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THE RIGHT NOT TO BE DOMINATED: THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS ON MIGRANTS' DESTITUTION*

ABSTRACT

The European Court of Human Rights increasingly deals with migrants' complaints about destitution in their host state under Article 3 of the European Convention on Human Rights (the prohibition of inhuman and degrading treatment). This case law has been criticized for not being consistent and/or for not providing migrants with enough protection. Based on a systematic case law search, in this article, I analyse Article 3 case law on migrants' destitution from a new perspective: the concept of freedom as non-domination, as developed in (neo) republican theory. It will argue that, seen through this lens, many tendencies in the Court's case law can be explained and constructed as consistent, and it is submitted that in this way the Court does provide migrants with important protection against unfreedom. Nevertheless, I also argue in the article that the case law could be improved in a number of ways in order to provide more effective and robust protection against domination.

KEYWORDS: *inhuman and degrading treatment, positive obligations, migrants, asylum seekers, living conditions, Article 3 European Convention on Human Rights.*

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1. INTRODUCTION

Laws, when prudently framed, are by no means subversive but rather introductive of liberty.

William Blackstone[1]

Even though the European Convention on Human Rights (ECHR)[2] covers civil and political rights, the European Court of Human Rights (ECtHR) increasingly deals with complaints of a socio-economic nature.[3] This article analyses a specific line of the ECtHR's socio-economic case law: cases that deal with complaints lodged by migrants, under Article 3 of the ECHR, with reference to poor living conditions in their host country. For this review, 22 cases were identified by means of a systematic HUDOC search of the Court's case law (see below at Section 3(A)). Among these cases is the famous *M.S.S.* judgment, which received widespread attention in legal scholarship. However, it includes also less well-known cases that the Court declared manifestly ill-founded.

The line of case law under review in this article has been criticized by legal scholars as not being consistent or coherent and/or not providing claimants with sufficient protection. It has been argued that the Court should provide more 'enhanced'[4] and 'effective'[5] protection in this area. With regard to ECtHR case law on poverty and living conditions in general, Gerards observed, for example, that there are 'hardly any intrinsic reasons of principle to explain that so much protection is given to certain rights if compared to others'.[6] While she understands that the rights of prisoners are strongly protected, in her view this does 'not fully explain why so much less protection is given to the rights of free persons living in hardship and extreme need'.[7] Lavrysen calls the protection offered by the Court to persons living in poverty 'relatively modest'.[8] More specifically with regard to migrants, Dembour finds the Court's destitution case law largely consistent,[9] yet indefensible.[10] According to Da Lomba, the case law reveals the

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[1] Blackstone, `Commentaries on the Laws of England', in *The Founders' Constitution Vol 1* (1987) Chapter 3, Document 3, at 88.
[2] European Convention on Fundamental Rights and Freedoms 1950, ETS 5.
[3] See, for example, Lavrysen, 'Strengthening the Protection of Human Rights of Persons Living in Poverty under the ECHR' (2015) 33 *Netherlands Quarterly of Human Rights* 293; Leijten, *Core Socio-Economic Rights and the European Court of Human Rights* (2018); Slingenberg, 'Social Security in the Case Law of the European Court of Human Rights' in Pennings and Vonk (eds), *Research Handbook on European Social Security Law (2015)* 53.
[4] Lavrysen, supra n 3 at 308 and further.
[5] Gerards, 'The ECtHR's Response to Fundamental Rights Issues Related to Financial and Economic Difficulties: The Problem of Compartmentalisation' (2015) 33 *Netherlands Quarterly of Human Rights* 274 at 290.
[6] Ibid. at 289.
[7] Ibid. at 290.
[8] Lavrysen, supra n 3 at 308.
[9] Dembour mentions the case of *M.S.S.* as the great exception: see Dembour, *When Humans Become Migrants. Study of the European Court of Human Rights with an Inter-American Counterpoint* (2015) at 445.
[10] Ibid. at Chapter 13.

Court's resistance to developing the socio-economic dimension of the ECHR in respect of migrants with precarious immigration status.[11]

This article will analyse the 22 cases on migrants' destitution through the lens of (neo) republican theory on freedom as non-domination. In short, non-domination means not being subjected to arbitrary interferences. Even though the Court has never explicitly referred to the concept of non-domination, this article shows that the core elements of this concept can be detected in the Court's legal reasoning in *all* cases on migrants' living conditions. This article argues, therefore, that with reference to the concept of non-domination, many tendencies in this line of case law can be understood and constructed as consistent. In addition, although the limited protection provided by the Court in this field can still be criticized, the analysis in this article shows that the Court does protect a kind of freedom that, as has been argued in republican theory, is fundamental for ensuring social justice.

In addition to providing a clarifying framework for and constructing consistency in the Court's case law on migrants' living conditions, this article will also use the concept of non-domination to critique the case law under study and provide some suggestions for increasing protection against domination. Suggestions for improving the socio-economic (migration) case law have been offered in the literature on the basis of other theories, such as the 'core rights',[12] 'capability'[13] or 'vulnerability'[14] approach. Without denying the relevance and importance of these theories for understanding and improving the Court's case law, this article adds a new angle to the debate by providing an alternative theory as a basis for case law analysis and critique. By showing that key elements of the concept of non-domination are already present in all case law on migrants' living conditions, the improvements suggested in this article might, albeit more limited in scope, have a particularly firm basis.

Section 2 will introduce the republican concept of freedom as non-domination, in particular, Frank Lovett's conceptualization. This part of the article has a descriptive nature, as it serves as a basis for a critical analysis of the Court's case law on migrants' living conditions in Section 3. Section 4 summarizes the findings on the case law and suggests some improvements.

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[11] Da Lomba, 'Vulnerability, Irregular Migrants' Health-Related Rights and the European Court of Human Rights' (2014) 21 *European Journal of Health Law* 339 at 358.
[12] Gerards, supra n 5; Leijten, supra n 3; Oette, 'Austerity and the Limits of Policy-Induced Suffering: What Role for the Prohibition of Torture and Other Ill-Treatment?' (2015) 15 *Human Rights Law Review* 669.
[13] Lavrysen, supra n 3.
[14] Da Lomba, supra n 11.

2. FREEDOM AS NON-DOMINATION

A. Third Concept of Freedom

The concept of freedom as non-domination is an historical concept that has its origins in the classical republican tradition, including figures such as Machiavelli, Milton, Montesquieu, Blackstone, Jefferson and Madison. There has recently been a revival of interest in the concept of freedom as non-domination by, what is often called, 'neo-republicanism'.[15]

In general terms, freedom as non-domination can be described as the absence of dependence on the arbitrary will of others. In order to explain the concept of freedom as non-domination more clearly, it is helpful to contrast it with two other concepts of freedom: negative freedom and positive freedom.[16] One is free in a negative sense to the degree that no one interferes with one's activity and to the degree that one can act unobstructed by others (freedom as non-interference). In a positive sense, one is free to the degree that one can be one's own master, to the degree that one's life and decisions are not dependent on external forces (freedom as self-mastery). Freedom in terms of non-domination is about the absence of mastery by others and has, therefore, elements in common with both freedom as non-interference and freedom as self-mastery. Just as negative freedom, it focuses on the absence rather than the presence of something and, like positive freedom, it focuses on mastery, not on interference.[17]

In neo-republican literature, it is argued that non-domination is a primary good and, therefore, a necessary political ideal.[18] Because this article deals with case law concerning migrants, a relevant question is whether domination suffered by migrants should also be minimized. Traditionally, neo-republican theory places a lot of emphasis on citizenship, asserting that a 'free state' should promote its *citizens'* freedom from domination.[19] In contrast, Lovett argues that this obligation applies to everybody who is affected by the power of the dominator 'regardless of community membership', since it has become 'increasingly obvious' that the persons affected by a community's institutions and practices are not coextensive with the members of that community.[20] Theorists on the ethics of migration have elaborated on this issue further.[21] They have

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[15] Lovett and Pettit, 'Neorepublicanism: A Normative and Institutional Research Program' (2009) 12 *Annual Review of Political Science* 11.
[16] These concepts have their origins in the writings of Hobbes and Rousseau respectively: see Lovett, 'The History of Freedom' in Wright (ed.), *International Encyclopedia of the Social and Behavioral Sciences* (2015) and have famously been reviewed by Berlin: see Berlin, 'Two Concepts of Liberty' in *Four Essays on Liberty* (1969) at 118.
[17] Petit, *Republicanism. A Theory of Freedom and Government* (1999) at 22.
[18] Ibid. at 90-5.
[19] Lovett and Pettit, supra n 15 at 12. In Petit's work, references to 'citizens' are omnipresent: see Petit, supra n 17.
[20] Lovett, *A General Theory of Domination and Justice* (2010) at 172-3.
[21] In 2014, a special issue of the *Critical Review of International Social and Political Philosophy* was published on Domination, Migration and Non-citizens, edited and introduced by Honohan and Hovdal-Moan (volume 17(1)).

argued that non-domination theory is indeed a relevant theory to address the issue of migration, in particular the treatment of non-citizens present in the territory.[22]

B. Arbitrariness

(i) Substantive vs procedural arbitrariness

The concept of arbitrary power is a key concept in neo-republican theory. Interference only results in domination if carried out in an arbitrary or uncontrolled[23] way. With regard to the issue of what type of control is required, two different views have been put forward. In the first view, called 'democratic control', the capacity to interfere is sufficiently controlled if it is governed by the direct influence of the persons subjected to it; if it cannot be used without regard to the relevant interests of the affected parties.[24]

The second view, called 'procedural control', is mainly developed by Lovett. In this view, the ability to interfere is sufficiently controlled if it is constrained by reliable and effective rules or procedures that are common knowledge to all persons concerned. The procedural view equates republican freedom with the traditional idea of the rule of law, 'provided of course that we are willing to loosen and extend this idea considerably'.[25] In order to defend his preference for the procedural view, Lovett argues that the democratic view incorrectly denies the increase in freedom when, for example, an undemocratic regime introduces the rule of law.[26] In Lovett's view the situation would change in an important way, since the persons subjected to the regime now at least know exactly where they stand and are able to develop plans of life based on reliable expectations accordingly.[27] This does not mean, as Lovett stresses, that the new situation is perfectly fair, but not everything that is unfair also must constitute domination in his view.[28] In

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[22] For example, Hovdal-Moan, 'Unequal Residence Statuses and the Ideal of Non-Domination' (2014) 17 *Critical Review of International Social and Political Philosophy* 70; Benton, 'The Problem of Denizenship: A Non-Domination Framework' (2014) 17 *Critical Review of International Social and Political Philosophy* 49. According to Fine, non-domination theory seems particularly well placed to address issues regarding the treatment of resident non-nationals. With regard to freedom of movement, that is, the right to enter a country, this theory seems to have more difficulty: see Fine, 'Non-Domination and the Ethics of Migration' (2014) 17 *Critical Review of International Social and Political Philosophy* 10. Hoye on the other hand, argues that traditional republican theory has much to offer to the politics of the border, but that current *neo*-republican theory does not realize any of those promised insights. In fact, neo-republicanism does not afford significant insights compared with the established liberal and democratic critiques, according to Hoye: see Hoye, 'Neo-republicanism, Old Imperialism, and Migration Ethics' (2017) 24 *Constellations* 154.

[23] Lovett, 'Non-Domination' in Schmidtz and Pavel (eds), *The Oxford Handbook of Freedom* (2018) Chapter 6 at 4; Petit, *On the People's Terms. A Republican Theory and Model of Democracy* (2012) at 58.

[24] Petit, ibid.

[25] Lovett, supra n 20 at 112.

[26] In the democratic view, this would not change the level of domination since the regime is in no way compelled to track and regard the interests of the persons subjected to the newly introduced laws.

[27] Lovett, supra n 20 at 116.

[28] Ibid.

addition, the procedural view implies that also persons who cannot exercise democratic control, such as children and mentally disabled, can enjoy freedom as non-domination.[29]

Since migrants cannot usually exercise full democratic control (although they may sometimes be able to contest decisions, they usually lack the right to vote) and since a human rights court can, by its nature, better protect against procedural arbitrariness, Lovett's approach seems to be most relevant for the purposes of this article. It is, therefore, necessary to look at his conceptualization of the rule of law a little closer.

(ii) The rule of law and coercive force

Lovett defines the rule of law as 'the situation enjoyed by persons and groups to the extent that they will not be exposed to coercive force except as the consequence of their having failed to observe a legally valid prescriptive rule'.[30] This definition reveals that Lovett limits the scope of the rule of law to preventing situations in which persons are exposed to the arbitrary use or threat of *coercive force*, since the domination that results from being exposed to coercive force is particularly worrisome.[31]

Coercive force is defined by Lovett as the ability to change what somebody else 'would otherwise prefer or be able to do through the use or threat of violence, physical restraint or other like means'.[32] Since this article is concerned with case law about migrants' poor living conditions and the absence of state financed benefits, the limitation to coercive force seems to imply, at first sight, that Lovett's conceptualization of the rule of law is not very helpful. However, Lovett acknowledges that modern states do much more than overtly coerce people. Modern states are far more concerned with controlling the distribution of resources.[33] As Lovett argues, such 'service activities of the state' can coerce people *indirectly*, for example by deliberately withholding expected public goods.[34] The rule of law must, therefore, apply to every distribution of service activity of the state that has become a part of the baseline expectations of the community.[35]

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[29] Lovett, supra n 3 at 11.
[30] Lovett, *A Republic of Law* (2016) at 124 (and many other pages in this book).
[31] Ibid. at 116.
[32] Ibid. at 65.
[33] Ibid. at 200.
[34] Ibid. Lovett uses the example of cutting power and water connections to recalcitrant neighbourhoods to force the residents to move away.
[35] Ibid. at 201. Petit arrives at a similar conclusion, when he discusses the difference between invasion and vitiation. According to Petit, invaders are hindrances that are only triggered by your attempting, or by the prospect of your attempting, to satisfy your will, whereas vitiators materialize for independent reasons, such as lack of personal, natural or social resources: see Petit, supra n 23 at 37-40. With regard to the distribution of resources, Petit holds (at 73) that if the provision of certain goods comes to represent the default expectation, which sets up a pattern of one-sided reliance, 'the negative action of refusing further help can be indistinguishable from an invasion of your free choice'.

(iii) The rule of law and legal dynamics

Coercion alone is not enough to establish domination. As said, domination only occurs if coercive force is used in an arbitrary or uncontrolled way, that is, not sufficiently governed by law. The second part of Lovett's definition of the rule of law reveals that coercive force can only be used if a legally valid prescriptive rule is not being observed. From this, Lovett deduces three broad criteria:

- 1) every use of coercive force is governed by a rule (that is, not a command);
- 2) such a rule must be effective and reliable (that is, there must be a high degree of probability that it will be observed and this probability must be robust); and
- 3) it must be common knowledge what the rules are and that they are effective and reliable (that is, the rules must be published, sufficiently clear and reasonably stable).[36]

These criteria have, among others, been mentioned and discussed by many authors on the rule of law.[37] What I like about Lovett's approach, however, is that he fully appreciates the dynamic aspects of the law. The law should *not* be viewed as a complete and internally coherent system that supplies every legal question with a clear and determinate answer. This 'deeply implausible' kind of legal formalism can simply not be true, due to the inherent ambiguity, internal contradictions and incompleteness of any rule.[38] The indeterminate character of law presents, however, no serious challenge to the idea of the rule of law, as long as legal actors behave *as if* the law is reasonably clear in most cases.[39]

In addition, Lovett stresses that legal systems are not static; they are subject to both endogenous and exogenous legal change. Endogenous legal change is caused by the open-ended and indefinite character of all prescriptive rules and the need to adapt and extend these rules to new circumstances through interpretation. If the adaption and extension process is oriented toward the natural expectations of the relevant parties, it can be reconciled with the rule of law.[40]

In addition, it is important to have mechanisms for effecting deliberative legal change, such as law-making through legislative processes, delegation to administrative agencies or local governments or case law.[41] According to Lovett, this exogenous legal change can only be reconciled

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[36] Lovett, supra n 30 at 128-32.
[37] Ibid. at 131 and 132.
[38] See on this also Tamanaha, *Beyond the Formalist-Realist Divide. The Role of Politics in Judging* (2009), arguing that legal formalism is almost non-existent amongst lawyers, but an invention of politically motivated critics of the courts.
[39] In that case, the people governed by the law will largely *experience* it as an impersonal body of rules and will be able to form reliable expectations that the law will actually govern. These expectations do not have to depend on their having special insight into the private psychology of the ones in power: see Lovett, supra n 30 at 149, similar to how 'simple' social rules function: see ibid. at Chapter 2.
[40] Ibid. at 177-8 and 199.
[41] Ibid. at 189-91.

with the rule of law if the legislative authority itself is brought under the cover of law. To that end, he formulates a number of conditions of 'legislative due process':

- there must exist public and orderly procedures that legislative authorities must follow in order to change the law;
- these procedures should clearly define and limit the scope of the legislative authority and indicate the aims or goals it is meant to serve; and
- there must be some mechanism for holding the legislative authority accountable, such as through possibilities to contest discretionary rulemaking in courts or through regular elections.[42]

According to Lovett, these conditions should be met in every case of discretion to create a rule.

