of a specific part/word of the law.

measure, which, in opposition to the will of the legislator, results in automatic expansion of the circle of persons envisaged by the disputed provision. For instance, the Constitutional Court of Hungary has expanded the provision, which entitled only a certain group of persons with the tax concession, through annulling specific word(s), to the other groups as well.[25] It is noted, that invalidating the provision through such measure is the expression of the act within the positive legislator powers.[26]

Apart from the fact that the model of "additive decision" is incompatible with the concept of negative legislator, in certain cases, it poses threat to the distribution of budgetary resources. On the one hand, for exercising the role of a guarantee of the protection of social rights and, on the other hand, for the purposes of avoiding the pressure on the budget without the adequate financial possibilities, in the mid-1990s, the Constitutional Court of Italy established a new form of decision-making, which is a specific type of "additive decisions" – creating the "additive decisions of principle" (additive di principio).[27] The main modification of this decision is that instead of a new normative regulation, it establishes the principles and leaves the legislator with the possibility to decide, how to amend the provision.[28] These are the very principles the lawmaker has to follow during the process of regulating the issue in a new way. In the additive decisions of principles, the disputed provision is declared unconstitutional and a term is indicated, within which the legislator has to adopt a new law.[29] It is disputable, whether the common court can use the principles established by the constitutional court for deciding the ongoing cases before the new provision is created. On the one hand, it is noted (including by the Constitutional Court), that the formulated principles by the Court are the roadmap, both for the legislator, in order to eliminate the unconstitutional regulation pursuant to the Court decision, and for the common court judges, to decide the disputes before them before the legislative interventions are made.[30] For example, the Constitutional Court of Italy by the Judgment N170/2014 has declared unconstitutional the rule, which established the mandatory divorce in the event one of the couples within the matrimony changed the gender. According to the Court, it was necessary to create the legal order, where such couples would be entitled to maintain the relationship if they wished and the Court addressed the legislator for adoption of a new regulation. Prior to establishing a new legal order for the homosexual couples (the institute of civil partnership), the Supreme Court of Italy used the principles established by the Constitutional Court and consid-

[25] Judgment of the Constitutional Court of Hungary №87/2008 [VI.188], See Lorant Csink, Jozsef Petretei, Peter Tilk, *Hungarian National Report*, in Allan R. Brewer-Carías ed., *supra* note 3, p. 581.
[26] *ibid.*
[27] Xenophon Contiades, *Constitutions in the Global Financial Crisis, A Comparative Analysis*, Routledge, 2016. p.111.
[28] Tania Groppi, *supra* note 18, p.108
[29] *ibid.*
[30] Allan R. Brewer-Carías, *supra* note 3, pp. 79-80

ered the matrimony of homosexuals real, before the civil partnership was regulated.[31] In opposition to this the majority of judges consider the legislator to be the sole addressee of the principles established by the Constitutional Court.[32] This latter position is somewhat flawed. On the one hand, the common court is dutybound to adopt decisions in compliance with the Constitution. The final and most authoritative source of defining the Constitution is the decision adopted by the Constitutional Court, which is why the execution thereof is obligatory to all, including to the common courts. On the other hand, the common court is not entitled to deny the exercise of justice with the reason of the lack of law and/or wait for the creation of new law indefinitely, considering the right of the claimant to have the dispute resolved within reasonable time. Therefore, when the legislator does not/cannot reflect the principles established by the Constitutional Court into the specific regulation, the adjudicator has to itself balance the legal vacuum through implementing the decision of the Constitutional Court directly. The user of the principles listed in the motivational part of the Constitutional Court judgment is not only the legislative body, but the common court as well, which is dictated from its primary function – to be the guarantee of the protection of human rights.

B. Declaring Law Incompliant with the Constitution without Invalidating/Annulling It

Germany is of the countries, where the institute of declaring the law incompliant with the Constitution is utilised.[33] Paragraph 2 of article 31 and paragraph 1 of article 79 of the Act on the Federal Constitutional Court of Germany establish the possibility of declaring the law or the part thereof incompliant with the Constitution in a way, when the disputed provision is not annulled.[34]

The Federal Constitutional Court of Germany uses the institute of declaring the law incompliant with the Constitution in two main instances: when on the one hand, there is a circumstance, where as the result of annulment through *ex tunc* effect the norm will depart (oppose) from the the constitutional legal order; while on the other hand, the right to equality is violated. In the latter instance, the elimination of unconstitutional regulation is possible through different methods, therefore, the Court transfers the authority of decision making to the legislator, which en-

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[31] Cecilia Siccardi , *Same-sex couples rights: the role of supranational and national Courts in order to fill legal vacuum in the Italian legal framework*, pp.1-5, accessible here <https://ddd.uab.cat/pub/poncom/2017/177321/Cecilia_Siccardi_LA_CREACION_JUDICIAL_DEL_DERECHO_Y_EL_DIALOGO_ENTRE_JUECES.pdf> [last visited on November 30, 2018].

[32] Tania Groppi, *supra* note 18, p.108.

[33] The Federal Constitutional Court of Germany used the institute of declaring the law incompliant with the Constitution first time in 1970 (BVerfG, Beschluss vom 11.05.1970), when it still has no legal grounds within the legislation of adjudication.

[34] Articles 31.2 and 79.1, Act on the Federal Constitutional Court of Germany. Accessible here: <https://www.gesetze-im-internet.de/englisch_bverfgg/englisch_bverfgg.html#p0192> [last visited on November 30, 2018].

tails invalidating the privilege or expanding such privilege to those persons, who were incorrectly excluded.[35]

Pursuant to the article 35 of the Act on the Federal Constitutional Court of Germany, the Court can decide within its judgment who shall execute its decision and, additionally, within a specific case, envisage the specific method for execution.[36] Pursuant to the mentioned article, when utilising the institute of declaring the law incompliant with the Constitution, the Constitutional Court makes the indication of the term, within which the legislator should amend the unconstitutional regulation. The length of such term is an assessable category and depends on the complexity, which the legislator may meet when adopting the new regulation.[37] According to the general rule, the provision which was declared unconstitutional, is not used for the legal relationships prior to adopting a new regulation.[38] However, the case law of the Court also includes the exemption from this rule. The Constitutional Court of Germany in one of its decisions declared unconstitutional the law regulating the inheritance tax, which envisaged the different models of evaluating the taxable property, thus causing different tax burdens. The Court declared the provision unconstitutional with regards to the right to equality and with the very decision, as an exception, stated that prior to adopting new regulations, the discriminatory law would continue to be in force. The Court justified the prolongation of the force of law with the purpose of safeguarding the principle of foreseeability.[39] It is notable, that the Federal Constitutional Court of Germany develops special approach towards the force of tax regulations provisions declared unconstitutional. Specifically, the Court defines that the expediency and the necessity of using the provisions declared unconstitutional are linked to the security of state financial sector and the high value thereof to the Country. The stable financial-budgetary planning of the State outweighs the violated basic human right.[40] Thus the "financial capacity", "unreasonable financial-budgetary outcomes" are the circumstances, with which the Constitutional Court validates using the unconstitutional provisions further, before the legislator establishes regulations in compliance with the Constitution.[41]

Apart from abovementioned instance, there are occasions, when the Federal Constitutional Court of Germany plays the role of a positive legislator. The expression of the positive legislator nature is vivid prior to adopting a new law by the legislator, during the interim period, when as an exception, the Constitutional Court authorises the discriminatory benefit to the circles not envisaged by the law. For instance, in one of its decisions the circumstances at hand for the

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[35] Ines Härtel, *German National Report*, in the book Allan R. Brewer-Carías, *supra* note 3, p.504.
[36] Articles 35, Act on the Federal Constitutional Court of Germany. *Supra* note 34.
[37] Ines Härtel, *German National Report*, in the book Allan R. Brewer-Carías, *supra* note 3, p.506
[38] *ibid*, p.505-506
[39] Decision of the Federal Constitutional Court of Germany, 1 BvL 10/02, November 7, 2006. Accessible here: <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2006/11/ls20061107_1bvl001002en.html> [last visited on November 30, 2018].
[40] BVerfG, 2 BvL 5/91, September 25, 1992.
[41] BVerfG, 2 BvL 17/99, March 6, 2002.

adjudication entailed the right of a person within a civil partnership to adopt a child, who was already adopted by the partner prior to registering civil partnership.[42] The decision states, that failure to grant such right to the partner is not incompatible with the rights of personal freedom and family life, however it violates the right to equality, since, according to the law, a spouse within a matrimonial relationship has the right to adopt a child already adopted by another spouse and additionally, it was permitted to adopt a biological child of a partner within civil partnership. According to the Court indication, since the legislator had various possibilities to eliminate unconstitutional condition, it was permissible to declare the disputed provision unconstitutional. At the same time, prior to adopting the new regulation, considering the negative aspects of the discriminatory treatment, the Constitutional Court expanded the scope of the disputed provision and entitle a partner of the civil partnership to adopt a child already adopted by the second partner. Other judgments of the Federal Constitutional Court of Germany are similar to the mentioned one, when the expansion of the persons exercising the benefits as a temporary measure is based on the expected negative outcomes, which the recipients of the benefits would face by the invalidation thereof. In addition to the mentioned, the weight of financial load to the State stemming from the granting legal privilege to the unprivileged group, is also evaluated.[43] The same Court had previously established a criterion in its case law, the satisfaction of which allowed the expansion of the circle of persons envisaged by the disputed provision. The mentioned criterion entails a situation, when it is undoubtful, that the legislator, once analysing the article 3 (Right to Equality) of the Basic Law of Germany, would have adopted such provision and would directly expand the law over the group at hand.[44] The mentioned standard is uncertain, since it is not clear, when the will of the legislator is "undoubtedly" foreseeable, especially when the lawmaker has the possibility of adopting several different decisions in compliance with the Constitution.

In certain cases the Federal Constitutional Court of Germany expresses more daring, when with its decision, on the one hand, establishes the incompliance with the Constitution and, on the other hand, defines, that in the event the legislator does not adopt new regulation within the set time, the relevant bodies should use the regulations existing prior to the force of the disputed provision (old regulation).[45] Such approach of the Court entails the signs of abuse of power vested in it. The failure to adopt new regulation by the legislator will result in annulment of the discriminatory regulation, which is fully compliant with the mandate of the constitutional court, since the negative legislator has no legal leverage, other than invalidating the law. While after

[42] Decision of the Federal Constitutional Court of Germany, 1 BvL 1/11, February 19, 2013. Accessible here: <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2013/02/ls20130219_1bvl000111en.html> [last visited on November 30, 2018].
[43] Decision of the Federal Constitutional Court of Germany 2 BvL 4/05, April 17, 2008.
[44] BVerfG, 1 BvR 241/56, February 21,1957.
[45] Decision of the Federal Constitutional Court of Germany, 1 BvL 16/95, October 29, 2002. Accessible here: <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2013/02/ls20130219_1bvl000111en.html> [last visited on November 30, 2018].

the annulment of the provision, the regulating the legal relationship, with enforcing the old regulations or through adopting completely new ones, is the authority which is fully attributed to the legislative.

Within the above-mentioned context, the practice of the Swiss Federal Supreme Court is also notable, where the Court rejects the exercise of the positive legislative functions and declares the provision or part thereof unconstitutional. For instance, the mentioned Court, in its so called *Hegetschweiler* case established that the legislation of the Canton was discriminatory, since it obligated the couple within matrimonial relationship to pay more income and property tax, compared to the unmarried couple, who had similar financial resources. The Court decided that the main object of the complainants was the demand to create new law, which would ameliorate their state. It was stated, that the invalidation of the provision by the Supreme Court would cause the enforcement of the law existing before, unless the Court itself created new provision. The Court, based on its mandate, did not satisfy the complaint and refused to invalidate the provision. However, it declared the law incompliant with the Constitution and this way requested the legislator to eradicate the unconstitutional condition.[46]

III. The Case Law of the Constitutional Court of Georgia on Eliminating the Statutory Discriminatory Privileges

The Constitutional Court of Georgia has more than once evaluated the constitutionality of the provisions establishing discriminatory privileges with regards to the right to equality before the law. In this regard the practice of the Court is varied. The analysis of the judgments indicates, that the Court, during different periods of times, was at different stages of development. It is noteworthy that in the recent judgments the Court studies issues with more scrupulosity, whether the adjudication of a specific matter is within the competence of a "negative legislator".