C. Dependency

Lovett emphasizes that domination should be understood structurally: the concept of domination must as a minimum include some level of dependency of a person or group on the social relationship. The level of dependency should be measured by taking into account the 'net expected costs (that is, expected costs less any expected gains) of exiting, or attempting to exit, a social relationship'.[43] Lovett stresses that the concept of 'exit costs' should be understood broadly: it is not limited to material costs, instead exit costs are often to some extent psychological and thus subjective.[44] For Lovett, dependency is a necessary condition for domination and the greater the dependency of the subject person is, the more severe his or her domination will be.

According to Benton, it is precisely the ability to differentiate on the basis of the concept of exit costs that makes non-domination theory powerful in its application to migrants. She submits that non-citizens have two routes to 'exit' the status of non-citizen; they can either leave the country or they can become a citizen (naturalization). The costs of leaving the status of non-national vary considerably for non-nationals, and the concept of domination allows for differentiation in this respect. For example, the level of costs depends on available social networks and employment opportunities, the living conditions and safety in the country of origin, outstanding debts with smugglers or family members, etc. Even though many non-citizens do not leave their status as non-citizen at all, the relevant question in order to establish the level of dependency is, there-

[42] Supra n 30. at 187.
[43] Lovett, supra n 20 at 39.
[44] Ibid. As an example, Lovett discusses (at 50-1) the dependency women can have on their marriage. Exit costs can be high through legal, financial and/or cultural difficulties in divorce, but also through a thorough personal convincement that a woman's highest possible calling is motherhood within a traditional relationship.

fore, whether it would be possible to leave their status and at what costs. This question can only be answered at the individual level.[45]

D. Summary

This Section has provided a framework of analysis for the case law review in this article. It has mainly drawn on Lovett's conceptualization of freedom as non-domination. In this view, for state domination to materialize, (1) the state should have some kind of coercive force over an individual, (2) that force should not be sufficiently governed by effective and reliable public rules and (3) the individual should be dependent on this relationship with the state. As argued by Lovett, coercion can also be employed with regard to the distribution of resources, which is the case if the state deliberately withholds expected public goods. The level of dependency on a social relationship can be measured by estimating the (objective and subjective) costs that must be incurred for a particular person to exit that relationship. In a situation where coercion and dependency are present, domination can be prevented if the distribution of resources is regulated by a clear, reliable and effective legal framework. In other words, in Lovett's conceptualization, coercion and dependency in the field of resource distribution only result in domination if the distribution is not governed by the rule of law. Taking into account the dynamic nature of the law, governance by the rule of law entails that the interpretation of rules should be oriented toward the natural expectations of the relevant parties and that the authority to create new rules should be in line with the 'conditions of legislative due process'. The next section will examine the case law of the ECtHR on migrants' living conditions through the lens of this concept of non-domination.

3. CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS ON MIGRANTS' LIVING CONDITIONS

A. Case Law Selection

This part of the article discusses case law from the ECtHR about migrants' living conditions in their host country in relation to Article 3 of the ECHR. It does not include case law about living conditions in migrants' country of origin or another country to which migrants are (about to be) returned or about the conditions of detention. The reason for excluding these types of cases from the analysis is threefold. First, as discussed above at Section 2(A), republican theory on non-domination is well-placed to address issues regarding the treatment of resident non-nationals, but is more difficult to apply to issues regarding entry, stay and expulsion of migrants. The hypothesis that ECtHR case law can be explained through the lens of republican theory on non-

[45] Benton, supra n 22.

domination can only be tested if the case law under analysis deals with issues that appear to fit within the scope of this theory. Secondly, this line of case law has led to a lot of criticism by legal scholars who claim that the ECtHR offers insufficient protection and/or is inconsistent. This article hopes that applying republican theory on non-domination to this type of case law will add a new angle to this area of the literature. Thirdly, on a more practical level, the limited number of cases about Article 3 of the ECHR and migrants' living conditions in their country of residence makes a *complete* analysis of *all* published case law feasible.

I carried out a systematic search in HUDOC, the ECtHR's database, to find all published[46] case law dealing with migrants' living conditions in their host country. This systematic search was carried out in May 2018, so this article does not include judgments and decisions on migrants' living conditions that were delivered after this date. On the basis of search terms,[47] 209 judgments and decisions were examined for relevance. Of these 209 cases, 29 cases actually dealt with migrants' living conditions in their country of residence.[48] Of these 29 cases, six cases were declared inadmissible by the Court for reasons not related to the merits of the case[49] and one was struck out of the list by the Grand Chamber.[50] These seven cases were excluded from the analysis. Therefore, the final sample for analysis in this part of the article consists of 22 ECtHR cases: eight judgments and 14 admissibility decisions. This article includes the admissibility decisions to give the full picture of the Court's case law with regard to migrants' living conditions and to avoid criticism that it only offers a 'truncated examination of the outputs of the Convention system'.[51]

The next sections analyse these 22 cases with reference to the concept of freedom as non-domination.

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[46] Possibly, many more complaints have been lodged about migrants' living conditions. The majority of cases are declared inadmissible by a single judge, and these decisions are not published. In 2017, for example, altogether 70,356 cases were declared inadmissible or were struck out of the list, 66,150 by a single judge: see European Court of Human Rights, *Annual Report 2017* (2018) at 156, 163.

[47] The search was narrowed by using the filter: ARTICLE (3). The following text searches were carried out: 'living conditions' AND asylum (16 February and 9 May 2018); Hunde (20 February 2018); 'conditions de vie' AND asile (14 May 2018); and 'conditions de vie' AND *réfugié* (14 May 2018). The following text searches did not deliver relevant cases that did not come up in the other searches: benefits AND migrant (16 February 2018); 'living conditions' AND migrant (16 February 2018); 'basic needs' AND refugee (9 May 2018); 'basic needs' AND migrant (9 May 2018); and 'living conditions' AND refugee (16 May 2018). The results were exported to excel and duplicates were removed. The excel file is available upon request.

[48] The majority of the 209 cases concerned complaints about expulsion and/or detention conditions.

[49] For example, for not meeting the six months deadline for lodging a complaint or for not exhausting domestic remedies.

[50] The case of *V.M. and Others v Belgium* Application No 60125/11, Strike Out, 17 November 2016 [GC]. The judgment of the Chamber (Merits and Just Satisfaction, 7 July 2015), which falls into the material scope of the article, was set aside by this Grand Chamber and no longer has any legal effect (see para 39 of the Grand Chamber judgment).

[51] Dembour, supra n 9 at 21.

B. First Judgments: Müslim and Mogoş

The oldest judgment in the sample is the case of *Müslim v Turkey.*[52] The applicant in this case was an Iraqi national who applied for asylum in Turkey. He was granted provisional refugee status. In his complaint he argued that, amongst other things, the Turkish government had violated Articles 3 and 8 of the Convention by not providing him with benefits, shelter or employment since his arrival in Turkey. Because of this, he had insufficient resources to meet his basic needs.

The Court had ruled in earlier cases that a complaint about insufficient social benefits could, in theory, raise an issue under Article 3, but held that in this case Article 3 (and Article 8) was not violated. It reasoned that the Convention does not impose a general obligation on states to provide refugees with a certain standard of living or the right to work[53] and then stated specifically:

> En l'espèce, il semble que le requérant ne se trouve pas empêché de maintenir le niveau de vie qu'il a lui-même choisi lorsqu'il s'est réfugié en Turquie et il ne paraît pas être dans un état de nécessité tel que cette solution ne soit pas viable, au point de l'acculer à quitter la Turquie …. Si la situation dénoncée constitue pour le requérant une épreuve difficile, celle-ci ne devrait assurément pas être pire que celle de l'ensemble des citoyens plus démunis que d'autres.[54]

In her analysis of this case, Dembour emphasizes the phrase that the refugee has *himself chosen* the standard of living and criticizes the Court for viewing the applicant as a liberal individual who is free to lead his life as he wishes without structural external constraints.[55] This critique in fact has much in common with a republican critique. It is, however, also possible to read this judgment differently. The phrase that the applicant is *not prevented* from choosing his own standard of living could be read as an indication that the applicant has not been subjected to state coercion. Since the Court also stresses that the applicant's situation was no worse than the poorer citizens in the host country, the provision of benefits is apparently not something that the applicant could have expected. This was also stressed by the Turkish government, by emphasiz-

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[52] Application No 53566/99, Merits, 26 April 2005.
[53] Ibid. at para 85.
[54] Ibid. at para 86. Translation in the press release: 'In the case before the Court, the applicant did not appear to have been prevented from maintaining the standard of living which he himself had chosen on seeking refuge in Turkey and his situation did not appear to be so desperate as to force him to leave Turkey because it was no longer tenable. Although difficult, it was undoubtedly no worse than that of any other citizen who was less well off than others.' See Press Release issued by the Registrar, 'Chamber judgments 26.04.05', published on 26 April 2005. It is not entirely clear whether this quote is related to Article 8, to Article 3 or to both of them. In paragraph 85, the Court mentioned only Article 8, but in the last sentence of paragraph 86 the Court concluded that the situation did not fall within the scope of Article 8 or Article 3.
[55] Dembour, supra n 9 at 454.

ing that they do not have any obligation under the Refugee Convention to provide non-European refugees with benefits.[56]

A few months later, the Court ruled again on the living conditions of non-nationals, in the case of *Mogoş v Romania*.[57] This case concerned a stateless family with three children (ages 19, 18 and 16 years). They were originally Romanian nationals, but left Romania and gave up their Romanian nationality in the 1990s. In 2002, they were forcibly deported to Romania by the German authorities. They refused to sign the necessary papers for repatriation at the Romanian border and were, therefore, transferred to the transit centre at Bucharest airport, where they were still staying at the time of the judgment. Even though these facts are about return, the complainants did not lodge a complaint against Germany, but against Romania. They complained about the poor quality of their living conditions at the transit centre, as a result of which the case fits the selection conditions of this study.[58] They claimed that they had to share a 22.5 square meters room which had inadequate furniture; did not receive humanitarian aid from the government, such as food and sanitary products; and did not have sufficient heating and warm water. The Romanian government contested these allegations. The Court started its assessment by stressing that the applicants had the opportunity to leave the transit centre at any time, but refused to do so, and that this could not be attributed to the government. The Court noted that the applicants were permitted to enter Romanian territory and that other expellees from Germany had indeed entered Romania, in order to take up residence there or to leave again to other countries. It noted the applicants' firm position in refusing to enter Romanian territory or to have any legal relation with the Romanian state.[59] After having stressed these circumstances, the Court assessed the living conditions in the transit centre. In this regard, the Court noted that the applicants did not submit any evidence about the quality of their living conditions and that information provided by the government, the airport authorities and the Committee for the Prevention of Torture contradicted the applicants' statements.[60] The Court concluded that 'in these circumstances', the living conditions were not sufficiently severe to constitute a violation of Article 3.

In this case, the Court emphasized the fact that the applicants could leave their situation but chose not to do so and that the applicants refused to enter into any legal relation with the Romanian state. This fits with the dependency condition of domination; the Court emphasized that the applicants were not dependent on the state.

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[56] Supra n 3 at para 84. Turkey has not ratified the Protocol Relating to the Status of Refugees 1967, 606 UNTS 267, which means that it has only obligations towards refugees originating from Europe. Tukey issued a declaration under Article 1(B)(1)(a) upon ratification of the Refugee Convention 1951, 189 UNTS 137.
[57] Application No 20420/02, Merits, 13 October 2005.
[58] See Section 3(A).
[59] Supra n 57 at paras 111-112.
[60] Ibid. at paras 114-118.

C. Violations: M.S.S. and More

In the case of *M.S.S. v Belgium and Greece,* the Court, for the first time, decided that there was a violation of Article 3 on the basis of poor living conditions. *M.S.S.* was an asylum seeker from Afghanistan who travelled through Greece to Belgium, where he lodged an asylum application. On the basis of the European Union (EU) Dublin Regulation,[61] Belgium sent him back to Greece, as this was the country where he first entered the EU. In his complaint against Greece, the applicant alleged, *inter alia,* that his poor living conditions there violated Article 3 of the ECHR.

The Court started by recalling the general observation in *Müslim* that there is no general obligation for states to provide refugees with financial assistance to enable them to maintain a certain standard of living.[62] But then the Court continued by stressing that

> what is at issue in the instant case cannot be considered in those terms. Unlike in the above-cited *Müslim* case …, the obligation to provide accommodation and decent material conditions to impoverished asylum-seekers has now entered into positive law and the Greek authorities are bound to comply with their own legislation, which transposes Community law, namely Council Directive 2003/9/EC laying down minimum standards for the reception of asylum-seekers in the member States. What the applicant holds against the Greek authorities in this case is that, because of their deliberate actions or omissions, it has been impossible in practice for him to avail himself of these rights and provide for his essential needs.[63]

Thus, the Court explained the difference between *Müslim* and *M.S.S.* by highlighting the fact that under Greek domestic legislation (which transposed EU law), the authorities were obliged to provide asylum seekers with decent conditions. In my view, the Court presents a clear 'rule of law' argument here. The Court stressed that by not providing the applicant with what was required under their own legislation, the Greek authorities subjected the applicant to arbitrary state power. I believe this to be a decisive element of the Court's reasoning.[64]

The Court continued by assessing whether the 'minimum level of severity' had been reached. In this regard, it noted that the applicant is an asylum seeker and 'as such, a member of a particu-

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[61] Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [2003] OJ L 050, replaced by Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person [2013] OJ L 180.

[62] Application No 30696/09, Merits and Just Satisfaction, 21 January 2011 at para 249.

[63] Ibid. at para 250.

[64] See also Slingenberg, *The Reception of Asylum Seekers under International Law. Between Sovereignty and Equality* (2014) at 292-6.

larly underprivileged and vulnerable population group in need of special protection'.[65] Apart from indicating the existence of a broad international consensus concerning the need for special protection for asylum seekers, it did not explain why all asylum seekers should be considered to be vulnerable. If, however, vulnerability is understood to be dependency on a social relationship, it makes sense to identify all asylum seekers as vulnerable in terms of their relationship with the state, since the costs to exit this relationship are usually high: having no other state to turn to and having no resources or networks in the state of residence.[66]

The Court then observed that the situation in which the applicant had found himself was particularly serious: 'He allegedly spent months living in a state of the most extreme poverty, unable to cater for his most basic needs: food, hygiene and a place to live. Added to that was the ever-present fear of being attacked and robbed and the total lack of any likelihood of his situation improving.'[67] The Court concluded that such living conditions attain the level of severity required to fall within the scope of Article 3 of the Convention. Since the applicant found himself in these conditions 'through the fault of the authorities',[68] Article 3 had been violated.

The *M.S.S.* case has received a lot of attention in the literature. Some authors only look at the Court's statements about the minimum level of severity and do not pay attention to what the Court said about Greece's legal obligations.[69] Others do distinguish two separate steps in the Court's reasoning.[70] Oette for example distinguishes between the parts of the *M.S.S.* judgment that deal with the issue of state responsibility on the one hand and with the minimum level of severity on the other.[71] In his view, the decisive factor for state responsibility is 'the relationship between the state and the (vulnerable and dependent) person and the state's response to a particular situation in which it would be expected to take measures to counter the apparent (risk of) suffering'.[72] He does, however, not refer to the Court's reference to Greek domestic legislation.

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[65] Supra n 62 at para 251.

[66] Cf Clayton who notes the relevance of asylum seekers' vulnerability to the state: 'Even the most wealthy and resourceful asylum seeker cannot grant their own refugee status nor give themselves access in law to the host society; they are dependent on state action for this': see Clayton, 'Asylum Seekers in Europe: *M.S.S. v Belgium and Greece*' *(*2011) *11 Human Rights Law Review* at 770.

[67] Supra n 62 at para 254.

[68] Ibid. at para 264.

[69] Dembour, for example, argues that the Court concluded that Article 3 had been violated in *M.S.S.* 'because of the utmost gravity of the character of the situation in which the applicant found himself': see Dembour, supra n 9 at 454. See, likewise, Koch, 'Chapter 5: The interaction between human rights case law: Convergence or competition?' in Pennings and Vonk (eds), *Research Handbook on European Social Security Law* (2015) 106; Leijten, supra n 3 at 240 and 270.

[70] Gerards, for example, notes that the *M.S.S.* case confirmed the very high threshold of the minimum level of severity, but also mentions an element of fault at the part of the authorities to be of relevance: see Gerards, supra n 5 at 282, 285.

[71] I also made this distinction in my earlier work, see Slingenberg, supra n 3 at 287-311.

[72] Oette, supra n 12 at 685. Note that this analysis has many elements in common with Lovett's conceptualization of domination: the emphasis on being dependent on a particular social relationship and on the expectation of the provision of public goods by the state.

This element is mentioned by other authors. Some argue that the Court's reference to Greek domestic legislation and, more specifically, to the EU Reception Conditions Directive, is not critical to identifying a violation, but is seen by the Court as an aggravating factor.[73] Others argue that the fact that Greece acted in violation of its own domestic legal obligations, as well as EU law, played a decisive role in the Court's judgment and they criticize the Court for that. Da Lomba criticizes the lack of protection by the Court for irregular migrants' social rights in relying on whether the state concerned has any legal obligations to provide such rights or not.[74] Lavrysen also argues that '[t]he legality of a situation is irrelevant for determining whether or not that situation comes within the scope of Art. 3 ECHR—to hold otherwise would allow States themselves to determine the minimum level of human rights protection, which is contrary to the counter-majoritarian function of human rights'.[75]

I believe that it is possible to understand the different aspects of the *M.S.S.* judgment in a coherent way in terms of non-domination. The analysis of the *M.S.S.* judgment would then be that the Court emphasized asylum seekers' vulnerability, which can be defined in terms of dependency on the relationship with the state. Since leaving the relationship with the state is extremely costly or even impossible for asylum seekers, especially when it concerns their 'most basic needs', they are highly dependent on the state. Coercive power exercised over them, which can also consist of the deliberate withholding of goods, must then be effectively and reliably constrained by legally valid rules. The Court established in *M.S.S.* that this was not the case in Greece and, consequently, found a violation.

After *M.S.S.*, the Court found a violation of Article 3 in four other complaints against Greece about the poor living conditions of asylum seekers. In three cases, the Court dealt with the complaints rather briefly, by using almost identical language and heavily and explicitly drawing on its findings in the *M.S.S.* case: the cases of *F.H. v Greece*,[76] *AL.K. v Greece*[77] and *Amadou v Greece.*[78] In these cases, the Court mentioned the limited availability of facilities in Greece to receive and house tens of thousands of asylum seekers and also noted the practical obstacles for having access to the labour market. In *Amadou,* the Court referred again explicitly to the legal obligations of Greece under EU law;[79] in *F.H.* and *AL.K.*, the Court merely quoted a passage

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[73] Clayton, supra n 66 at 768; Costello, *The Human Rights of Migrants and Refugees in European Law* (2015) at 17–18; Peroni and Timmer, 'Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law' (2013) 11 *International Journal of Constitutional Law* 1056 at 1078. Ippolito merely notes that '[t]o what extent this new scope of Article 3 depends on the Reception Directive remains to be tested in future litigation': see Ippolito, 'A European Judicial Dialogue on Refugee Rights?' (2015) 9 *Human Rights and International Legal Discourse* 184 at 193.

[74] Da Lomba, supra n 11 at 358.

[75] Lavrysen, 'European Asylum Law and the ECHR: An Uneasy Coexistence' (2012) 4 *Goettingen Journal of International Law* 250.

[76] Application No 78456/11, Merits and Just Satisfaction, 31 July 2014.

[77] Application No 63542/11, Merits and Just Satisfaction, 11 December 2014.

[78] Application No 37991/11, Merits and Just Satisfaction, 4 February 2016.

[79] Ibid. at para 61.

from *M.S.S.* that refers to these legal obligations.[80] In addition, it noted that only a diligent examination of their asylum application could have put an end to the applicants' situation, but that, in all cases, the application, or an appeal, was still pending. Hence, the Court emphasized the applicants' dependency on the state and the difficulty of leaving the relationship with the state. In *F.H.*, the Court even noted that the applicant had sought to withdraw his asylum application in order to be able to leave for Turkey, but that this request had not been dealt with by the Greek authorities.[81] These cases, therefore, fit the analysis of the *M.S.S.* case as presented above.

The case of *Rahimi v Greece*[82] is somewhat different from the other cases as it concerned an unaccompanied minor. The applicant arrived in Greece from Afghanistan at 15 years of age and was placed in detention upon arrival on the island Lesbos. After two days in detention, he was released. He was left with no accommodation or means of transport and only received assistance from local non-governmental organisations (NGOs). A few days later, the applicant formally submitted his asylum application. The applicant complained about his poor living conditions after release from detention.

The Court started by emphasizing the applicant's vulnerability as an unaccompanied minor who was illegally present in an unfamiliar foreign country. This vulnerability was decisive in this case and prevailed over the applicant's status as an illegal migrant, according to the Court.[83] The Court looked at the period between the applicant's release and the submission of an asylum application with reference to a number of reports from human rights organizations and the Ombudsman, which indicated systematic failures in the protection of unaccompanied minors and the absence of a legal framework and policies to deal with their treatment after release from detention.[84] With regard to the period after the application for asylum was submitted, the Court noted that the Greek authorities, particularly the prosecutor responsible for minors, had not appointed a guardian for the applicant although this was a legal obligation under Greek domestic law.[85] The Court concluded that because of the Greek authorities' failure to monitor and supervise the applicant, Article 3 of the ECHR had been violated.

The Court emphasized similar elements in the *Rahimi case* as to those in *M.S.S.*: the applicant's vulnerability which can be understood in terms of dependency and the failure of the authorities to comply with their legal obligations.[86] In addition, the Court noted the absence of any kind of regulation about the living conditions of the applicant after release from detention. This clearly

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[80] Ibid. at paras 58 and 107 respectively.
[81] Supra n 76 at para 108.
[82] Application No 8687/08, Merits and Just Satisfaction, 5 April 2011.
[83] Ibid. at para 87.
[84] Ibid. at para 91.
[85] Ibid. at para 88.
[86] Also, Lavrysen argues that the Court in *Rahimi*, just as in *M.S.S.*, attributes decisive power to the legal obligations of the Greek government. Lavrysen indicates that also the obligation to appoint a guardian is an implementation of the EU Reception Conditions Directive: see Lavrysen, supra n 75 at 248-9. In my view, however, that is not relevant for the Court's finding of a violation.

fits a non-domination framework. By pointing at numerous reports of the human rights organizations, the Court made clear that the Greek government was *expected* to take care of the applicant and that by failing to meet this expectation, the authorities indirectly coerced him. The use of coercion or invasion should be controlled by effective and reliable public rules in order to prevent domination. In *Rahimi*, however, public rules were either non-existent or not complied with.

The most recent case in which the Court found a violation of Article 3 of the ECHR for migrants' poor living conditions is the case of *Shioshvili and Others v Russia*.[87] This case is about a woman who was eight months pregnant and her four children (ages 2, 6, 9 and 11 years). The applicants were Georgian nationals who were illegally present in Russia. When this was discovered, they were served with an expulsion order and took the train to leave for Georgia. Near the Russian border, the train was stopped and all Georgian nationals were ordered to leave the train. They were subsequently prevented from leaving Russia and had to wait for almost two weeks for a transit visa in the town of Derbent. During this period, they were not provided with any kind of assistance by the Russian authorities and had to live in poor circumstances in an overcrowded house. They complained that the Russian authorities had violated Article 3.

Just as in *M.S.S.* and *Rahimi*, the Court started by emphasizing the applicants' extremely vulnerable situation. The Court defined their vulnerable status by indicating the mother's pregnancy, the very young age of the children and the limited resources at their disposal. Moreover, the Court stressed in this regard the fact that they were expelled from Russia and that the Russian authorities then interrupted their travel without explanation and forced them to stay in an unfamiliar city.[88] This fits with Lovett's concept of dependency in the sense that the applicants were unable to exit their situation and were, therefore, dependent on the state for their living conditions. The Court continued by observing that

> the applicants' stay in Derbent was based on the conduct of the Russian authorities, which constituted a violation of Article 2 of Protocol No. 4 …. It also notes that the applicants were not provided with a reason for the interruption of their travels and that the duration of the stay was not foreseeable for them, but wholly dependent on the conduct of the Russian authorities.[89]

Article 2 of Protocol 4 to the ECHR contains the freedom to leave any country. This was violated by Russia since restricting the movement of the applicants was not in accordance with the law: there was no legal basis for requiring a transit visa nor for expelling the applicants from the train.[90] By exerting this type of state coercion, that was not controlled by external rules, the Russian authorities subjected the applicants to another, more indirect type of state coercion by

[87] Application No 19356/07, Merits and Just Satisfaction, 20 December 2016.
[88] Ibid. at para 83.
[89] Ibid. at para 84.
[90] Ibid. at paras 60-61.

not providing them with any kind of assistance. In its concluding remarks, the Court noted that 'the Russian authorities showed indifference towards the applicants' extremely difficult situation' and held that Article 3 was violated.[91]

Also, in this case, the Court's reasoning can be explained in terms of non-domination theory. In such a case of state coercion, which is combined with a high level of dependency, the allocation of resources should be governed by effective and reliable public rules in order to prevent domination. However, in this case, the Russian authorities showed complete 'indifference' with regard to the applicants.

D. Inadmissible Cases

Fourteen cases in my sample were declared inadmissible by the Court because they were found to be manifestly ill-founded. All these decisions concern complaints made against Italy or the Netherlands.

(i) Complaints against Italy

In a much earlier case against Italy, the Court dealt with the complaint of a family with unknown nationality about the poor living conditions in their travellers' camp in Rome. The Court declared this complaint manifestly ill-founded without much elaboration. It merely noted that the applicants lived there of their own free will and were able to leave this place.[92]

The *M.S.S.* judgment triggered many complaints from asylum seekers about poor reception conditions. Many of them were lodged against Italy.[93] Even though the Grand Chamber in its 2014 judgment in the case of *Tarakhel*[94] held that Switzerland would violate Article 3 of the ECHR if it returned a family with young children to Italy without obtaining assurances about the quality of the reception conditions. Other complaints against Italy, both before and after the *Tarakhel* judgment, have generally been declared manifestly ill-founded. In all these decisions the Court used a similar line of reasoning. In short, the Court found that it was not established that the Italian authorities had not complied with their own legislative and policy framework.

In the case of *Mohammed Hussein and Others v The Netherlands and Italy*,[95] the Court observed that the applicant, a pregnant woman from Somalia, was provided with a place in a reception

[91] Supra n 87 at para 86.
[92] *Sejdovic and Sulejmanovic v Italy* Application No 57575/00, Admissibility, 14 March 2002 at para 12.
[93] As explained above, in Section 3(A), this article only deals with complaints about living conditions in the country of residence, not about living conditions in the country to which migrants are about to be expelled. For this reason, only complaints are discussed here that are (also) directed against Italy, not complaints that are only directed against the country of expulsion.
[94] *Tarakhel v Switzerland* Application No 29217/12 Merits and Just Satisfaction, 4 November 2014.
[95] Application No 27725/10, Admissibility, 2 April 2013.

centre, 'as put into place by the Italian authorities for asylum seekers pursuant to their international and domestic legal obligations'.[96] In addition, after her request for international protection was accepted, as a pregnant woman she was eligible for priority placement in a facility for accepted refugees under Italian law.[97] Likewise, in the case of *Abubeker v Austria and Italy*,[98] the Court held that the applicant was provided with accommodation and residence papers while in Italy and that the applicant had voluntarily left this accommodation. The Court, therefore, held that 'when the applicant complains that he was homeless, had to sleep in the streets and lacked subsistence and food, the Court does not find that this situation resulted from the legal system or from a practical situation caused by the Contracting State.'[99] This was also observed by the Court in the case of *Hussein Diirshi and Others v The Netherlands and Italy* where it held that 'the Italian authorities treated the applicant in accordance with the special rules applicable to unaccompanied minor asylum seekers. The applicant voluntarily abandoned this protective scheme for which decision Italy cannot be held accountable.'[100] A similar, albeit more general, conclusion was reached by the Court in the case of *Miruts Hagos* and that of *Mohammed Hassan and Others*, in which the Court 'found no basis on which it should be held that the applicant had been unable to benefit from the available resources in Italy for asylum seekers or that, in case of difficulties, the Italian authorities would not have responded in an appropriate manner.'[101]

The Court continued this line of reasoning after the *Tarakhel* judgment, in which, as noted, it required more guarantees from the Italian authorities about the reception of families with minor children. The Italian authorities subsequently delivered guarantees in a number of circular letters. So, in *Ali and Others*, which concerned a single mother with a young child, the Court 'understands from the circular letters dated 2 February, 15 April and 8 June 2015 from the Italian Ministry of the Interior … that the first and fourth applicants would be assigned one of the places in reception facilities in Italy which have been reserved for families with minor children and has no reason to believe that none of these places would be available to them upon their arrival in Italy'.[102] Also, in *E.T. and N.T. v Switzerland and Italy*, the Court observed that 'the Italian Government confirmed that the applicants, upon their return, would be accommodated as

[96] Supra n 95 at para 72.
[97] Ibid. at para 74.
[98] Application No 73874/11, Admissibility, 18 June 2013.
[99] Ibid. at para 61.
[100] Application No 2314/10 and others, Admissibility, 10 September 2013 at para 140.
[101] Both cases were decided on the same date, and contain identical language. *Miruts Hagos v The Netherlands and Italy* Application No 9053/10, Admissibility, 27 August 2013 at para 38; *Mohammed Hassan and Others v The Netherlands and Italy* Application No 40524/10 et al., Admissibility, 27 August 2013 at para 176. The same phrase was used by the Court in the case of *Hussein Diirshi and Others v The Netherlands and Italy*, supra n 99 at para 139, and in *Ali and Others v Switzerland and Italy* Application No 30474/14, Admissibility, 4 October 2016 at para 35.
[102] Supra n 101 at para 34.

a single-parent family in a reception facility belonging to the SPRAR network'[103] and that because they are recognized as refugees, these applicants are entitled to benefits under the general schemes for social assistance, health care and housing under Italian domestic law. The Court stressed that 'it is for the applicants to assert their rights before the Italian courts'.[104]

Hence, in all these cases, the Court did not see any proof of 'deliberate withholding of expected public goods' and, thus, no indirect coercion by the state. Instead, the Court seemed to accept that in Italy the distribution of expected public goods to asylum seekers and accepted refugees has been governed by effective and reliable public rules. These applicants' unsatisfactory situation had not been caused by a lack of compliance with domestic legal obligations by the Italian authorities, but by the applicants' own actions either by choosing to leave state facilities or by failing to assert their rights. In some cases, the Court also stressed that the applicants could easily exit their unsatisfactory situation by submitting an application for asylum, which would entitle them to have access to a reception centre. If applicants choose not to file an asylum request, state responsibility 'cannot be engaged on account of the fact that the applicant did not have access to the reception schemes reserved for asylum-seekers', according to the Court.[105]

(ii) Complaints against the Netherlands

Of the five cases against the Netherlands, two were about the living conditions of migrants who were considered to be a danger to national security or who had committed serious crimes in their country of origin.[106] Although the applicants in these cases did not have lawful residence in the Netherlands, and were thus under a legal obligation to leave the Netherlands, they were not threatened with forced expulsion because they were still at risk in their country of origin. For this reason, their situation has been described as living 'in limbo': they can neither return to their country of origin nor ever gain the right to stay in the host country of residence.[107]

The case of *I.* was the first time that the Court had to deal with the question whether the living conditions of a migrant in 'limbo' (that is, not the absence of residence permit as such) violated Article 3 of the ECHR. With reference to the *M.S.S.* case, the Court quickly arrived at the conclusion that the minimum level of severity, 'either from a material, physical or psychological

[103] Application No 79480/13, Admissibility, 30 May 2017 at para 24.
[104] Ibid. at para 26.
[105] Application No 53852/11, Admissibility, 18 June 2013 at para 65. See also *Miruts Hagos v The Netherlands and Italy*, supra n 101 at para 37.
[106] There have been other cases decided against the Netherlands in which migrants in a similar situation complained about a violation of Article 3 ECHR, due to the lack of a residence permit such as *Bonger v The Netherlands* Application No 10154/04, Admissibility, 15 September 2005; *K. v The Netherlands* Application No 33403/11, Admissibility, 25 September 2012. As Dembour observes, supra n 9 at 445, these cases can (also) be approached as forming part of the residence permit case law of the ECtHR. For this article, the 'destitution case law' is indeed treated as distinctive from the 'residence permit case law' and only cases in which migrants explicitly complained about their socio-economic living conditions have been selected.
[107] Dembour, supra n 9 at 443.

perspective' had not been reached in this case.[108] Also in the case of *A.*, the Court concluded that it could not find that the applicant's predicament met the required minimum level of severity.[109] In this case, the Court added that the situation in Libya, the applicant's country of origin, had changed dramatically since it was first established that he could not return there.[110] More generally, it added that the Convention does not guarantee, 'as such', socio-economic rights and that 'aliens who are subject to expulsion cannot in principle claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance and services provided by the expelling State'.[111] Hence, in this case, the Court emphasized that it was possible for the applicant to leave his unsatisfactory situation.[112]

According to Dembour, one could say that *M.S.S.* has been 'clawed back' with the decision in the case of *I.*[113] The brevity and lack of elaboration in the Court's decisions taken after the *M.S.S.* judgment is indeed striking. On the other hand, the circumstances that were decisive in the *M.S.S.* case were not present in the two decisions discussed here. The Dutch authorities were not obliged under their own domestic law or relevant EU law, to provide these migrants with benefits. In other words, the provision of benefits did not become part of the baseline expectations. Moreover, in both cases, the applicants had a spouse and children with Dutch nationality, with whom they could cohabit, which made them less dependent on the state. Read in this way, *M.S.S.* was not clawed back, but its scope is more limited than its reasoning might have suggested.