Similar to other courts, the Constitutional Court of Georgia has also taken on the function of "positive legislator", however, through the abovementioned "additive decisions". One of the prominent examples is the case "Citizen of Georgia Tristan Mamagulashvili v. The Parliament of Georgia".[47] In this case the law, granting the status of a displaced person to only the persons displaced from the occupied territories of Georgia was disputed. The Claimant was disputing the words "from the occupied territories of Georgia" and argued that the status of displaced person and relevant social benefits had to be also possible for the persons forcefully displaced from other territories as well. The Court considered that the disputed words unjustifiably excluded the persons displaced by force from territories not occupied and, therefore were discriminatory. In the mentioned case through declaring the words void, the Court automatically expanded the

[46] Tobias Jaag, *supra* note 12, pp. 789-790.
[47] Citizen of Georgia Tristan Mamagulashvili v. the Parliament of Georgia judgement 1/3/534, the Constitutional Court of Georgia, June 11, 2013.

circle of subjects to the disputed provision and granted the status of a displaced person to all, who faced proven forceful displacement.

In the recent case law of the Court there are judgments, which establish new standard and the approach opposing to the criterion established in the case N1/3/534. In the case "Citizen of Georgia Lali Lazarashvili v. the Parliament of Georgia" the claimant (former judge) disputed her discriminatory exemption from the right to receive compensation in comparison to other judges of the Supreme Court.[48] The Claimant indicated during the trial, that she demanded the disputed provision to be declared unconstitutional in a way, that would grant her the right to receiving compensation similarly to other former judges. When deciding this case, the Constitutional Court defined, that "the demand of the Claimant is directed not to invalidating specific normative content of the disputed provision, but to creating new normative content. The Claimant, in reality does not consider the issuing of the compensation based on the disputed provision to be problematic but demands to expand the disputed provision and be used towards her as well. This demand is identical to creating positive prescription into the law, which is a part of the legislative process and is not an issue to be decided within the negative legislator competence. Therefore, the Constitutional Court is not entitled to satisfy the claim and grant the Claimant the right to relevant compensation.".[49] Although the mentioned case deserves positive assessment for not granting the Claimant the right not prescribed by the law, it is however the subject to criticism, for leaving the disputed provision without the assessment of its constitutionality.[50] Regardless the claim, it was relevant for the Court to assess the discriminatory nature of the disputed provision, especially, when the court recognised the differential treatment between the essentially equal persons, while the Parliament of Georgia was unable to point to a specific legitimate aim, justifying such differentiation. The mandate of the Constitutional Court is the starting point for deciding the issue. Exercising constitutional adjudication, unlike the disputes in the common court, does not serve merely the protection of the Claimant only within the specific case, but the Court also assesses the constitutionality of the normative act, which has the affect over undefined circle of persons. In this case the role of the Claimant and her specific case was in identifying the legal problem correctly and displaying the issue as a tangible/real problem. Therefore, once the Claimant demonstrates the legal issue correctly to the Court, the motivation/wish declared during the formation of the claim should not become a barrier to invalidating obviously unconstitutional provision and eliminating it from the societal life. In the case of Lali Lazarashvili, the obviously discriminatory provision was at hand, while as a result of the Court's decision, such regulation continued to exist.

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[48] Citizen of Georgia Lali Lazarashvili v. the Parliament of Georgia judgement 3/6/642, the Constitutional Court of Georgia, November 10, 2017.
[49] *ibid*, paragraph II-24.
[50] Regarding this issue, see the dissenting opinion of the member of the Constitutional Court of Georgia – Lali Papiashvili to the Judgment of the Constitutional Court Plenum N3/6/642, adopted on November 10, 2017.

It is noteworthy, that the standard established in the above mentioned case was strengthened by the Decision N2/1/760, where the demand of the Claimants (Members of the Supreme Council of Soviet Socialist Republic, elected before 1990) to receive compensation similarly to the Members of the former Supreme Council, was rejected based on the grounds, that the disputed issue was not within the authority of the Constitutional Court.[51] Thus the tendency of rejecting the expansion of the content of disputed provision through the function of positive legislator is a part of solid practice established recently by the Constitutional Court of Georgia.[52] At the same time the Court has established a new tool for invalidating the discriminatory law. The mentioned tool was first used by the Constitutional Court in the so called "Patriarchate Cases".[53] In both cases the Claimants were different religious confessions and they considered the disputed provisions to put the Georgian Apostolic Autocephalous Orthodox Church to be in a predominant position through various exemptions and, thus, were discriminatory. In the case of July 3, 2018 N1/2/671 the Claimant was disputing the constitutionality of Tax Code provision, which entitled the construction, restoration and painting the Temples and the Churches to be VAT exempt, if these works were contracted by the Patriarchate of Georgia. The Court considered the disputed provision establishing tax exemption to be granting the Patriarchate of Georgia in a predominant position in comparison to other religious organisations without rational justification and, thus, declared unconstitutional the normative content of the disputed provision, which entitled VAT exemption to the services of the construction, restoration and painting the Temples and the Churches, contracted only by the Patriarchate of Georgia. Similar situation was in the case N1/1/811 of July 3, 2018. Specifically, the disputed provision granted the right to receive state property freely only to the Georgian Apostolic Autocephalous Orthodox Church and other religious unions were left without such right. The Court considered this provision discriminatory and declared the normative content of the provision unconstitutional, which envisaged granting state property for free to only the Georgian Apostolic Autocephalous Orthodox Church. In both these cases, based on the paragraph 3, article 25, of the Organic Law of Georgia "On Constitu-

[51] Citizens of Georgia Vileni Alavidze, Tengiz Uchaneishvili, Irakli Motserelia, et al. (52 Claimants in total) v. the Parliament of Georgia Decision 2/1/760, the Constitutional Court of Georgia, February 22, 2018.

[52] Additionally see, the Constitutional Court of Georgia, Citizen of Georgia Avtandil Katamadze v. the Government of Georgia, Judgment 2/1/743, February 22, 2018; Citizen of Georgia Ana Maisuradze v. the Government of Georgia, Decision 2/8/881, March 22, 2018, paragraph II-8; The Group of Members of the Parliament of Georgia (Davit Bakradze, Sergo Ratiani, Roland Akhalaia, Levan Bezhashvili and others, in total 38 MPs) and the Citizens of Georgia Erasti Jakobia and Karine Shakhparoniani v. the Parliament of Georgia, Protocol on case 3/4/768,769, June 17, 2016, paragraph II-3; Citizen of Georgia Mzia Turashvili v. the Parliament of Georgia and the Minister of Justice of Georgia, Decision 2/17/1301, July 27, 2018.