The three other decisions against the Netherlands concerned migrants who were excluded from social benefits for other reasons. In the first of these cases, *Ndikumana*, the applicant applied for asylum in the Netherlands. However, the Dutch immigration authorities considered that under the Dublin Convention, Germany was responsible for dealing with this person's asylum application. At that time, the Netherlands had a policy in place according to which asylum seekers in the applicant's position (so-called 'Dublin claimants') had no access to a State-sponsored reception centre for asylum seekers. There was an exception for those who, in the view of the immigration authorities, were in acute humanitarian need. The applicant complained that by not providing him with food, shelter and medical care, the Netherlands had violated Article 3 of the ECHR.

After repeating its findings in the case of *M.S.S.*, the Court started its assessment of the *Ndikumana* case by noting that 'pursuant to the national legislation applicable at the relevant

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[108] Application No 24147/11, Admissibility, 18 October 2011 at para 41.
[109] Application No 60538/13, Admissibility, 12 November 2013 at para 53.
[110] Ibid. at para 50.
[111] Ibid. at paras 51-52.
[112] On this issue, the Court (at paras 58-59) contradicts itself a little, since, in the same judgment it declares that there is no case for a violation of the right to respect for family life because the applicant's removal from the country is not imminent.
[113] Dembour, supra n 9 at 455.

time the applicant had no right to reception facilities … and that the respondent State was not yet under a positive obligation under the European Reception Directive to provide for asylum seekers' most basic needs'.[114] In addition, the Court found it relevant that the applicant had not availed himself of any of the official pathways to request access to the reception centre.[115] The applicant could have lodged a request for reception facilities by arguing that he found himself in a situation of acute humanitarian need. If this request had been denied, he could have lodged an objection and an appeal against the refusal.[116] For this reason, the Court decided that the authorities could only become aware of the applicant's needs once he presented himself at the gate of a reception centre. Given that the authorities offered him reception two nights later, it cannot be said that the applicant was faced with official indifference in a situation of serious deprivation or want incompatible with human dignity,[117] according to the Court.

In the case of *Hunde v The Netherlands,* the applicant was a failed asylum seeker. He was squatting in an indoor car park, together with a group of other unsuccessful asylum seekers. He complained that he was forced to live in the car park in inhuman conditions that were in violation of Article 3 of the ECHR. Just as in the *Ndikumana* case, the Court started its assessment by emphasizing that the applicant was not entitled to any social assistance in the Netherlands.[118] Subsequently, the Court noted the 'crucial differences' between the applicant's situation and the situation of the applicant in *M.S.S.*. The Court pointed out that 'unlike the applicant in *M.S.S.* who was an asylum-seeker, the applicant in the present case was at the material time a failed asylum-seeker under a legal obligation to leave the territory of the Netherlands'. The Court explained that *M.S.S.*'s suffering could have been alleviated if the Greek authorities had assessed his asylum application promptly. The Court stressed that 'by failing to do so the applicant was left in uncertainty', whereas the uncertainty that *Hunde* found himself in was 'inherently different' from *M.S.S.* in that it was not linked to the Netherlands authorities' assessment of his asylum request.[119] In addition, the Court noted that it could not be said that the authorities had shown ignorance towards Hunde's situation. He was granted a period of four-weeks' grace after the final rejection of his asylum application during which period he retained his right to reception benefits. Moreover, he had the option of applying for reception benefits at a centre where his liberty would be restricted. Finally, the Court noted that the Netherlands had set up a special scheme providing for the basic needs of irregular migrants, which was instigated, among other things, by the applicant's pursuit of domestic remedies in connection with his Article 3 claim. In these circumstances, the Court concluded that 'it cannot be said that the Netherlands

[114] Application No 4714/06, Admissibility, 6 May 2014 at para 45. The EU Reception Conditions Directive was adopted in 2003, and the implementation deadline expired in 2005. *Ndikumana* applied for asylum in the Netherlands in 2000, so before the Netherlands had any obligations under this Directive (see paras 19–20 of the decision).
[115] Ibid. at para 47.
[116] Ibid. at para 27.
[117] Ibid. at para 47.
[118] Application No 17931/16, Admissibility, 5 July 2016 at para 55.
[119] Ibid. at paras 55-56.

authorities have fallen short of their obligations under Article 3 by having remained inactive or indifferent'.[120]

In the case of *Said Good v The Netherlands*, which also concerned a failed asylum seeker, the Court referred to the relevant principles as set out in the *Hunde* decision and limited itself to assessing whether the particular circumstances of this case should lead to a different conclusion.[121] The circumstances in *Said Good,* however, did not lead to such a conclusion. The Court noted that her exclusion from reception benefits did not stand in the way of her being able to undergo two knee replacement surgeries, paid for by the State, and a rehabilitation process, that was also financed by the state.[122]

Hence, it can be deduced from the above decisions that the Court is concerned with situations of uncertainty if the uncertainty is caused by the absence, ineffectiveness or unreliability of the legal framework *and* if the migrant in question cannot influence the uncertainty, for example, by lodging an application for benefits, starting legal proceedings against a refusal, cooperating in a return procedure or by leaving the host country voluntarily.

4. CONCLUSION: (SUFFICIENT) PROTECTION AGAINST DOMINATION?

With regard to providing protection against poverty and destitution, the Court has been criticized by legal scholars for not being consistent, systematic and internally coherent enough in its case law.[123] In this article, I have tried to provide an explanation for one particular line of this 'destitution case law', that is, complaints about destitution and poor living conditions of migrants. This particular line of case law has also been criticized for not being consistent and for not providing enough protection.[124] However, I argue that seen through the lens of republican theory on non-domination, the Court's case law can be constructed as consistent and internally coherent. Seen through this lens, an explanation for the reasoning in and outcome of the cases discussed in this article is that the Court is only willing to protect against situations of destitution or poverty if these situations show evidence of individuals being dominated by the state. This means that although the Court often refers to the 'minimum level of severity', the severity of the situation (that is, the extent and length of deprivation) cannot explain the various outcomes of these cases and does not appear to be decisive.

In all cases where the Court found a violation, the high level of vulnerability of the persons concerned was noted. This vulnerability can be understood in terms of dependency related to the

[120] Supra n 118 at paras 56, 59.
[121] Application No 50613/12, Admissibility, 23 January 2018 at paras 21-22.
[122] Ibid. at para 23.
[123] Gerards, supra n 5 at 276 and 289-90; Oette, supra n 12 at 683 and 687. For a critique on the Court's case law in the socio-economic sphere more generally, see Leijten, supra n 3 at 81-3 with further references.
[124] Dembour, supra n 9 at 445, 452-6; Da Lomba, supra n 11.

inability to leave a difficult situation. In *M.S.S.* (and the cases based on *M.S.S.*, *F.H.*, *Al.K.* and *Amadou*) and *Rahimi,* this difficulty was the result of the applicants' status as an asylum seeker, whereas in *Shioshvili* this was caused by the restrictions on the applicants' freedom imposed by the government combined with their lack of resources. In addition, the Court (although not explicitly) emphasized that the provision of benefits was expected in these cases, for example, because the government was legally obliged to do so under domestic and/or EU law (*M.S.S.* and *Rahimi*), coupled with a broad consensus in reports by relevant and authoritative human rights organizations acknowledging these obligations (*Rahimi*), or because the applicants were forced into their difficult situation by the government and the government could easily have ended this (*Shioshvili*). Because the legal framework governing the action of the state was either absent/unclear (*Rahimi* and *Shioshvili*) or not complied with by the state (*M.S.S.* and, partly, *Rahimi*), the Court found a violation.

In contrast, in cases where the Court found no violation or were found to be manifestly ill-founded, the Court's arguments can be traced back to (the absence of) coercion, dependency and arbitrariness. In these cases, the Court noted that

- the state was not expected to provide benefits since there was no legal obligation for them to do so (for example, *Müslim, Hunde*, *Ndikumana*), and/or
- the applicants were not dependent on their relation with the state since they were not in a relationship with the state, as they did not formally apply for asylum, benefits or entry (for example, *Halimi*; *Miruts Hagos, Ndikumana, Mogos*) or did not convince the Court that the costs of leaving the relationship were prohibitively high, since they left accommodation by choice (for example *Abubeker, Hussein Diirshi)* or could leave for another country (*A, Hunde*), and/or
- the applicants did not convince the Court that the authorities would not comply with their legal obligations (for example, *Miruts Hagos, Mohammed Hassan, E.T. and N.T.*).

Hence, the core elements of *domination* as conceptualized by Lovett (that is, coercion, dependency and insufficient control) can be detected in the Court's legal reasoning in all cases on migrants' living conditions and can, therefore, provide a theoretical explanation for the various outcomes in this type of case law. While some of these elements have been mentioned in the literature and match well with current trends in the case law that have been observed, such as the 'procedural turn'[125] and 'vulnerability reasoning',[126] the concept of freedom as non-domination

[125] For example, Arnardóttir, 'The "procedural turn" under the European Convention on Human Rights and Presumptions of Convention Compliance' (2017) 15 *International Journal of Constitutional Law* 9; Gerards and Brems (eds), *Procedural Review in European Fundamental Rights Cases* (2017); Spano, 'The Future of the European Court of Human Rights: Subsidiarity, Process-Based Review and the Rule of Law' (2018) 18 *Human Rights Law Review* 473.

[126] For example, Timmer, 'A Quiet Revolution. Vulnerability in the European Court of Human Rights' in Fineman and Grear (eds), *Vulnerability. Reflections on a New Ethical Foundation for Law and Politics* (2013) 147; Al Tamimi, 'The Protection of Vulnerable Groups and Individuals by the European Court of Human Rights' [2016] *European Journal of Human Rights* 561.

provides an overarching theory capable of providing an explanation for these trends and relevant elements. Future research must reveal whether this conclusion can also be drawn for other lines of case law, such as other aspects of the Court's migrants' case law or all cases dealing with poverty.

It must be stressed here that I do not claim that the Court knowingly or intentionally protects against domination; my claim merely is that this line of case law can be explained more coherently in terms of the concept of non-domination. Nor do I claim that the Court *should* only provide protection against domination. Even though neo-republican theory offers a convincing account on why non-domination is a primary good and might even be a sufficient good for achieving social justice, it can be argued that the Court should (also) provide basic fairness. In addition, the question as to how the concept of non-domination fits into human rights legal theory and principles more broadly should be addressed.[127] My primary aim for this article was, however, not normative but explanatory: it seeks to understand and find consistency in the case law of the Court.

Yet, in addition to providing an explanatory framework, relying on republican theory also provides a basis to critically analyse the case law as to whether it provides *enough* protection against state domination. I believe the case law discussed in this article can be improved in three ways in order to provide better protection against the (neo) republican concept of domination. I will discuss this briefly here, but all three issues merit a more elaborate analysis in future research.

First, the concept of dependency, defined by the level of exit costs, could be used to better differentiate amongst migrants. In the case law discussed in the article, the Court uses broad legal categories of 'asylum seekers' and 'irregular migrants' and categorizes all asylum seekers as vulnerable and ignores the (more subjective) high costs of exit that irregular migrants might face when having to leave their country of residence. While it should indeed be assumed that all asylum seekers incur high exit costs in leaving a territory or the power of the state, since they might run a serious risk in their country of origin, they do not necessarily all have the same difficulties in leaving the particular relationship with the state as provider of social benefits. After all, not all asylum seekers are by definition without resources or without a social network in the country of residence. In theory at least, some of them may not be dependent on the state for meeting their basic needs. On the other hand, the Court could pay more attention to the variety of costs of leaving the country that irregular migrants might face. As Benton convincingly argued, the costs of leaving the host country vary considerably among migrants depending on, for example, ties in the country of residence, lack of viable opportunity to live elsewhere and/or the existence of debts to smugglers or family members (see Section 2(A) above). The Court does take such issues into account in its case law on Article 8 of the ECHR, with regard to the

[127] See, for a first step in this regard, Ivision, 'Republican Human Rights?' (2010) 9 *European Journal of Political Theory* 31.

question whether expulsion of a family member violates the right to respect for family life,[128] but this could also be integrated into its destitution case law under Article 3 of the ECHR.

Secondly, the Court could pay more attention to coercion by the state *via* social benefit schemes. Especially when in-kind benefits are provided in large-scale accommodation centres, asylum seekers and irregular migrants might be subjected to direct and indirect coercion by the state, for example, in the form of daily or weekly reporting duties, forced transfers, benefits being provided on the condition of actual residence in the centre or of co-operation in return procedures. If this coercion is not sufficiently governed by an effective and reliable legal framework, it affects migrants' freedom as non-domination. In cases like *Mohammed Hussein*, *Abubeker* and *Hunde*, however, the Court merely observes that the applicants were offered a place in a reception centre. Yet, in order to provide full protection against domination, the coercion employed in these reception schemes and the legal framework governing it should be more closely assessed. In order words, even though living in reception centres can be voluntary, attention should be paid to the possibility that migrants trade off their freedom as non-domination in order to be able to gain basic needs.[129] Since the Court is limited by what the applicants bring forward in their complaints, this could also be more extensively argued by the applicants themselves.

Thirdly, taking into account the importance of the rule of law in order to minimize domination as well as the legal dynamics inherent in every legal system, as analysed by Lovett, the Court could better assess the quality of the legislation. In cases like *Ali and Others* and *E.T. and N.T.*, the Court referred to Italian law and 'circular letters' and assumed that the authorities would comply. In order to better provide protection against domination, it is necessary to examine the clarity of the rules, the amount and kind of discretionary power held by the administration and to what extent the conditions of 'legislative due process' are met when rules are created. Again, in case law concerning negative obligations under Articles 8 to 11 of the ECHR, the Court does pay more elaborate attention to the existence of a legal basis and its quality,[130] but this could also be integrated in the Article 3 case law in order to better protect against domination.

If the suggestions above are implemented, the Court could provide more effective and robust protection against domination of migrants. This would *not* mean, however, that migrants would henceforth be guaranteed complete fair treatment; it would only mean that their situation would be less bad than in a situation of more domination. However, in the current European context, where the Court also needs to be concerned about its own accountability towards states and

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[128] See, for example, *Jeunesse v The Netherlands* Application No 12738/10, Merits and Just Satisfaction, 3 October 2014 at paras 116-119; *Darren Omoregie and Others v Norway* Application No 265/07, Merits, 31 July 2008 at para 66.
[129] Lovett, supra n 20 at 197-8.
[130] See, for example, *Kuric and Others v Slovenia* Application No 26828/06, Merits and Just Satisfaction, 26 June 2012 at paras 341-350; *Al-Nashif v Bulgaria* Application No 50963/99, Merits and Just Satisfaction, 20 June 2002 at paras 117-128.

where migrants' rights, particularly those with illegal or insecure status, are under threat,[131] providing migrants with effective protection against domination might ensure essential freedom for migrants, as well as practical feasibility.

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[131] European Union Agency for Fundamental Rights, 'Regular overviews of migration-related fundamental rights concerns', available at: fra.europa.eu/en/theme/asylum-migration-borders/overviews [last accessed 4 April 2019].

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APPLICATION OF THE CONSTITUTIONAL RIGHTS BY THE COMMON COURTS – EFFECTIVE REMEDY FOR HUMAN RIGHTS PROTECTION

ABSTRACT

Application of an unconstitutional law in the process of adjudication entails a risk of human rights violation, therefore, court should ensure prevention of such risk. The aim of this paper is exploring the very measures for reaching the mentioned goal. Scope of application of constitutional rights is not defined in Georgian court practice, which is why this article through comparative research, analysing experience of different countries and utilising the rules of various interpretations of legal acts, investigates the scope and legal consequences of direct application of the Constitution by common courts.