[53] 1) The Judgment of the Constitutional Court of Georgia on Case 1/1/811, 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, July 3, 2018; 2) The Judgment of the Constitutional Court of Georgia on Case 1/1/671, 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, July 3, 2018.

tional Court of Georgia", the Court postponed invalidation of the disputed provisions till December 31, 2018.[54] The Court has postponed the invalidation of the disputed provisions in multiple other cases, however in these instances, the motivation for postponing is relevant. The Court defined, that the right to equality does not prohibit establishing a privilege (transfer of state property for free, using tax exemption) to a certain person and it does not prescribe for the duty to granting such privilege to any person either. The object of this right is equal treatment of essentially equal persons.

In the Judgments it was indicated that the equality can be reached by the legislator both through expanding the privileges to all substantially equal persons and through completely annulling such privileges. Therefore, the legislator had several alternatives to eliminating discrimination, which one the legislator chooses, is within its discretion. Additionally, the Court stated that the disputed provisions had granting character, thus annulling them at the moment of publishing the Constitutional Court Judgment would cause eliminating the possibility of the Georgian Apostolic Autocephalous Orthodox Church to exercise those privileges. In fact, the Constitutional Court granted the lawmaker with the term for making the amendments, while in case of failure to make them within this term, will cause the annulment of the disputed provisions and invalidating the privileges the Patriarchate has. It is obvious that the tool established by the Constitutional Court of Georgia is somewhat influenced by the institute of invalidating the provisions not compliant with the Constitution established in the adjudication of German Constitutional Court and the institute of "additive decision of principle" used in the practice of Italian Constitutional Court. However, there are relevant differences at hand. Namely, before the exhaustion of the term set by the Constitutional Court of Georgia, the disputed provision continues to be in force as before, despite its discriminatory nature. The regulation in force at the time of adopting the so-called Patriarchate Cases, as well as currently, the Constitutional Court does not have authority to make any decision, other than invalidating the unconstitutional provision.[55] At the same time, the freedom of action of the Court is limited with regards to defining the execution of its own decision. Specifically, the Constitutional Court can only declare the later term of the invalidation of unconstitutional provision or part thereof.[56] In such situation there is no procedural rule, which would ensure the suspension of the unconstitutional provision prior to the exhaustion of the term given to the legislative body. Thus, the force of the unconstitutional provision could continue for several months or even years. In all cases, maintaining the force of the unconstitutional provision undermines the aim of exercising constitutional control, creates basis for continuous violation of the right and incentivises the legislator to delay the amendments as much as possible. However, as an exception, the occasions, when the prolongation of the force

[54] Article 25.3, the Organic Law of Georgia "On Constitutional Court of Georgia", January 31, 1996, Parliamentary Herald, 001, 27.02.1996.
[55] Article 60.5, Constitution of Georgia, August 24, 1995. Herald of the Parliament of Georgia, 31-33, 24.08.1995.
[56] *Supra* note 55, also article 25.3, the Organic Law of Georgia "On Constitutional Court of Georgia", January 31, 1996, Parliamentary Herald, 001, 27.02.1996.

of unconstitutional provision for safeguarding more valuable interest are not excluded. Therefore, the Constitutional Court, as an exception should be able to prolong the term of the unconstitutional provision based on individual assessment of circumstances, but this cannot be a general rule. With this regard, the abovementioned rule established in the German constitutional adjudication can be a certain orientation model for the amendments in the Georgian law.

CONCLUSION

The analysis of the case law evidences, that there are various ways for eliminating privileges opposing equality. A part of the courts consider modification of the provision through the judiciary means and, thus, exercising the positive legislator function to be a tool for reinstating the equality between groups. The mentioned approach neglects the principle of division of powers and justifiably deserves criticism. The constitutional court, through invalidating the provisions, modifies legal order in any case, however, this is radically different from adding new constitutional rules. Creation of new rules from the constitutional court is justifiably only when this is the sole measure for safeguarding constructional rights. The specificity of the discriminatory provisions establishing statutory privileges is in the fact that the legislator can edit/amend them through various alternative ways, while selecting one of several constitutional solutions is beyond the adjudication field.

In opposition of this, invalidating discriminatory law by the constitutional court is within the negative legislator mandate, which, obviously, will cause elimination of the possibility to use the privileges by the privileged persons and the equality will be reinstated through this way. The position, according to which the full annulment of the provision by the Constitutional Court includes the signs of abuse of powers, is not to be shared.[57] The annulment of the provision is the sole measure, which the constitutional court can use for safeguarding the right to equality. It does not cause limiting the authorities of the legislative body in any way or diminishing it. The latter, unlike the constitutional court, has far more levers to equalise the persons and can, despite the annulment of the privileges by the court, create a new normative order and expand the privilege to all subjects. Part of the courts avoid invalidation of empowering provision, since it envisages possible damage to the privileged persons. Obviously, invalidating such provisions will result in failure to receive benefits by the privileged group, which could neglect the legitimate expectation towards the benefit. It is possible such legitimate expectation to be related to certain constitutional right, however, considering it within the view of the right to equality before the law will be incorrect. Another legal means, which can be used by the constitutional court, entails postponing invalidation. As it is stated in the legal literature, constitutional court expresses reverence towards the legislator's competence, allowing it to select one from several alternative

[57] Werner Heun, *supra* note 4, p. 206.

solutions and eliminate the inequal state.[58] Using the mentioned legal technique is fully within the margin of appreciation of the constitutional court and there is no duty to implement it. This model is utilised in the practice of legally developed states (Germany, Italy, Switzerland) and the Constitutional Court of Georgia has established it in its recent practice too, which should be positively assessed.

At the same time, the approach towards the discriminatory provisions establishing constitutional right is different. In the case of a constitutional right, the legislator/constitutional court does not have liberty to act and the only relevant solution is to grant the right to a person. Therefore, if the constitutional court invalidates the provision establishing the constitutional right in a discriminatory way, so that it expands the disputed provision and grants the constitutional right to the persons, limited from the possibility of exercising it, the court shall not invade the authority of the positive legislator.

[58] Werner Heun, *supra* note 4, p. 206.

CASE NOTES OF THE CONSTITUTIONAL COURT OF GEORGIA

ABSTRACT

The Journal of Constitutional Law continues to offer the readers brief summaries of the latest significant cases resolved by the Constitutional Court of Georgia. For this Volume four judgments adopted by the Court within 2019 were selected for publication, some of which have had high resonance not only within Georgia, but globally in the legal field. The Journal hopes the notes will bring more interest towards the case-law of the Court and will motivate further discussions around its practice.

LLC SKS V. THE PARLIAMENT OF GEORGIA

On 18 April 2019, the First Chamber of the Constitutional Court of Georgia rendered a decision on the Case of "LLC SKS v. the Parliament of Georgia" (The Constitutional Complaint №655).