1. INTRODUCTION

In Georgia justice is administered by common courts and their decisions are based on the law. However, application of unconstitutional provision in this process entails a risk of human rights violation. For a person to have access to fair and effective justice, it is necessary for the common court to ensure prevention/remedy of human rights violation through unconstitutional provision. Below the need to equip both common and constitutional courts with all tools/competences for safeguarding human right for the efficiency of justice, shall be emphasised. At the same time, I will separate the competences of these two courts for execution of constitutional rights. Specifically, both courts apply and interpret the Constitution, however, the right to annul the law for its unconstitutionality is an exclusive competence of the Constitutional Court. Therefore, common court is obliged to make a constitutional submission to avoid the application of unconstitutional law. At the same time, it is noteworthy, that the judgment of the

[*] For the support in the process of writing this paper, I express my gratitude towards Mr. Giorgi Chitidze, Master of Human Rights Policy and Practice, Pedagogue of Ilia State University.

Constitutional Court does not result in invalidating the disputed provision for legal relationships completed before the date of the judgment. Thus, the court making a submission is authorised to apply the consequences of declaring the provision unconstitutional to the past relationships through the force of the Constitution indicating to its supremacy. Concurrently, the scope of application of constitutional rights is not interpreted in Georgian court practice, therefore, the article analyses practice of different countries to uncover the guiding principles for establishing such scope.

2. Effective Administration of Justice as the Main Function of the Right to a Fair Trial

Respect and protection of human rights is main object and purpose of a democratic society. Every action of the state should not only aim to respect human rights, but also to create the mechanisms necessary for their practical exercise. Nevertheless, the risk of violation of human rights resulting from arbitrary conduct of a state or other action/omission certainly cannot be eliminated. Besides, we should bear in mind that in a number of cases, human rights are naturally in conflict with each other, other constitutional values or state interests, based on which the legitimate limitation of rights is permitted. While deciding upon the conflict between rights or the reasonable balance of human rights and/or other important public interests, the risk of making errors and limiting human rights excessively, in a disproportionate manner is constantly present. Hence, even in the most democratic systems, it is crucial that there be effective mechanisms for identifying the facts of human rights violations, for proper reaction in this regard as well as for restoration of violated rights.

Many international[1] and domestic human rights documents reiterate the necessity to create effective legal means for the protection of human rights. In this regard, fair trial is a universally recognized mechanism of utmost importance. The right to have an access to the court in order to protect human rights is envisaged by constitutions of almost every country, including that of Georgia, whereby Article 31 clause 1 stipulates that "[e]very person has the right to apply to a court to defend his/her rights. The right to a fair and timely trial shall be ensured".[2] The Constitutional Court of Georgia has stated that: "the right to a fair trial, first and foremost, stands for the possibility to bring a complaint before the court with respect to any of the decisions (actions) of every branch of the government and to request their legal assessment in case they result in

[1] See e.g. the European Convention for the Protection of Human Rights [hereinafter, the "ECHR"], 1950, Article 13.

[2] Article 31, paragraph 1, Constitution of Georgia, August 24, 1995, Gazette of Parliament of Georgia, 31-33, 24/08/1995.

breach of human rights".[3] Accordingly, the right to have an access to a fair trial is a general guarantee for the protection of rights, which is applicable to any area and any action limiting human rights.

It is noteworthy that the existence of human rights, or even the fact of identification of violation thereof would be insufficient and deprived of any sense had there been no means for remedying the violation. Hence, the right to a fair trial entails that individuals have an access not only to independent and impartial administration of justice, but also that this justice be efficient. International as well as regional and domestic constitutional acts often explicitly note the necessity for the above-mentioned efficient mechanism for the protection of human rights to exist.[4] In several cases, this is explicitly stated in judicial decisions as well.[5]

Naturally, persons refer to the court principally to restore the violated rights, and not to achieve a mere declaration regarding the fact of violation. The mere declaration of the fact of violation without the possibility to remedy such violation creates not only the feeling of injustice, but also incapacitates the body administering justice and decreases the confidence towards it. A low confidence for the judiciary branch or law in general not only reduces the ways of protecting human rights through legal means but compels an interested party to "seek justice" beyond the scope of the constitutional domain. This threatens the proper functioning of a rule of law state. Thus, the possibility to protect human rights through the courts is an utmost important value for the state. The requirement of effectiveness in administration of justice is an important factor for the proper understanding and interpretation of the constitutional right to a fair trial.

3. JUDICIAL SYSTEM AS ENVISAGED BY THE CONSTITUTION OF GEORGIA

Under the definition provided by the Constitutional Court of Georgia:

> "Constitutionally recognised right to fair trial exists within the constitutionally established institutional system. In particular, the right to a fair trial is not abstract and it entails the possibility of protecting rights through organs of the judiciary branch that are defined by institutional system of the Constitution, with due regard given to institutional requirements envisaged by the Constitution".[6]

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[3] Judgment of the Constitutional Court of Georgia №1/466 dated 28 June 2010 in the case of "Public Defender of Georgia v. Parliament of Georgia" para. II-14.
[4] See e.g. ECHR supra 1, Article 34, second sentence.
[5] See Judgment of the Constitutional Court of Georgia N3/1/466 dated 28 June 2010 in the case of "Public Defender of Georgia v. Parliament of Georgia", para. II-2.
[6] Judgment of the Constitutional Court of Georgia №3/5/768,790,792 dated 29 December 2016, para. II-68.

At the same time, the Constitution of Georgia creates two separate judicial systems. The body of constitutional control is the Constitutional Court,[7] whereas justice is administered by common courts.[8]

Accordingly, under Georgian Constitution, protection of the right to a fair trial implies conducting judicial review of all acts that are limiting human rights,[9] and such a review can be conducted by two separate judicial systems.[10] At the same time, the Constitution does not provide strict definitions of administration of justice and constitutional control.[11] Accordingly, the true substance and scope of these terms should be established in the light of the essence or each of these institutions, whereby both of them together should encompass all the instruments that are necessary for the protection of human rights through the judiciary.

4. Distinguishing Functions of the Common Courts and the Constitutional Court in the Context of Protection of Human Rights

As it has been noted above, the body conducting constitutional control in Georgia is the Constitutional Court. Conducting constitutional review primarily entails the assessment of compatibility of legislative legal acts with the Constitution. However, this competence should not be interpreted in a way that suggests that interpreting and applying Constitution is the exclusive right of the Constitutional Court. Common courts, withing the scope of their competence, also interpret and utilise the Constitution. The Constitution itself prescribes that the Constitutional Court shall "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".[12] Clearly, in order for judges of common courts to have a reasonable suspicion regarding constitutionality of the provision, they must first interpret the Constitution.

It is also important to consider that none of the state organs, including common courts are allowed to act in contradiction to the Constitution.[13] Hence, neither can judges of common courts unconditionally and in every case presume the constitutionality of the law and execute it unquestionably. However, establishing the law's compatibility with the Constitution is the exclu-

[7] Article 59, paragraph 2, Constitution of Georgia.
[8] Article 59, paragraph 3, Constitution of Georgia.
[9] See, supra 3.
[10] According to the case-law of the Constitutional Court, the right to a fair trial protects the right to access not only common courts, but the Constitutional Court as well. See e.g. Judgment of the Constitutional Court №3/5/768,769,790,792 dated 29 December 2016, para. II-97,
[11] With respect to the functions of the Constitutional Court, a relatively specific indication can be found in Article 60, however, there are no further references with respect to the functions of common courts in the Constitution.
[12] Article 60, paragraph 4, subparagraph c, Constitution of Georgia.
[13] Article 4, paragraph 4, Constitution of Georgia.

sive competence of the body of constitutional review.[14] Accordingly, taking into account the state of constitutional law in Georgia, its essence and entire architecture, judges of common courts are deprived of the ability to refuse application of the law upon their own initiative and justify this refusal with the incompatibility of the law with the constitution. In such cases, the only correct way for avoiding the application of an unconstitutional provision and/or delivering a judgment based on such a provision would be to refer to the Constitutional Court with a constitutional submission.

This approach is shared not only by the current law but also the existing practice of common and constitutional courts. In particular, Article 7 (3) of the Organic law of Georgia "On Common Courts" provides that:

> "If during the hearing of a particular case the court infers that there is a sufficient basis to believe that a law or any other normative act to be applied by the court in deciding the case may be deemed incompatible, in full or in part, with the Constitution of Georgia, it shall suspend the hearing and refer to the Constitutional Court of Georgia. The hearing shall be resumed after the Constitutional Court of Georgia has made a decision on the matter".[15]

This provision categorically indicates that a judge "**shall suspend"** judicial proceedings if he or she deems that the applicable law is incompatible with the Constitution.

At the same time, the practice of the Supreme Court of Georgia demonstrates that common courts make constitutional submissions even in cases, where the unconstitutionality of an applicable law is clear and incontestable, and this is also indicated in the case-law of the Constitutional Court. For instance, in its judgment N1/4/592, the Constitutional Court declared that imposing imprisonment as a form of punishment for the purchase-possession of 70 grams of dried marijuana with the intent of its personal use was unconstitutional.[16] After delivering the said judgment, a number of provisions remained in the Georgian legislation, which were prescribing imprisonment and as form of penalty for purchase-possession of marijuana in the amount of less than 70 grams in dried form.[17] Unconstitutionality of these provisions was evident for the Supreme Court, however it held that it was not competent to refuse application of

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[14] See e.g. Hans Kelsen, *Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution*, The Journal of Politics Vol. 4, No. 2 (May 1942), pp. 185-186, Published by: The University of Chicago Press on behalf of the Southern Political Science Association. pp. 185-186.

[15] Article 7, paragraph 3, Organic Law of Georgia "On Common Courts", December 4, 2009, Legilative Herald of Georgia, 41, 08.12.2009.

[16] Judgment of the Constitutional Court of Georgia №1/4/592 dated 24 October 2015 in the case of "Citizen of Georgia Beka Tsikarishvili v. Parliament of Georgia", para. III-2.

[17] Penalties for the consumption of different amounts of marijuana were prescribed by different provisions of the Criminal Code. At the same time, in its judgment N1/4/592, the Constitutional Court examined constitutionality of the law that had already lost legal effect, hence, formally speaking, the Court did not invalidate the rule regarding the penalty for marijuana in amount of less than 70 grams.

the existing (although unconstitutional) laws and thus applied to the Constitutional Court with a constitutional submission on each separate criminal case, requesting to declare the disputed provisions invalid.[18] On its part, the Constitutional Court deemed the aforesaid disputed provisions to be the applicable law in cases before the common court,[19] held that they override the Court's N1/4/592 judgment, and thus declared them invalid.[20]

It should be pointed out that part of lawyers, including some of the judges of common courts, are of the opinion that common courts are entitled to refuse application of unconstitutional laws and decide a case based directly on the Constitution.[21] However, two of the courts of the highest instance share the view that declaring norms unconstitutional and annulling the laws adopted by legislators on these grounds is the exclusive competence of the Constitutional Court. Accordingly, the aforesaid approach is supported by legislation as well as by the practice of both highest instance courts.

5. The Relevance and Scope of Application of the Constitution of Georgia by the Common Courts

The competence of the Constitutional Court of Georgia, as a rule, is limited to constitutional revision of normative acts.[22] However, declaring certain normative act unconstitutional frequently fails to result in automatic restoration of the violated right. Common courts interpret and utilise constitutional standards established by the Constitutional Court. Common courts are the ones applying constitutional standards when deciding specific case and, therefore, are equipped to ensure efficient protection of person's rights. Thus, it is of utmost significance to define the scope of application of constitutional rights for deciding a specific case by the common courts.

As stated above, in order to avoid the application of unconstitutional law, common court is obliged to refer to the Constitutional Court with a submission. However, it is no less relevant to

[18] See constitutional submissions: 869, 866, 865, 856, 830, 819, 818, 817, 816, 815, 807, 806, 805, 804, 803, 802, 801, 800, 799, 798, 797, 796, 788, 787, 786, 785, 784, 778, 777, 776, 775, 774, 773, 772, 771, 710, 709, 708.

[19] When common courts request to declare unconstitutional a provision, which is not applicable to a given case, the Constitutional Court does not examine constitutionality of the disputed provision (See Ruling of the Constitutional Court of Georgia N3/3/ 685,686,687,688,689,736,737,758,793,794,820 dated 29 September 2016).

[20] Ruling of the Constitutional Court of Georgia №3/1/708,709,710 dated 26 February 2017; Ruling of the Constitutional Court of Georgia №3/1/855 dated 15 February 2017; Ruling of the Constitutional Court of Georgia №3/2/771,775,776,777,786,787,788 dated 29 September 2016.

[21] Following the call announced by the High Council of Justice on 10 May 2019 for the selection of judges of the Supreme Court in order to fill the vacant positions, hearings have been held in the HCoJ and the Parliament, where several candidates (acting judges of the courts of different instances) noted that in practice, whenever the applicable law is unconstitutional, they decide disputes based directly on the Constitution. See the audio protocols of the interviews, available here: http://hcoj.gov.ge/ge/press/audio-skhodmis-oqmi/uzenaesi-sasamartlos-mosamarleobis-kandidatebis-gasaubrebebis-audio-oqmebi [last accessed on December 28, 2019].

[22] Article 60, Constitution of Georgia.

analyse, how a common court can use declaration of unconstitutionality of the disputed provision on the case pending before it.

Pursuant to paragraph 5 of article 60 of the Constitution of Georgia:

> "A judgment of the Constitutional Court shall be final. An act or a part thereof that has been recognised as unconstitutional shall cease to have legal effect as soon as the respective judgment of the Constitutional Court is made public, unless the relevant judgment envisages a later time frame for invalidating the act or a part thereof."

This provision defines the moment of declaring the disputed norm invalid and determines at the constitutional level as to when does it cease to have effects. Unequivocally, for the period/relationships that had occurred before the judgment of the Constitutional Court was delivered, the norm declared unconstitutional maintains its legal force and has regulatory effect on a relationship. Thus, with respect to relationships that had taken place before publication of the judgment of the Constitutional Court (completed civil relationships, issued administrative-legal acts), regulating law does not change with the judgment of the Constitutional Court.

It should also be noted that common courts consider cases that are distinct by substance. When the case concerns future relationships (e. g. a person requests from a public body for a certain act to be conducted in the future or he or she wants to enter into property relation with private individuals) declaring a norm unconstitutional as a result of the submission will have an incontrovertible effect. The common court will deliver its judgment in the light of new regulatory framework established after declaring the disputed norm unconstitutional and invalid. However, the results of declaring a norm unconstitutional based on a constitutional submission are less clear when common courts decide upon the relationships that have already completed. For instance, when a person is requesting to annul the fine issued by the police officer based on unconstitutional law or to render a contract concluded in the past void/valid.

In this case, the legality of the police officer's action is not questioned since he or she was acting in accordance with the law that was in force by the time of action, and the judgment of the Constitutional Court does not affect the regulating law for the period before the judgment was delivered. However, it is important to establish what impact the fact that the law applied by the police officer was incompatible with the Constitution should have on the outcome of the case. It should be taken into account that a specific constitutional provision and even more so - the one establishing human rights - has been in effect in the past as well and hence the applied law was incompatible with the Constitution even when fine had been issued.

Under the second sentence of Article 4 (4) of the Constitution of Georgia, "[t]he Constitution of Georgia shall be the supreme law of the State". At the same time, during the collision of norms, *i.e.* when one legal relationship is governed by different acts, the Court can decide the dispute based on the law that is higher positioned in the hierarchy. Hence, if the relationship is regulated

directly by the Constitution, the Court can decide a dispute based on the Constitution and, as a result, annul the fine issued by the police officer.[23]

At the same time, it is well-established that common courts are entitled to deliver a judgment based on the Constitution in cases where a subject to the dispute is not regulated under the law (legal vacuum). According to the Constitutional Court of Georgia, "the Constitution not only recognises and protects human rights and liberties but also defines their content and scope. Thus, constitutional rights exist even without their legal recognition or declaration, and they continue to exist even when the law does not specify the grounds of realisation thereof".[24]

Taking into account the aforementioned, for determining the scope of application of human rights by the common courts in each case, it is important to establish which relationships are regulated directly by the constitutional rights, *i.e.* for which relationships they constitute the directly applicable law.