In this case, the subject of dispute was constitutionality of subparagraph "r" of Paragraph 3^1 of Article 1 of the law of Georgia "On Public Procurement" with respect to the first and second sentences of article 30(2) of the Constitution of Georgia, the edition that was in force as of December 16, 2018.

Pursuant to the disputed regulation, it was established that Law of Georgia "On Public Procurement" may not apply to the public procurement by a contracting authority of postal and courier services of the LLC Georgian Post.

According to the complainant, the disputed provision allowed public agencies to procure postal and courier services through direct contract from LLC Georgian Post. Therefore, it excluded the ability of other economic agents operating in the same market to participate in the state procurement process. Under the aforementioned circumstances LLC Georgian Post was granted the exclusive authority to provide postal and courier services and created a legal precondition for establishing it as a monopolist on the postal and courier service market. Given the abovementioned argumentation, the complainant considered that the disputed regulation was contrary to the constitutional right of the entrepreneurship and the freedom of competition.

The Respondent, the representative of the Parliament of Georgia, explained that the measure envisaged by the impugned regulation served the legitimate aim of providing postal and courier services at an affordable price throughout the whole territory of Georgia. In line with the Respondent's argument, the standards of postal and courier services provided by LLC Georgian Post was in accordance with qualitative and tariff requirements established by international

documents in this field. At the same time, under the disputed provision procuring entities had the right, not an obligation, to conclude a direct contract with LLC Georgian Post. Respectively, they were fully entitled to declare tender in which case economic agents operating in the postal and courier market would have the opportunity to participate in it. Based on provided arguments, the Respondent party considered that the disputed regulation was not in contradiction with the requirements of the Constitution of Georgia and constitutional complaint should not be upheld.

In the present judgment, the Constitutional Court of Georgia held that public agencies and other entities funded from the state budget had the ability to purchase postal and courier services solely from the LLC Georgian Post, by evasion of procedural requirements for public procurement so, as not to take into account the offers of other economic agents providing the same services. Under these conditions, the LLC Georgian Post was given a significant market advantage, as far as, unlike other economic agents operating on the same market, it had already served a significant number of guaranteed purchasers, in the form of public procurement organizations. Accordingly, the Constitutional Court of Georgia indicated that under the disputed regulation LLC Georgian Post was granted such benefit, through State resources on a selective basis, which improved its market position and created risks for freedom of entrepreneurship and competition. Thereby, it was established that the contested regulation restricted the constitutional right to freedom of entrepreneurship and competition.

The Constitutional Court of Georgia shared the position of the Parliament of Georgia and indicated that providing population with access to the postal and courier services throughout the whole territory of the country was an important legitimate aim. At the same time, The Constitutional Court of Georgia accepted the respondent's position that the delivery of postal and courier services in less populated and hardly accessible areas of the country may not be commercially attractive. Therefore, in order to ensure affordable prices for postal and courier services on the whole territory of the country, the interference in the relevant market would be justified *inter alia* by establishing a preferential treatment for the LLC Georgian Post. Nevertheless, the Constitutional Court of Georgia indicated that any such benefit granted to the LLC Georgian Post should be proportional to the services rendered.

Finally, the Constitutional Court of Georgia concluded that the Georgian legislation in the field of the public procurement failed (a) to clearly define the obligation of the LLC Georgian Post to provide postal and courier services with affordable price on the whole territory of the country; (b) to establish transparent and objective criteria for calculation of economic expenses necessary for providing postal and courier services with affordable price on the whole territory of the country; and, (c) to incorporate a mechanism that would prevent LLC Georgian Post from abusing their market power by receiving benefits, which exceed adequate commercial expenses and reasonable profit. In view of the above-mentioned arguments, the Constitutional Court of Georgia established that the disputed legal provision unduly restricted the freedom of entrepreneur-

ship and competition and contradicted first and second sentences of article 26(4) of the Constitution of Georgia.

Furthermore, the Constitutional Court of Georgia indicated that in case of an immediate invalidation of the impugned legal provision LLC Georgian Post would lose granted economic benefits. This may have hindered the process of providing postal and courier services throughout the whole territory of the country at an affordable price and may negatively affect on the interests of the postal and courier services customers. For this reason, the Constitutional Court granted the legislature, the Parliament of Georgia, with reasonable time to address the said regulatory non-compliance in line with the Constitution of Georgia by May 1, 2020, after which the disputed legal provision will be invalidated.

N(N)LE Media Development Foundation and N(N)LE Institute For Development of Freedom of Information v. The Parliament of Georgia

On 7 June 2019 the First Chamber of the Constitutional Court of Georgia adopted the judgment in the case of "N(N)LE Media Development Foundation" and "N(N)LE Institute For Development of Freedom of Information" v. Parliament of Georgia (Constitutional complaints N693 and N857). Constitutionality of the several provisions of the Administrative Code of Georgia and Law of Georgia "On Personal Data Protection" were challenged.[1] Disputed norms regulated granting freedom of information (FOI) request regarding the public information, which contained personal data. The disputed provisions restricted the disclosure of any type of personal data in response to public information requests. If the personal data fell under the special category disclosure or granting access of that data as FOI was prohibited under any circumstances without the consent of the data subject.

According to the complainants, accessing the full text of the judgments (without depersonalization of the text) of the court is vital for judicial transparence and it is protected by the right to access the public information. Plaintiffs indicated that based on the disputed provision they were unable to acquire full text of the judicial acts adopted by common courts of Georgia after open/public hearing. Namely, courts refused to disclose judicial acts to protect personal data in it on the one hand and if the act was requested in redacted form, they indicated that it was unable to depersonalize the requested document and they did not grant the requests. Complainants claimed that such regulation contradicted the right to access the information stored in public institutions (Article 18, Section 2 of the Constitution of Georgia).

[1] Disputed provisions within the N693 constitutional complaint – article 44 (1) of the Administrative Code of Georgia (effective until 16 December 2018) and article 6(3) of the Law of Georgia "on personal data protection with respect to article 41(1) of the constitution of Georgia (effective until 16 December 2018).
Disputed provisions within the N857 constitutional complaint – article 28(1) and 44 (1) of the Administrative Code of Georgia (effective until 16 December 2018) and articles 5, 6(1) and 6(3) of the Law of Georgia "on personal data protection with respect to article 41(1) of the constitution of Georgia (effective until 16 December 2018).