6. DIRECT EFFECT OF CONSTITUTIONAL RIGHTS

There is no practice in the case-law of the Constitutional Court of Georgia regarding the scope of direct effect of the constitutional rights. The Court has not yet defined the type of relationships and conditions where constitutional rights can be applied directly. Therefore, it is relevant to analyse the practice of other countries with relevant experience and case-law. I believe, such analysis will significantly support Georgian jurisdiction in adopting guiding criteria for establishing the scope of direct effect of the rights protected by the Constitution of Georgia.

Generally, pursuant to the conventional view, human rights have emerged to safeguard persons from the abuse of the State.[25] Naturally, it is not disputable that the major aim of the Constitution, including of the constitutional rights, is to define the duties of the state.[26] Supreme/Constitutional Courts of different states agree on the minimum, that the constitutional rights by all means apply to the vertical relations, against the Government.[27] In other words,

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[23] Certainly, with the reservation that the unconstitutionality was established by the Constitutional Court. As it has been stated above, the Constitution of Georgia grants the competence to examine compatibility of laws with the Constitution exclusively to the Constitutional Court.

[24] Ruling of the Constitutional Court of Georgia №1/494 dated 28 December 2010 in the case of "Citizen of Georgia Vladimer Vakhania v. Parliament of Georgia", para. II-11.

[25] John Locke was developing the position, that human rights protect humans from the state, and it is the role of the government to ensure the protection thereof. See, for instance, J Locke, *Second Treatise on Government*, 1689, chapters VII and XIX.

[26] Among others, see the first sentence of paragraph 4, article 4 of the Constitution of Georgia.

[27] See, e.g., Judgments of the Supreme Court of the United States of America on *Burton v. Wilmington Pkg. Auth.*, 365 U.S. 715 (1961), *Peterson v. City of Greenville, S.C.* 373 U.S. 244 (1963); Judgment of the Supreme Court of Canada on *RWDSU v. Dolphin Delivery Ltd.* (1986) 2 SCR 573, the latter available here: https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/181/index.do, Judgment of the Constitutional Court of Germany BVerfGE

constitutional rights safeguard a person from the State, it is undoubtful, that person can apply for the constitutional right directly against the state and demand an action from based on it (direct vertical effect).

At the same time approaches are not homogenous regarding the application of the constitutional rights on horizontal relationships. It is rare when human rights documents and/or courts indicate on the direct horizontal effect of the constitutional rights.[28]

US Supreme Court is a strong follower of the position of applying the constitutional rights towards only the state. Its approach is based on the state action doctrine, pursuant to which, evaluation of human rights violation is done by the Court only in the case, where there is a state action.[29] The Supreme Court of the United States does not indicate on existence of the positive obligations of the state on adopting law or in other way safeguarding persons from violations of rights by private parties.

At the same time, in certain cases US Supreme Court envisions the notion of "state action" widely and supposes, that human rights violation may happen through the actions of private actor, when there is high engagement from the state in such action.

For instance, in the case of *Burton v. Wilmington Pkg. Auth*., a restaurant, situated in the publicly owned vehicle parking building, refused a person services only because the latter was a person of colour. The building was constructed through public funds, for public purposes and was ran by one of the units of Delaware State. The restaurant was renting the space from this unit. The Supreme Court of Delaware declared that the actions of the restaurant were not state action and thus it did not have the duty derived from the Fourteenth Amendment not to discriminate its clients. The case ended up in the Supreme Court. The Supreme Court stated that the building was public property, serving public use and established, that there was significant link between the actions of the state and a private actor, considered the state action to be present in the case and found Wilmington Pkg. Authority in violation of the Fourteenth Amendment.[30]

In another instance, on the case of *Peterson v. City of Greenvile*, ten persons of colour were punished for trespassing private property. Specifically, they set at the lunch counter of private shop. Manager called the police and stated that the store had been closed and everyone should

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7, 198 – Lüth, 15 January, 1958 (elaborated on below), available here: https://germanlawarchive.iuscomp.org-/?p=51 [links last accessed on December 28, 2019].

[28] See Judgment of the Supreme Court of South Africa on the case *Khumalo and Others v. Holomisa* (CCT53/01) [2002] ZACC 12; 2002 (5) SA 401; 2002 (8) BCLR 771 (14 June 2002); Article 8, paragraph 2 of the Constitution of South Africa; Judgments of the Supreme Court of Ireland on cases *Meskell v. C.I.E* (1973), *Attorney General (Society for the Protection of the Unborn Child (Ireland) Ltd) v. Open-Door Counselling Ltd*, (1988), *Crowley v. Irish National Teachers Organisation* (1980).

[29] See, e.g., *Virginia v Rives*, 100 U.S. 313 (1880), available at: https://supreme.justia.com/cases/federal/us/100/313/case.html [last accessed on December 28, 2019].

[30] *Burton*, supra 27.

have left the building. The Claimants did not follow this order and refused to leave the area. This resulted in imposing liability on them. Later, the manager of the store stated that by providing services to the claimants, he would have violated the municipal regulation, requiring segregation by colour. The Court declared that in this instance state participation in private decision making was significant. State adopted a measure, establishing the requirement of segregation and the manager of the store merely executed it. He was in fact deprived of other choices; therefore, the Supreme Court saw state action in this case and declared the denial of entry in the diner in violation of the Fourteenth Amendment, therefore the Court struck down the punishment.[31]

Thus, the violation of the human rights established by the US Constitution by the private actors can be considered only when there is significant nexus with state action.[32] At the same time, in each mentioned case the respondent was a state institution not the private person, whose actions were disputed by the claimants. In these cases, it was actually established that the state violated the rights of claimants through imposing obligation on private persons to discriminate.

It is noteworthy, that in the US Constitution, unlike the Constitution of Georgia, the wording of the provisions establishing human rights is different. Namely, almost all human rights provisions demonstrate that they are directed to the state. For instance, while the Constitution of Georgia established the right of religion, belief, expression, First Amendment of the US Constitution states:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances".

Similar wordings are found in other human rights provisions as well,[33] for instance, Fourteenth Amendment indicates, that:

> "[…] No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

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[31] *Peterson*, supra 27.

[32] For instance, in the case of Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974), the Court indicated that there has to be significant link between the state and disputed actions, in order to consider the later to be an act of state. In this case the Court did not consider the actions of communal service providers to be of such nature, although they were strictly regulated by the State.

[33] Except of Thirteenth Amendment. This provision abolishes slavery and has forbidding nature for all. The text is as follows: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

Thus, the approaches of the Supreme Court have developed, and the mentioned provisions were defined as the acts imposing duties only to the State.

The wording of the human rights has significantly changed in more recent documents.[34] Similarly to the Constitution of Georgia, they, as a rule, indicate to the existence of human rights generally and the texts itself do not unequivocally indicate that the sole addressee is State (for instance: "freedom of thought and expression is safeguarded, it is prohibited to persecute a person for a thought and the expression thereof", "right to property or inheritance is recognised and guaranteed"). At the same time, similar documents, as a rule, include separate provisions, establishing the scope of application of the constitutional rights (so called "application clause"). Such provision(s) establish guiding principles for establishing the scope of direct effect of the constitutional rights.

For instance, Article 32 of the Canadian Charter of Rights and Freedoms states:

> "This Charter applies
>
> (*a*) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
>
> (*b*) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province"[35]

Paragraph 3 of Article 1 of the Constitution of Federal Republic of Germany establishes, that "[…] basic rights shall bind the legislature, the executive and the judiciary as directly applicable law."[36] Based on the mentioned provisions, the Supreme Court of Canada[37] and the Constitutional Court of Germany[38] exclude the application of the constitutional provisions directly to the private actors.

In each instance the approach is derived from the logic, according to which the constitutional rights do not impose obligations of individuals. Since the dutybound parties are the state bodies, demands based directly on the constitution can only be made towards them. Private person

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[34] See articles 1-19 of the Basic Law of Federal Republic of Germany; Canadian Charter of Rights and Freedoms; European Convention on Human Rights and Fundamental Freedoms; etc.
[35] Canadian Charter of Rights and Freedoms, 1982, available at: https://laws-lois.justice.gc.ca/eng/Const/page-15.html [last accessed on December 28, 2019].
[36] Basic Law of the Federal Republic of Germany, article 3(1), available at: https://www.btg-bestellservice.de/pdf/80201000.pdf [last accessed on December 28, 2019].
[37] E.g. see: RWDSU v. Dolphin Delivery Ltd. (1986), available at: https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/181/index.do [last accessed on December 28, 2019].
[38] *Lüth*, supra 27.

cannot make a claim against another private person demanding the latter to act or to restrain from acting based directly on the constitutional rights.[39]

Based on all abovementioned it is vivid, that the scope of application of the constitutional rights, as a rule, depends on the constitutional wording of the provisions establishing rights and/or special provisions on their application within the constitutions.

7. The Application of Constitutional Rights Pursuant to the Constitution of Georgia

It is noteworthy, that much like the constitutions of other states, the Constitution of Georgia also includes the provision regarding the scope of application of the human rights. Namely, article 4, paragraph 2 of the Constitution states:

> "The State acknowledges and protects universally recognised human rights and freedoms as eternal and supreme human values. While exercising authority, the people and the State shall be bound by these rights and freedoms as directly applicable law."

Similarly, to the Constitution of the Federal Republic of Germany, the Constitution of Georgia establishes that the human rights law is directly applicable law. At the same time, it indicates that human rights bind the people and the government, **only while exercising authority.** What is envisioned as exercising authority by the people is elaborated by the Constitution itself, namely, per the second sentence of the second paragraph or article 3: "People are the source of state authority. People exercise power through their representatives, as well as through referendums and other forms of direct democracy". Therefore, it is highly possible, that constitutional provisions shall apply to the forms of exercising power by the people, including to the conformity of the results of referenda to human rights. However, human rights guaranteed by the Constitution, as a directly applicable law, cannot itself bind humans with duties in the relationships, where they do not exercise power.

With regards to the private actors, those provisions of the Second Chapter of the Constitution of Georgia, which establish specific direct duties and requirements based on their content can be directly applicable. For instance, paragraph 2 of article 23 of the Constitution of Georgia, which

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[39] However, there are rare instances of regulating the issue differently. For instance, Paragraph 2 of Article 8 of the Constitution of South Africa directly indicates the possibility of applying the rights horizontally. According to the provision: "A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right (Article 8, Constitution of South Africa, 1996, available at: https://www.justice.gov.za/legislation/constitution/SAConstitution-web-eng.pdf [last accessed on December 28, 2019].

states: "2. Political party membership of persons enlisted in the Defence Forces or bodies responsible for state and public security, and those appointed as judges, shall cease."

However, the provision establishing human right (e.g. "The right to own and inherit property shall be recognised and guaranteed") cannot itself be considered as directly applicable to private parties.

Based on aforementioned, although an authoritative definition on this issue is not yet given by the courts of Georgia, considering the experience of developed states and the provisions of the Constitution of Georgia, one can conclude, that the Constitution of Georgia allows direct effect of human rights law only to the vertical relationships, against the state.

8. INDIRECT EFFECT OF HUMAN RIGHTS ESTABLISHED BY THE CONSTITUTION

The Constitution of Georgia is the most general document establishing standards for multiple legal fields. Human rights not only establish negative duties of the state (for the state not to violate human rights), but also demand it to take positive actions, within which it will defend persons from the violation of rights based from the actions of other private parties. With regards to the legislator, its positive duty is demonstrated through establishing relevant legal order for ensuring the realisation of a right.[40] Thus the legislator within its constitutional duty regulates both vertical (relationship between a person and the state) and horizontal (between the private parties) relationships. As for the Constitutional Court, it evaluates the constitutionality of the provisions regulating each of these relationships and establishes whether they are in conformity with the constitutional standards.[41] Thus based on the practice of the Constitutional Court of Georgia, it is unequivocal, that the requirements of human rights, among others, apply to the regulations of private party relationships.

Hence the Parliament of Georgia is dutybound to regulate legal relationships pursuant to the Constitution. Legislative process aims at adopting acts in conformity with the Constitution and they should be defined by the implementor with this concept in mind, including by the common courts as well. Based on the aforementioned, when the law adopted by the parliament allows for several different meanings, one of which results in unconstitutional consequences, common court is obliged to define and apply it with the content conforming with the Constitution. The mentioned demand of the Constitution is particularly relevant for the provisions of general nature, which are frequently given for the relationships of private law.

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[40] The Constitutional Court indicates towards this duty in number of its judgments. E.g. see: Judgment of June 26, 2012 N3/1/512 on the case of "Citizen of Denmark, Heike Cronqvist v. the Parliament of Georgia", II-33.

[41] For instance, see the Judgments of the Constitutional Court of January 29, 2014 N1/1/543 on "Ltd 'Metalinvest' v. the Parliament of Georgia"; October 17, 2017 N3/4/550 on "Citizen of Georgia Nodar Dvali v. the Parliament of Georgia".

Constitutional courts of multiple countries establish the duty to define the general provisions in conformity with constitution. For instance, the mentioned principle was established in the legal system of the Federal Republic of Germany by the Constitutional Court in 1958 in the case of Lüth.[42]

Lüth, joined by several others, demanded boycotting a movie, the producer of which also worked on several anti-Semite movies during Nazi regime. Lüth demanded the cinemas, movie distributors and the society to boycott the movie indicating towards the amorality of the producer. The producer and the distributors of the movie applied to the court and demanded Lüth to be prohibited from boycotting demands. The Court of Hamburg satisfied the claim, basing its decision on article 826 of German Civil Code[43] and stated that Lüth's actions were against "good morale".

In the mentioned case the Federal Court of Germany indicated that the basic rights, first of all, were the rights safeguarding citizens from the state; however, the basic rights envisaged by the Basic Law of Germany establish and embody the objective system of values, which apply to all legal fields. These principles should guide both the legislator when adopting a law, and the adjudicator, including the court, when it is faced with the task of defining it. Therefore, when elaborating on article 826 of the Civil Code, the relevance of freedom of expression should have been taken into account. In each individual instance the decision should be adopted through balancing the freedom of expression and the interests of the addressee of expression.[44]

This approach ensures defining civil code provisions in the manner, which will allow limiting freedom of expression only within the bounds permitted by the Constitution. Specifically, prohibiting any kind of expression based on the civil code provision is allowed only in the instances, where circumstances of specific case demonstrate the interests of the addressee of expression outweigh the interests of safeguarding freedom of expression.

At the same time, apart from the mentioned example, the duty to define general provisions of civil law in conformity with the human rights is seen in the law and practice of other countries (e.g. Spain,[45] Italy,[46] Japan[47]). General provisions, such as – good faith, morale, public order, good morale, etc., – characteristic to the Continental European Civil Law, are used by the courts as a so called "gate" for applying basic rights to civil law. The mentioned provisions create

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[42] Lüth, supra 27.
[43] The text of the provision: "A person who, in a manner contrary to public policy, intentionally inflicts damage on another person is liable to the other person to make compensation for the damage".
[44] Lüth, supra 27, B1, paras 1-3.
[45] Aharon Barak, *Constitutional Human Rights and Private Law*, Human Rights in Private Law. Ed. Daniel Friedmann and Daphne Barak-Erez. London: Hart Publishing, 2001, p. 24.
[46] Ibid.
[47] Ibid.

somewhat grounds for balancing the rights of parties when judging the matter.[48] Specifically, courts define general provisions, based on their general-abstract nature, in such a manner, that constitutional rights and principles are considered within.

Considering the examples given above, it is relevant for the Georgian common courts to share European experience. Establishing correct practice by the common courts is of vital significance, so that each general provision is defined in conformity with human rights; while in the event one of such definitions is in contradiction with the requirements of the basic rights, revising such meanings (constitutionality of normative content) is possible, in our case – in the Constitutional Court of Georgia.

9. CONCLUSION

As a conclusion, one can state, that the right to effective court remedy guaranteed by the Constitution of Georgia, first of all, entails the possibility to restore the violated right through the court. At the same time, it is indisputable, that despite the immensely great role and significance of the Constitutional Court, common courts are the entities of the judiciary power, deciding on remedying violation of human right in each individual case. Therefore, in order to efficiently exercise the right to a fair trial, it is of vital importance for the common courts to utilise all instruments permitted by the Constitution, including in instances, where the violation of the right stems from the law.

As it was already stated, in order to ensure the above mentioned, one of the most efficient tools is to apply the Constitutional Court through a submission by the common court and when the provision is declared unconstitutional, the latter can decide the case based directly on the Constitution.

At the same time, it was underlined that the Constitutional rights establish both negative and positive duties of the state. With regards to the negative duties, it is clearer and more determinable what demands a person can make towards the state. For instance, it is obvious, that expropriation of the right to property should not take place without proper compensation. Therefore, in such a case, if a person is deprived of property by the state, a person may protect his/her right to property without specific legal regulation.