The respondent disagreed with the plaintiffs' positions. Representative of the Parliament of Georgia argued that the disputed provisions existed to protect the personal data of the parties and other participants to the cases. The respondent indicated that, legislation allowed disclosure of the personal data within the document and the balance of interests was protected. The parliament of Georgia claimed that personal data under the special category was extremely sensitive and prohibition to disclose such information without the consent of the data subject was justified. Consequently, the respondent concluded that the disputed provisions were in accordance with the requirements of the Constitution of Georgia.

The Constitutional Court of Georgia acknowledged that article 18(2) of the Constitution of Georgia allowed the members of the society to be informed on the issues it deemed to be important and to engage consideration and implementation of these issues in active and effective manner. It is the aim of the right to access information that exist in public institution to facilitate public control and to engage society in decision making process. The Constitutional Court indicated that the disputed provisions regulated general issues regarding public information that contained personal data and the scope of the norms cover every type information and they were binding to any public institution. Considering the constitutional claim, The Constitutional Court reviewed the constitutionality of the disputed norms only in relation to the accessibility of the judicial acts delivered within the scope of an open hearing by the Common Courts of Georgia.

The Constitutional Court acknowledged that the freedom to access judicial acts were protected by the right to receive information from public institutions. The Court stated that the disputed provisions restricted access to judicial acts that contained personal data and if depersonalization was not possible, the respective act was not disclosed. Therefore, the provision constituted a restriction to the right protected by the article 18(2) of the Constitution of Georgia.

The Constitutional Court agreed to the respondent party's position and declared that the legitimate aim of the disputed provisions was the protection of personal data. In addition, disclosing personal data during the open court hearing has an instant effect whereas disclosing the same information in response of the requests increases the publicity level and in certain circumstances, it may restrict right to privacy more intensively in comparison to open court hearing. Therefore, the Constitutional Court did not exclude the interest of data subject to prevent the further spread of instantly revealed information and the Court considered the disputed provisions to be adequate/suitable for achieving legitimate aim.

On necessity stage, the Constitutional Court discussed the will of personal data subject to keep his/her personal data confidential. The Court interpreted, that the legislation does not contain flexible measures ensuring the right of an adult person with full legal capacity to waive his right on personal data protection within the scope of the respective judicial act. The law required consent of the data subject every single time, but the identity of the data subject is usually unknown for the person seeking the copy of the judgment. According to the assessment of the Constitutional Court within the existing legal framework it was almost impossible to gain access to the full texts of the judicial acts even if data subjects had no interest to protect their personal

data or wished their case to be publicly accessible. The Constitutional Court interpreted that such regulation was not pursuant to the necessity requirement as it restricted the right of access to information in the public institution excessively and such extreme measures were not necessary for achieving the legitimate aim.

According to the Constitutional Court, data subject having an interest in keeping his/her personal data confidential, does not automatically provide a ground for restricting the accessibility thereof. The Constitutional Court indicated that, under such circumstances, there was a collision between two competing constitutional rights, and it established the balance between competing interests on proportionality (*stricto sensu*) stage.

The Constitutional Court acknowledged that the interest of accessibility of the information stored in the public institutions varies and there might exist superior public interest of transparency toward certain category of public information. The Court named judicial transparency to be the first interest of accessibility of the common court judgments. The Court indicated that the Constitution of Georgia considers judicial transparency amongst matters of special importance as the Constitution regards transparency to be the principle for exercising judicial power. The Court noted that public trust is the vital source for legitimacy of the judiciary and it could not be ensured without transparency.

The Court emphasized that public oversight on exercising judicial power and on judicial acts in particular had vital importance in a democratic society. In this manner, every individual enjoys possibility to carry out public control of the judicial system. People shall have opportunity to evaluate every judicial act and place every judgment, order or interpretation under wide public scrutiny. The Court noted that in certain circumstances it is impossible to fully evaluate judicial acts in order to find out whether it is objective or biased and prejudiced without the full text of the judgments including personal data within.

The Constitutional Court acknowledged that the judicial transparency is a part of fair trial and legal safety. The Court stated that every person shall have the right to inform the society about his/her own case and place it under public scrutiny. In addition, legislation gains its real effect upon applying and interpreting its provisions by the judiciary. Judiciary is a part of the constitutional architecture of governmental institutions, which makes final statement regarding the interpretation and applicability of the law. Thus, accessibility of judicial decisions ensures the opportunity of individuals to know the content of the law, how specific provisions are applied by the courts and what a normative regulation requires from them.

Based on mentioned arguments the Constitutional Court considered that there was superior public interest toward accessibility of the judicial acts.

The Constitutional Court underlined the relevance of the personal data protection and noted that confidentiality of personal data aims to ensure protection of one's private life. Level of protection varies by the importance of the information and its potential to negatively influence one's private life. Higher potential of negative influence and consequently higher guarantees for con-

fidentiality might be caused by the category of the data, also circumstances accompanied to accessing and disclosing of such information and other relevant factors.

The Constitutional Court emphasized that the disputed norms restricted access to the judicial acts delivered within the scope of an open/public hearing by the Common Courts of Georgia. The Court assessed that confidentiality level of personal data in such acts is usually low and it shall not outweigh the superior public interest toward the accessibility of the judicial acts. The Court interpreted that covering personal data in judicial act after public hearing could be justified but decision-maker shall assess whether personal data protection prevails over high constitutional interest of the accessibility of the judicial acts.

The Court indicated that, the disputed norms established the default balance in favor of the personal data protection and such legislative approach contradicted the order of the constitutional values established by the basic law. The Court noted that the disputed norms undermined the public oversight and trust toward judiciary. According to the judgment, in many cases it is impossible to demonstrate and reason high public interest toward a case without accessing the personal data in it. Necessity for such reasoning every time an interested party requests a judicial act excludes effective public oversight and the possibility of accidental (untargeted) public control for exposing possible shortcomings, biased tendencies or selective justice. According to the assessment of the Constitutional Court, restriction imposed by the disputed norms is extremely intensive when common courts refused to grant the access to judicial act at all if the depersonalization was not possible. According to judgment under consideration, such regulation not only excludes untargeted public control but also disregards the requirements of legal safety as society is refused to have access to legal reasoning and authoritative interpretations of the existing legislation.

The Constitutional Court also ascertained that there may be circumstances which require to reverse balance in favor of personal data protection when disclosure of the data has intensive negative influence of one's privacy considering the content and subject of the data, time and form of exposure and other conditions. To demonstrate such exceptional circumstances the Court invoked the interests of minors and intimate issues. However, the Court noted that if such exceptional need for privacy is challenged by outstanding public interest toward the case there should exist legislative measure to disclose the respective judicial act.

Based on represented reasoning, the Constitutional Court ruled that the disputed provisions established unconstitutional balance toward personal data protection with respect to the right to access the information kept in public institutions and it caused the breach of article 18(2) of the Constitution of Georgia. In addition, the Court noted that enforcing its judgment immediately would cause legislative absence. Namely, there would not be any legislative ground for denying freedom of information requests for protecting the personal data within the judicial acts and that could cause the violation of the right to privacy. In addition, to ensure necessity of the restriction establishing flexible legislative means for persons with full legal capacity in ongoing as well as finalized court proceedings to ensure that possibility to restrict the right to access judicial deci-

sion will only be available if data subject expresses will to protect his/her personal data. Therefore, the Constitutional Court postponed invalidating the disputed provisions until May 2020.

THE PUBLIC DEFENDER OF GEORGIA V. THE PARLIAMENT OF GEORGIA

On 2 August 2019 the Constitutional Court of Georgia adopted the judgment in the case of "The Public Defender of Georgia v. the Parliament of Georgia" (the Constitutional complaint №770). The subject of the dispute was the constitutionality of the wording "if the application of this measure is considered insufficient after taking into account the circumstances of the case and the person of the offender – administrative detention for up to 15 days" of section 2 of Article 45 of the Administrative Offences Code of Georgia (version of provision that was in force until 28 July, 2017) and the wording "or by imprisonment for up to one year" of Article 273 of the Criminal Code of Georgia (version of provision that was in force until 28 July, 2017) with regard to paragraph 1 and 2 of Article 17 of the Constitution of Georgia (version of the provision that was in force until 16 December, 2018).

The Public Defender of Georgia claimed that the sanctions of administrative detention and imprisonment, respectively, for illegal production, purchase, storage and/or use without a doctor's prescription of a narcotic drug, its analogue or a precursor in small quantity contradicted the Constitution of Georgia. The complainant indicated that according to the disputed norms prison sentence was equally applicable for illegal use of soft and hard narcotic drugs. Furthermore, in some cases, the punishable quantity of narcotic drugs was so small that the public threat derived from this action could not justify the prison sentence. The complainant further stated that the main purpose of above-mentioned sanctions was repression and general prevention of prohibited action. The complainant thereby considered the sanctions of administrative detention and imprisonment, as established by the disputed norms, were clearly disproportional punishment.

The respondent indicated the protection of public health, prevention of distribution of drugs and drug addiction as legitimate aims of the disputed law. Further, the respondent emphasized that the law in question prescribed alternative sanctions, which allowed courts and law enforcement bodies to take into account the factual circumstances of the case and interpret the law in each individual case.

In the present case, the Constitutional Court had to assess, in general, the constitutionality of the sanctions of administrative detention and imprisonment for illegal production, purchase, storage and/or use without a doctor's prescription of a narcotic drug, its analogue or a precursor in small quantity. The Constitutional Court explained that the subject of disputed norms included multiple type of narcotic substances, which had various effects and contained different degree of threat for society. Further, "small quantity", indicated in the impugned norms, may have been quantity enough for a single use or quantity that exceed the amount of one-time use. Therefore, the Constitutional Court assessed separately, on the one hand, the punishment for production,

purchase, storage of a narcotic drug, its analogue or a precursor for a clearly personal use (quantity enough for a single use) and, on the other hand, production, purchase and storage thereof that exceeds the amount of a single-use.

The Constitutional Court noted that every person who was involved in illegal turnover of drugs (drug users, manufacturers, retailers, etc.), to some extent, contributed to illicit traffic of prohibited substances and created a "market demand". Illegal turnover of narcotic drugs was a threat to public health and safety and preventing these threats was legitimate aim of the disputed norms.

The Constitutional Court drew the distinction between criminalisation of illegal production, purchase, storage and/or use without a doctor's prescription of narcotic drugs, which cause rapid addiction and/or aggressive behaviour and prohibited substances which did not have mentioned side effects. The Constitutional Court stated that the potential risk of violation of public order is carried by the illegal use of only those prohibited substances, which established a state of abstinence, caused fast addiction, aggressive behaviour or high risk of committing crime. Accordingly, the Constitutional Court noted that the sanctions of administrative detention and imprisonment for illegal production, purchase, storage and/or use without a doctor's prescription of a narcotic drug for clearly personal use that do not cause fast addiction and/or aggressive behaviour in their user did not serve the legitimate aim of protection of public order and security and it was limited only by the protection of public health.

The Constitutional Court explained, that the sanction for illegal production, purchase, storage and/or use without a doctor's prescription of narcotic drugs for personal use had deterrent and preventive effects and was reducing illegal turnover of prohibited substances. Therefore, the impugned provisions protected the health of a consumer of narcotic drug and the health of the entire society. Regarding these legitimate aims, the Constitutional Court stated that imposition of punishment to prevent an adult person from harming his or her own health was the form of paternalism demonstrated by the state, which was not compatible with the free society and contradicted the requirements of the Constitution. In relation to protection of public health, the Constitutional court pointed out that the importance of an individual drug user in the process of illegal turnover of prohibited substances was insignificant and by this reason, using prison sentence for drug users had non-essential consequences for reducing illicit traffic. The Constitutional Court further explained that production, purchase, storage of a narcotic drug for personal/single-use generated minimal, hypothetic risk of its distribution and the danger of public health emanating from this action was significantly low. Taking the above arguments into account, the Court concluded that the sanctions of administrative detention and imprisonment for production, purchase, storage of a narcotic drug for personal/single-use (prohibited substances which did not cause fast addiction and/or aggressive behaviour in their user) was clearly disproportional punishment and contradicted the Constitution.

The Constitutional Court separately addressed the constitutionality of applying imprisonment for narcotic substances which cause fast addiction and/or aggressive behaviour in their user and pointed out, that even a single use of these types of drugs, as well as, production, purchase or

storage for a clearly personal use contained a high risk of violating public order and safety. According to the Constitutional Court, being under the influence of such drugs or in the condition of abstinence, increased the risks of committing a crime and/or violating public order. Therefore, the Constitutional Court concluded that applying the sanctions of administrative detention and imprisonment was justified for the prevention of the above-mentioned threats.