At the same time, common courts are well placed to ensure the application of the provisions regulating civil relationships in conformity of the constitution, through defining general provisions in light of the requirements of the Constitution (in certain cases, it is possible, for the

[48] Supra 45, pp.21-22.

common courts to apply to the Constitutional Court for evaluating the constitutionality of the normative contents of specific provisions).

It is noteworthy that within the two instruments elaborated on above, common court still is not able to ensure restoration of a right based on specific civil law provisions. However, considering participation in civil law relationships is, as a rule, based on the person's will, the risk of irreparable damage to the right caused by specifically defined prohibition is relatively small. For instance, if unconstitutional law clearly prohibits purchase of some items, a person can first dispute the constitutionality of a prohibition and then buy them.

At the same time, it is natural, that the common court cannot fully take on the role of legislator through directly (or indirectly) applying the constitutional rights. Specifically, within the civil law relationships the perspectives of safeguarding human rights are somewhat obscure for the instances of legal vacuum (for instance, in the cases, when the legislator does not regulate certain civil law relationships, does not provide for the rules to recognise or execute the contract, etc.). Simultaneously, considering the possibility of using legal analogies in civil law relationships, it is less likely not to be able to find provisions which the court would apply through analogy and define in conformity with the Constitution.

In certain instances, the responsibility of state may become relevant for not creating legal order and as a result violating constitutional right (and/or when specific formulations of provisions regulating private party relationships, the definition of such provisions in conformity with the Constitution is impossible). However, establishing what criteria should be followed for a person to remedy the violated right from the state in such an instance requires separate in-depth analysis, which is not a subject of this paper.

Thus, it is clear, that the Constitution of Georgia, through the mutual efforts of the Constitutional and Common Courts and appropriate collaboration, creates the preconditions to property uncover the violation of human right through law and to remedy the right efficiently. This, in high probability, shall become even more apparent following the development of the case-law of these two institutions of the judiciary.

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REAL CONTROL IN THE GEORGIAN SYSTEM OF CONSTITUTIONAL JUSTICE

ABSTRACT

The system of Common Courts becoming subject to the jurisdiction of the Constitutional Court of Georgia has grown particularly relevant. Therefore, the aim of this paper is to provide systemic analysis of the problems within the constitutional control system of Georgia. Specifically, the so called "real" constitutional claim and the prospect of establishing it in Georgia will be discussed. We shall see, how efficient "real" constitutional claim is for the protection of human rights and how hard it is to integrate within the constitutional justice, considering the ongoing transformation of state legal system. The paper will be oriented on both the practice of the Constitutional Court of Georgia, as well as the European approaches.

1. INTRODUCTION

A person has the right to have rights, to be a subject of the rights and all of this is stemming from the fact that he or she is a person and has dignity.[1] Accordingly, human rights create a certain system of norms, the realization of which is a precondition for establishing a state governed by the rule of law. Hence, legal mechanisms that serve for the protection of rights and liberties are of utmost importance.

The constitutional court is a body intended to protect constitutional rights and prevent the branches of the government from unconstitutional interference with the constitution.[2] It should be noted that preservation of the constitution attains a higher importance in the countries of "young democracy" since the legal systems of such countries undergo constant changes.[3]

With respect to Georgian constitutional justice system an issue of subjecting common courts to constitutional review has become relevant, *i.e.* the importance of the "real" constitutional com-

[1] J. Maritain, *The Rights of Man and Natural Law*, The Centenary Press, London, 1945, pp. 37-39.
[2] D. Gegenava, *Constitutional Jurisdiction in Georgia: Main Systemic Issues of Jurisdiction,* Universal Publishing, Tbilisi, 2012, p. 26.
[3] G. Kverenchkhiladze, *Legal Defence of the Constitution and the Models of Constitutional Justice,* Caucasian University Publishing, Tbilisi, 2008, p. 73.

plaint and the possibility of implementing it into the Georgian system of constitutional justice.[4] Thus, the aim of this article is to analyze the challenges of the Georgian model of the system of constitutional control. This article will examine the effectiveness of the "real" constitutional complaint in protection of human rights and assess the complexity of its implementation in the constitutional decision-making process when the country is in the process of transformation. The article will address the experience of the Constitutional Court of Georgia as well as the European standards.

2. CONSTITUTIONAL REVIEW AND THE TYPES OF CONSTITUTIONAL COMPLAINT

The idea of constitutional review has attained special importance after the famous decision of the US Supreme Court – *Marbury v. Madison*.[5] It was this fact that laid grounds for creation of the mixed constitutional justice system. This means that the Supreme Court conducts the constitutional review. The concept of mixed constitutional control implies that the constitutional control be conducted on a case by case basis (incidental constitutional control).[6] As for the first model of specific constitutional decision-making – it was first created upon the initiative of Hans Kelsen resulting in creation of the Constitutional Court of Austria in 1920. The Kelsenian model *i.e.* concentrated constitutional decision-making entails an independent[7] centralized constitutional court, which provides a strong protection for individual rights.[8] In the system of special constitutional decision-making, the constitutional court is allowed to exercise concrete as well as abstract constitutional review. Concrete constitutional control is always *a posteriori*, which removes the constitutional court from the process of preparation and adoption of legislative acts.[9]

The types of constitutional control and the forms of its execution are closely connected to individual constitutional complaints. Individual constitutional complaint represents one of the ways of referring to the constitutional court, which allows the realization of the interest-based claim-

[4] In the case of *Apostol v. Georgia*, the European Court of Human Rights has addressed the importance of the Constitutional Court of Georgia and the real constitutional complaints very broadly. It would be no exaggeration to state that this very decision served as principal grounds for initiating a conversation regarding introduction of the real constitutional control. See *Apostol v. Georgia*, Application No. 40765/02, ECtHR, 28 November 2006.
[5] B. Bojan, Court as Policymakers: Lessons from Transition, Harvard International Law Journal, 2001, pp. 247-248.
[6] *The Role of the Constitutional Court in the Consolidation of the Rule of Law*, Venice Commission, CDL-STD(1994)010, pp. 3, 19, available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD%281994%29010-e [accessed 26 November 2019].
[7] P. Hert, S. Somers, *Principles of National Constitutionalism limiting Individual Claims in Human Rights Law*, Vienna Journal on International Constitutional Law, 2013, p. 17.
[8] A. Sajó, *Limiting Government, An Introduction to Constitutionalism*, Translation by M. Maisuradze, Cezanne Publishing, Tbilisi, 2003, p. 288.
[9] Kverenchkhiladze, supra 3, p. 74.

related rights of an individual. Within the constitutional decision-making, two types of individual constitutional complaints can be distinguished: **direct** and **indirect**.

- Indirect constitutional complaint supposes the protection of fundamental rights indirectly, through the relevant competent government officials or bodies.[10]
- In case of direct constitutional complaint, individuals and legal entities have the right to bring a constitutional complaint before the constitutional court directly whenever there is a violation of rights or a threat of violation thereof.[11]

Within the scope of abstract and concrete constitutional review, differences might arise within the direct constitutional control. Hence, there are two scenarios:

- In case of abstract constitutional review, anyone can bring a claim before the constitutional court, regardless of whether his or her rights have been violated.[12] The basis for this is the concept of abstract control as such, under which the issue regarding the constitutionality of a norm can be raised at any moment after it enters into force.
- In case of direct constitutional complaint within the context of concrete constitutional review, a person can only bring a claim before the court if his or her rights have been violated, or there is a risk of violation.[13]

Within the context of concrete constitutional control, direct constitutional complaints can further be divided into three sub-categories:

- Constitutional revision – only decisions of the courts of final instance can be appealed before the constitutional court.[14]
- Normative constitutional complaint – persons can only bring claims regarding normative acts.[15]

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[10] *Study on Individual Access to Constitutional Justice*, European Commission For Democracy through Law, Venice Commission, CDL-AD(2010)039rev., paras. 3, 56, available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)039rev-e [last accessed 26 November 2019].

[11] See ibid, paras. 53-54, 75-77, available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)039rev-e [last accessed 26 November 2019].

[12] L. Sólyom, *Constitutional Justice - Some Comparative Remarks*, Venice Commission, CDL-JU(2003)30, p. 3. see. https://www.venice.coe.int/webforms/documents/?pdf=CDL-JU(2003)030-e [last accessed 4 December 2019].

[13] *Study on Individual Access to Constitutional Justice*, European Commission For Democracy through Law, Venice Commission, CDL-AD(2010)039rev., I.1.2, available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)039rev-e [last accessed 26 November 2019].

[14] *Comparative Overview of European Systems of Constitutional Justice*, 5 Vienna Journal on International Constitutional Law, 2011, p. 166.

[15] *Study on Individual Access to Constitutional Justice*, European Commission For Democracy through Law, Venice Commission, CDL-AD(2010)039rev, para. 77, available at:

- Real/full constitutional complaint – acts of all the branches of the government can be brought before the constitutional court (based on the principle of subsidiarity).[16]

The idea of real constitutional complaint forms a part of the importance of the real constitutional control. Hence it is important to assess the scope of rights that the real constitutional control grants to the constitutional court and physical persons respectively. It is also necessary to examine to what extent the system of common courts can be subjected to the constitutional control. Firstly, it should be noted that addressing the constitutional court with real constitutional complaint does not mean assessing the grounds of the case.[17] Constitutional control of the common courts is only conducted with respect to human rights.[18] This is an important reservation insofar as it handles the limitation of the constitutional review over the decisions of the common courts. The establishment of real constitutional control is linked to a fundamental doctrinal problem as to what extent the constitutional court should interfere within the performance of immanent functions of the common courts. Accordingly, I believe that one of the directions is conducting constitutional review of the decisions of common courts in the context of human rights.

3. Georgian Model of Constitutional Control – Relevance of the Individual Constitutional Complaint

Georgian constitutional justice is characterized as a concrete constitutional control.[19] This is realized by the procedure started based upon constitutional submissions or constitutional complaints. Individual constitutional complaint is the most important instrument that serves the protection of human rights.[20] Accordingly the Georgian model of constitutional justice prescribes the possibility of protecting rights against potential breaches, which does not prevent the introduction of real constitutional control.

Challenges of effectiveness of the Georgian model of constitutional complaint can be raised as a consequence of several issues. In particular, every person can challenge the constitutionality of the law even if he or she is not directly affected by the law (provided there is potential threat).

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https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)039rev-e [last accessed November 26, 2019].

[16] See ibid, para. 80, available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)039rev-e [last accessed November 26, 2019].

[17] S. Banić, *Full Individual Access to the Constitutional Court as an Effective Remedy for Human Right Protection*, Venice Commission, CDL-JU(2015)011, p. 5, available at: https://www.venice.coe.int/webforms/documents/?pdf=CDL-JU(2015)011-e [last accessed December 4, 2019].

[18] *Study on Individual Access to Constitutional Justice*, European Commission For Democracy through Law, Venice Commission, CDL-AD(2010)039rev, para. 81. available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)039rev-e [last accessed December 3, 2019].

[19] See *Apostol v. Georgia* supra 4.

[20] M. Fremuth, *Constitutionalism and Constitutional Litigation in Germany and Beyond the State – A European Perspective*, Duquesne law Review, Vol.49, 2011, p. 385.

However, an individual is deprived of the ability to challenge the decisions of courts and other public bodies which directly affect their situation.[21] Hence, the system of common courts in Georgia is not subjected to constitutional control in the area of human rights. In addition, this is coupled with the lack of conversation between judges,[22] which can also be deduced based on the small amount of constitutional submissions. According to official data, as of 2018, overall 80 constitutional submissions have been brought before the constitutional court.[23] Due to these reasons, it is necessary to introduce mechanisms, which would promote the establishment of judicial interaction and increase the possibility of protecting human rights. For the efficiency of legal system, it is important to create and use an interactive potential, which excludes the mere legalistic division of the legal system (***erga omnes effect***), in particular a "rather uncomfortable legal position" arises from the lack of "confrontation" and discussions among the courts.[24] Naturally, the above-mentioned does not imply negative approaches and it aims to set forth limitations for definitions by the courts. Furthermore, the analysis of international practice suggests that states are creating the mechanisms for "obligatory dialogue" in order to eliminate the formal borders existing between separated constitutional and common courts. In this regard, the real constitutional control is an important mechanism, which in a way obliges the courts to exchange experiences and communicate with each other insofar as in this case, courts will have to examine the standards established by one another. The ultimate goal of this is to increase the degree of the protection of human rights. The aforementioned is not the sole challenge the Constitutional Court of Georgia is facing. Another important problem is that declaring a norm unconstitutional does not result in annulment of the judgments delivered based on such norms. This means that the Constitutional Court does not have the competence to redress the issues that are caused by action or inaction of common courts.[25] Such an arrangement is directly linked to the problem of execution of the judgments of the Constitutional Court. For instance, the European Court of Human Rights deemed the Hungarian model of abstract control inefficient given that the Constitutional Court could only assess the constitutionality *in abstracto*, without the possibility of annulling or amending the measures taken with regard to an individual. In case of *Apostol v. Georgia*, the Court offered introduction of the law similar to the one existing in German legislation as a way of the solution for this problem. Namely, the Federal Constitutional Court is entitled to identify the subject responsible for execution of the judgment and, under specific circumstances, even indicate the method of execution.[26] Such an arrangement attains an important significance in the context of Georgian legal reality. The Constitutional Court may

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[21] *Apostol v. Georgia*, supra 4, para. 40.
[22] M. Claes, *Negotiating Constitutional Identity or Whose Identity is It Anyway?* in: Constitutional Conversations in Europe, Intersentia, Cambridge, 2012, pp. 222-230.
[23] See http://old.constcourt.ge/ge/legal-acts/statistics [last accessed on December 20, 2019].
[24] J. Gerards, The Pilot Judgment Procedure Before the European Court of Human Rights as an Instrument for Dialogue, in: Constitutional Conversations in Europe, Intersentia, Cambridge, 2012, pp. 370-372
[25] *Apostol v. Georgia* supra 4 para. 42.
[26] Supra 4, para. 30.

declare the legal norm constitutional, however declare its specific normative content incompatible with the Constitution. Although the Court does not have an authority to issue separate judgments aiming to offer definitions, in case of judgments regarding the normative content it can address the issue of authenticity of the norm.[27] Unfortunately, "attention is not paid" to such situations and government bodies continue to apply the normative content existing before the judgment.[28] Besides, when we are giving the Constitutional Court the competency to conduct oversight over common courts as well as public agencies though the real individual constitutional complaint, it is also necessary to introduce effective means for the exercise of such oversight. Accordingly, the Court has to determine who is responsible for execution on a case by case basis.[29] Hence, would it not be justified to create a separate department of the Constitutional Court responsible for the execution of judgments? The grounds for such an approach can also be found in Georgian legislation. In particular, it is noteworthy that one of the most important functions of the Secretary of the Constitutional Court is to "take measures designated for the execution of the judgments of the Court and provide the Plenum with a report regarding execution of judgments once a month".[30] It would make sense to link the creation of a separate supervisory department to this specific function. The existence of effective mechanisms for control imply the possibility of one branch to participate in the performance of tasks by another branch and its capacity to influence different stages of execution of judgments.[31] On one hand, creation of the supervisory department would facilitate the process of interaction between the Constitutional Court and other bodies and, most importantly, it would serve as an important guarantee for the execution of judgments. On the other hand, introduction of such a mechanism is linked with the legitimacy of the Constitutional Court.[32] Attention should be paid to the issue of distinguishing functions and competences, so that the lack of clarity does not serve as grounds for unconstitutionality. However, in the end, introduction of the real constitutional control as well as the creation of a separate department responsible for the oversight of the execution of judgments is an issue of legal policy.

The Georgian model of constitutional complaint has some advantages in comparison with the real constitutional complaint. First of all, judicial overload might occur in the latter case. Besides, today there is no competition among the courts when it comes to interpretation regarding

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[27] Gegenava, supra 2, p. 75.

[28] Information on Constitutional Justice in Georgia – Constitutional Court of Georgia, 2017, p.33 see. http://old.constcourt.ge/uploads/other/3/3841.pdf [last accessed on December 20, 2019].

[29] For the discussion regarding different methods of execution of judgments, see S. Bross, *Reflections on the Execution of Constitutional Court Decisions in a Democratic State under the Rule of Law on the Basis of the Constitutional Law Situation in the Federal Republic of Germany*, Venice Commission, CDL-JU(2009)001, p. 4, available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-JU(2009)001-e [last accessed 29 November 2019].

[30] Article 14, Organic Law of Georgia "On Constitutional Proceedings", 31 January 1996, 001, 27.02.1996.

[31] Sajo supra 6, p. 126.