Furthermore, the Constitutional Court found a prison sentence for production, purchase, storage of drugs that exceed the amount of one-time use constitutional. The Constitutional Court indicated that production, purchase, storage of narcotic substance exceeding the amount of single use did not necessarily refer to the purpose of distribution. Nevertheless, along with an increase in the amount of drug public (including, adolescents) access to narcotic substances rises, which, consequently, increases the illegal circulation of drugs. According to all the above mentioned, the Constitutional court concluded that production, purchase, storage of drugs that exceed the amount of one-time use contained significant threat for the society and applying the sanctions of administrative detention and imprisonment for this action could not be considered as an apparent disproportional punishment.

ALEXANDRE MDZINARASHVILI V. THE GEORGIAN NATIONAL COMMUNICATIONS COMMISSION

On 2 August 2019, the Constitutional Court of Georgia adopted the judgment in the case of "Alexandre Mdzinarashvili v. the Georgian National Communications Commission" (constitutional complaint №1275). The subject of dispute in this case were the norms of the regulation adopted by the Ordinance №3 of March 17 of 2006 of the Georgian National Communications Commission on Providing Services and Protection of Users' Rights in the Field of Electronic Communications. On the one hand, the disputed provisions established the obligation of the internet domain issuer to block the website in order to prevent dissemination of inadmissible products and, on the other hand, it gave the service supplier the opportunity to adopt appropriate measures in order to prevent dissemination of the message containing inadmissible products via network (according to the disputed Resolution, inadmissible products encompassed products depicting particularly severe forms of hatred and violence, degrading the personal life, also products that were defamatory, abusive, violating the presumption of innocence and inaccurate).[2]

According to the complainant's position, the contested Resolution of the National Communications Commission itself defined the notion of inadmissible products and regulated the issues

[2] The subject of the dispute fully: Constitutionality with regard to Article 24(1) of the Constitution of Georgia (version in force until December 16, 2018) of Article 10^3 (2)(b), Article 25(4)(g) and Article 25(5)(b) of the regulation adopted by the Ordinance №3 of March 17 of 2006 of the Georgian National Communications Commission on Providing Services and Protection of Users' Rights in the Field of Electronic Communications.

related to the prohibition of the dissemination of such products. As explained by the complainant, interference with freedom of expression by the disputed norms was carried out without delegation of powers. The restriction instead of the law, was based on the Resolution of the Georgian National Communications Commission. Complainant considered that it was formally in contradiction with the constitutional requirements.

The respondent, the Georgian National Communications Commission, emphasized that disputed provisions did not violate the formal requirement of the Constitution to restrict freedom of expression. In particular, the respondent indicated that the authority had been delegated to the National Communications Commission by the relevant provisions of the law on Electronic Communications and the law on National Regulatory Bodies and based on this delegation, the Georgian National Communications Commission was given the authority to draft legal acts on any matter that would be aimed at protecting users' rights in the field of electronic communications.

According to the Constitutional Court of Georgia, freedom of expression protects the right to freely receive and disseminate opinion/information, which includes the exchange of information in a desirable manner and means, without any content filtering. Based on the disputed norms, the Georgian National Communications Commission prohibited the transmission of messages depicting particularly severe forms of hatred and violence, degrading the personal life, defamatory, abusive, violating the presumption of innocence or inaccurate. In the Court's view, regulating the issue in such a manner meant the content regulation of expression and the restriction of the dissemination of opinion/information because of its content, which constituted one of the most severe forms of interference in this right.

According to the Constitutional Court, freedom of expression is not an absolute right and the Constitution of Georgia allows its restriction. The Court indicated that the constitutional norm establishing freedom of expression requires that the restriction of this right be allowed only in accordance with law. Failure to comply with the aforementioned formal requirement, despite the content of the regulation, leads to the unconstitutional restriction of the fundamental right.

The Constitutional Court elucidated that the constitutional guarantees for the restriction of the fundamental right by the law serve the realization of the principle of separation of powers, thereby avoiding the risk of concentration and abuse of state power. At the same time, such an order additionally ensures that the right is restricted only by the decision of state authority which is the highest representative body with the proper legitimacy granted by the people. The Parliament of Georgia is the constitutional body that resolves the issues based on a transparent legislative process, as a result of political debates and in this way, creates an additional filter to reduce the risks of unjustified interference in the right.

However, the Court considered that the formal requirement of the Constitution does not imply that the right can be restricted only by the Parliament of Georgia. In some cases, the Parliament of Georgia is authorized to delegate the competence of the regulation of some issues to another

state body, as the imposing of obligation to regulate on all issues related to the restriction of the rights on the Parliament of Georgia may paralyze legislative authority and delay the legislative process. The mechanism of the delegation of power greatly simplifies the law-making process and gives the legislature the ability to make decisions on principal political-legal issues, while passing the details necessary for their implementation to other state bodies.

According to the Constitutional Court, the delegation of powers by the Parliament may violate the Constitution in cases where delegation is expressly prohibited by the Constitution of Georgia and/or when it is determined that by delegation of certain powers the Parliament of Georgia refuses to exercise its constitutional authority. The Court considered that this occurs, for example, when the Parliament of Georgia delegates a fundamentally important part of its power.

According to the Constitutional Court, by the disputed regulation, the Georgian National Communications Commission determined what type of opinion and information is inadmissible. Accordingly, the content regulation of expression was established, which implies a restriction of the dissemination of opinion/information due to its content. The Constitutional Court noted that freedom of expression is a fundamental and functional element of a democratic society. It forms the necessary foundation for the development of society and for the protection of human rights. The equal and full enjoyment of this right determines the degree of openness and democracy of society. Thus, the content regulation of freedom of expression and determination of its aspects is the issue of high political and public interest. Therefore, according to the Court, the determination of this issue was a fundamentally important power of the Parliament of Georgia and delegation of this power to the Georgian National Communications Commission was inadmissible. Consequently, even if there was a legislative provision delegating the power of content regulation of freedom of expression, such a will of the Parliament would be unconstitutional.

At the same time, the Court indicated that the impugned provisions beyond the content regulation of expression also regulated the procedure for technical enforcement of the restraint establishing the content regulation. The Constitutional Court noted that the Constitution of Georgia does not exclude the power of Parliament of Georgia to delegate to another state body the authority to adopt the regulation of technical, content-related issues related to the restriction of freedom of expression. However, based on an analysis of the relevant legislative norms, the Court found that the Parliament of Georgia had not delegated the power to the Georgian National Communications Commission to regulate freedom of expression regarding the disputed matter.

In view of the foregoing, the Constitutional Court of Georgia held that the formal requirements for the restriction of freedom of expression had not been complied with. Therefore, the disputed provisions were found unconstitutional with respect to the first sentence of Article 17(1) and Article 17(2) of the Constitution of Georgia.