[32] W. Sadurski, *Post-Communist Constitutional Courts in Search of Political Legitimacy*, European University Institute, 2001, p. 21.

the constitutionality of a norm. Nevertheless, there are strong arguments in favor of the real constitutional complaints. I believe that introduction of the real constitutional complaint will facilitate the process of the conversation between the Constitutional Court and the common courts, which will promote judicial law-making. Hence, there is an expectation that common courts will aim to introduce higher standards for the protection of human rights. Moreover, as demonstrated by the case law of the ECtHR, in countries with real constitutional complaints, the amount of cases brought against them before the Court is significantly lower.[33] Real constitutional complaint is particularly popular in the Eastern Europe[34] and the ECtHR advocates for such type of complaints as an additional mechanism for the protection of human rights.[35]

Clearly, there is no universally accepted model of individual constitutional complaint. Moreover, accepting this instrument of the protection of human rights as the sole existing alternative contradicts the principle of legal state. Legislators should identify, which model of constitutional complaint would be more efficient in the country based on regulations existing therein as well as its legal reality. Accordingly, each position has its pros and cons. However, it is becoming clear that the real constitutional control guarantees a higher standard for the protection of human rights as compared to the model which does not offer any oversight of the decisions of common courts by the Constitutional Court.

4. THE POSSIBILITY OF IMPLEMENTING THE "REAL" CONSTITUTIONAL CONTROL IN THE GEORGIAN SYSTEM OF CONSTITUTIONAL JUSTICE

In the countries of so-called "new democracy" implementing real constitutional control to the system of constitutional justice is a difficult task. Georgia, as a state in the process of transformation, is facing serious challenges in this regard. Based on the Georgian legal reality, the necessity to purposefully broaden the scope of the authority of the court is based on the unconditional fact that the courts are obliged to consider the scope of the values of legal regulations while interpreting and applying laws. If the court does not pay due regard to it, it violates stipulations of the basic law and it is necessary to control the decisions taken by the court. Such a control should be conducted by a constitutional court.[36]

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[33] P. Paczolay, *Introduction to the Report of the Venice Commission on Individual Access to Constitutional Justice*,Venice Commission, CDL-JU(2013)003, p. 2, available at: https://www.venice.coe.int/webforms/documents/?pdf=CDL-JU(2013)003-e [last accessed 4 December 2019].

[34] E. Hasani, P. Paczolay, M. Riegner, *Constitutional Justice in Southeast Europe: constitutional courts in Kosovo, Serbia, Albania and Hungary between ordinary judiciaries and the European Court of Human Rights*, Nomos, Eschborn and GIZ, Germany, 2012, p. 13.

[35] *Apostol v. Georgia* supra 4, paras. 41-71.

[36] Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 1 BvR 400/51, BVERFGE 7, 198 [207], Jan. 15, 1958.

The possibility of implementing real control was being considered in 2013 and it became relevant in 2016 as well. The analysis of legislative bills allows us to say that the initiators of the bills have suggested several innovative ideas. For example, such as the issue of admissibility of constitutional complaints regarding individual acts and final decisions of the common courts and applicable exceptions; a different division of the functions of the judges of the constitutional court and, in particular, changes to the duties of the President of the court. However, there are some challenges as well, namely the possibility of considering a case by a single judge following the simplified procedure, the ambiguity in distinguishing the functions of judges, as well as the issue of compensation for incurred harm. Accordingly, the reason for rejecting the real constitutional control was the impossibility to agree on the aforementioned and other issues. However, nevertheless, the main reason for the failure of the Commission was the fact that the country's legal system was not prepared for relevant changes.

With respect to introduction of the real constitutional control, drawing the line of distinction between the constitutional control and a general legal control of norms is always a subject of the dispute. The difficulty of clear definition of the intensity of the constitutional review is stemming from the "caution" of states and it is necessary to elaborate such an arrangement that would avoid politicization of the court (with respect to the qualitative issues of the constitutional control)[37] and substitution of the functions of the legislative branch. Accordingly, it is the legislative amendments that should introduce the real constitutional control, although this does not imply that the body conducting constitutional review should be deprived of the ability to make political decisions altogether, rather it is important to define as to what extent this will be done and to what results it will lead.[38] This issue can be solved by identifying a group of people from which the constitutional control will accept real individual constitutional complaints (e.g. the "amparo" procedure in Spain).[39] However, it is difficult to distinguish ordinary wrongdoings from human rights violations as well as establishing the criteria that would serve as grounds for reexamining judgments of the court of the last instance. Prior definition of this issue is impossible, because it is the constitutional court that should define the guiding principles through is case law, which is a quite difficult task for the countries of "new democracy". The constitutional court should elaborate a self-restraining mechanism so that the judicial overload as well as the "legal war" on interpretation of constitutionality of norms is avoided.[40] Introduction of such self-restraint as well as of real control is linked to legislative changes. For integration of the real

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[37] E. Mclean, *The Most Dangerous Branch: The Judicial Assault on American Culture*, University Press of America, 2008, pp. 1-16.
[38] A. Miller, *The Supreme Court and American Capitalism*, Free Press, New York, 1968, p. 5.
[39] See European Commission for Democracy through Law, *Brief on the remedy for the protection of individual rights before the Spanish Constitutional Court (recurso de amparo)*, CDL-JU(2015)009, 13 May 2015, available at: https://www.venice.coe.int/webforms/documents/?pdf=CDL-JU(2015)009-e [last accessed 29 November 2019].
[40] *Study on Individual Access to Constitutional Justice*, European Commission For Democracy through Law, Venice Commission, CDL-AD(2010)039rev, para. 211, available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)039rev-e [last accessed 26 November 2019].

control into the Georgian system of constitutional justice, it is necessary to amend the law so that it includes the authority of the constitutional court to consider the constitutionality of normative and individual acts with respect to the Second Chapter of the Constitution when all domestic remedies have been exhausted (principle of subsidiarity).[41] The principle of subsidiarity creates a certain precondition for the admissibility of constitutional complaints and its substance is to be determined by states themselves. It is important to consider the experience of European states with respect to subsidiary nature of individual constitutional complaints, which rejects the use of the subsidiarity principle in cases where it can result in irreparable violation of human rights.

At the same time, it is important to enact a legal regulation, according to which the constitutional court will not be competent to adjudicate upon the constitutionality of the judicial judgments as such, whenever the applicant is claiming to declare only a certain part of the judgment unconstitutional. However, exceptions might be allowed when a part of the judgment the constitutionality of which is not disputed will lose legal effect after declaring the disputed part of the judgment unconstitutional. In addition, exceptions can be allowed, when the disputed part of the judgment is by substance connected to the part the constitutionality of which is not disputed by the party to a case, but where delivering a judgment without considering it would be impossible.

It is also important to make a reservation under which, in case of declaring the final judgment of common courts unconstitutional, declaring the judgment void and returning it to the court which issued the judgment for reconsideration shall follow. In such cases, judges, who previously participated in the hearing of the case should not be allowed to sit on the retrial. Due to this fact and for the purposes of efficiency, it would be reasonable to make a separate department in the system of common courts which would be responsible for reconsidering the judgments that have been declared unconstitutional. This does not imply the existence of an additional instance, but rather it is necessary to make structural adjustments in common courts to serve the specificities of the real control. It should be noted that the Constitutional Court adheres to the principle *iura novit curia* and thus the issue of constitutional control over the common courts has to do with the scope/clarity of definitions regarding fundamental rights. The real control most definitely implies the existence of such mechanisms and means that express the respect towards administration of justice by common courts.[42] Upon the introduction of the real control, the Constitutional Court will participate in the work of common courts and complements (not substitutes) the functions of the Supreme Court.

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[41] Such a model can be found in the constitutional justice system of Germany, Croatia, Hungary, Slovakia and Portugal. *Co-operation of Constitutional Courts in Europe Current Situation and Perspectives*, Venice Commission, CDL-JU(2014)003. available at: https://www.venice.coe.int/files/2014-05-02-CECC-e.pdf [last accessed December 5, 2019]

[42] *Study on Individual Access to Constitutional Justice*, European Commission For Democracy through Law, Venice Commission, CDL-AD(2010)039rev., para. 211, available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)039rev-e [last accessed November 29, 2019].

In addition, real constitutional control would require increasing the number of the Justices of the Constitutional Court insofar that the increased number of constitutional complaints will require relevant organization of the Court. Taking this into account, it is suggested that smaller chambers[43] are created with the aim to assess the formal criteria and reasoning of real individual complaints. References to the increase of the number of judges can also be found in legislative bills of 2013 and 2016. Creation of such a structural division is aimed to achieving balance in the Constitutional Court. For the accomplishment of the same purpose, introduction of certain consecutiveness upon the distribution of incoming claims can also be considered. If the said group of judges deems it necessary, they should be able to refer to the Plenum and request that the case be considered by it. The possibility of such a motion derives from the difficulty of defining the intensity of the control and the legal criteria, which is the biggest challenge during the introduction of real constitutional control. Besides, for the purposes of ensuring the flexibility of contentious proceedings, we could also consider the possibility of creating the unit of assistants, given that the increased amount of constitutional complaints requires not only increasing the number of judges but also formation of relevant structural units of the Staff of the Constitutional Court. This would be another mechanism that could serve as a tool for avoiding judicial overload. In addition, it would be useful to introduce other mechanisms that contributes to avoiding the overload of the Court. For example, it could be possible to consider a constitutional complaint without an oral hearing and to deliver judgments following the simplified procedure whenever a similar case has already been decided by the Constitutional Court.

However, all of this is not sufficient for ensuring the constitutional order that individual constitutional complaint procedure is aiming to establish. In particular, the right of individuals and legal persons to bring a real constitutional complaint before the court is also associated with certain obligations. It is prohibited to use this right in bad faith. It is important to adopt the criteria for good faith action since this is what serves as grounds for defining the limits of such right. A relevant method of bearing responsibility should be adopted to prevent the abuse of the right. In addition, the exercise of real constitutional control should not obstruct the access to the court. In any case, given the self-contained nature of the constitutional justice, it is necessary to establish a procedure, which would create grounds for timely and efficient consideration of real constitutional complaints. In order to achieve this, it is important to establish reasonable timeframes which, together with other procedural regulations, will serve as means for avoiding the prolongation of the consideration of complaints.

5. CONCLUSION

As a body protecting fundamental rights, the Constitutional Court should be given the possibility to create long-lasting and effective means for protecting the rights through real control.

[43] Ibid, para. 225.

Evaluation of the value of events and aspiration for institutional development serve as grounds for compliance of normative reality with ongoing processes. For this reason, the Constitutional Court has addressed the issue of introducing the real constitutional control several times, but finally this model of individual constitutional complaint remained to be an unaccomplished goal. Nevertheless, the lack of dialogue between the judges as well as the lack of constitutional submissions indicates the necessity of introducing the real constitutional control. Subjecting common courts to constitutional review guarantees the effectiveness of domestic mechanisms for the protection of human rights and the creation of the constitutional system which corresponds with the needs of democracy. All of this will be reflected in the self-control of the system of common courts with respect to application of laws, as well as in the completion of doctrinal views and the creation of preventive functions. In this case, the work of the Constitutional Court only complements the functioning of common courts and does not lead to the assessment of the appropriateness of the decisions; this way, the Supreme Court and the Constitutional Court divide compatible functions.

Introduction of the real constitutional control needs fundamental legislative changes as well as the preparedness of the Constitutional Court. This has to do with lengthy and complicated procedures. Given that there is no universal system for the assessment of dogmative-legal criteria, it is necessary for the Constitutional Court to address this issue through its case law. The legislature defines a normative framework and the constitutional court creates legal dogmatics. For the purpose of substantial or qualitative aspects of the constitutional control, the following should be defined: rights and duties of judges; the issues related to reorganization of the courts (increase of the number of judges; creation of the division in charge of the process of execution or creation of the department of assistants). In addition, for introduction of the real constitutional control, the duty of the Constitutional Court to create self-limiting mechanisms for the purposes of avoiding judicial overload is important. For example, a principle of subsidiarity can be introduced. In this regard, it is important to consider and act in accordance with the experience of European countries. The necessity to establish certain exceptions is also significant, so that the clear definition of legal norms does not lead to excessive robustness. The introduction of real constitutional control is a crucial and very difficult process, which is accompanied by the necessity to regulate important doctrinal issues.

Identifying the specificities of the real constitutional control makes the assessment of its characteristic difficulties and benefits possible. For this reason, this article addressed the pros and cons of introducing the real constitutional control to the Georgian system of constitutional justice, relevant necessary legislative changes and potential novelties have been identified. Finally, it should be addressed that there is no universally recognized model of constitutional control and for defining each of the models it is necessary to consider the experiences and legal reality of each country.

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THE POLITICAL ROLE OF THE SUPREME COURT OF THE UNITED STATES UNDER THE SEPARATION OF POWERS AND ITS MODEL OF CHECKS AND BALANCES

ABSTRACT

The role of the judicial branch in the US checks and balances model of the separation of powers has never been univocal; An analysis of the epochs reveals that this branch of government has come together in an interesting and complex way of evolution. The following paper briefly discusses the basic essence of the US constitutional model, the development of constitutional review within its framework, key characteristics of the Supreme Court control, along with several case-law decisions and the contemporary challenges of the American Supreme Court in a polarized political climate.

1. THE FIRST WRITTEN CONSTITUTION

"We the People of the United States, in Order to form a more perfect Union,"[1] - with these words begins the first written constitution in the history of mankind, its preamble, this document, dated 1787, is one of the shortest and oldest basic laws. It takes into account and is based on the principles of republicanism, separation of powers and federalism.[2]

The text of the Constitution along with the Declaration of Independence of 1776 is infused with the ideas of Thomas Hobbes, John Locke, Charles Louis de Montesquieu and others. The new state was developed from the colonies of England in accordance with the inevitable values of life, liberty and property by the American nation. Locke argued that these natural God-given individual rights were substantially inviolable, therefore depriving of these rights by any gov-

[1] See the preamble to the Constitution of the United States., available at: https://www.senate.gov/civics/constitution_item/constitution.htm [last accessed on November 26, 2019].
[2] "Constitutional Law of Foreign Countries", Edited by Melkadze O., Tbilisi, 2013, 13.

ernment was not acceptable, he called such a corrupted arrangement despotic and did not necessarily consider obedience to the hegemonic government.[3]

After the American Revolution and the secession from England, the colonies were left without a central government. It was soon discovered that a weak central government, lacking economic and military power, could not maintain internal order, this inability was especially noticeable in the wake of the farmers uprising of 1786 and 1787 (referred to as "Shays Rebellion").[4] The "Founding Fathers" and the authorities of the individual states absolutely understood this; During the Philadelphia Convention of 1787, which had only to revise the Articles of the Confederation, following Edmund Randolph and James Madison's proposed amendments (the "Virginia Plan"), they rejected the original purpose of the convention and began working on a constitution.[5] This impetuous, panic-ridden decision is called by some thinkers two steps ahead and one behind it, "a counter-revolution against popular democratic ideals."[6]

The developments in Massachusetts turned out to be a truistic argument for the creation of a strong central government, taming turbulent democracy. The Philadelphia Convention sought to establish a direct connection between citizens and the central government without the interposition of the authorities of the states, which the symbolic, nominal central government could not do under the confederation, consequently, the constitution of 1787 actually created a new nation and gave rise to a solid and more or less consensual sense of unity between the states.[7] The centralization of political power gradually became legally justified and even legalized by the US Supreme Court.[8]

2. AMERICAN NOVATION

The American model of governance was a novelty in its form, defined primarily as an alternative to British rule.[9] The "founding fathers" did not trust the principle of "unity of power", viewing it as a remnant of the monolithic state and sharing Montesquieu's view that human nature was prone to the abuse of power, and that is why the system of government had to be institutional-barrier to control political authority.[10] James Madison, in his 51st Federalist Letter, develops a similar concept in which he writes that an interest must be challenged by the opposing

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[3] Locke J., "Second Treatise of Government, Introduction to Modern Thought", Book One, Tbilisi, 2014, 247-276.
[4] Janda K., Berry J., Goldman J., "American Democracy", Tbilisi, 1995, 50.
[5] Ibid.
[6] Elster J., *Constitution-Making and Violence*, Journal of Constitutional Law, Second Volume, 2018, 27, See citation: Bouton T., Taming Democracy, New York, 2007.
[7] Khubua G., "Federalism as a Normative Principle and Political Order", Tbilisi, 2000, 281.
[8] Ibid 282, See citation: Hesse J., Benz A., *New Federalism unter Präsident Reagan*, Speyer, 1987, 3.
[9] William Henry Hirst. "Constitutional Government in the Spotlight: The Origin, Vicissitudes, Problems and Trend of the American System", 1935, 16.
[10] Sajó A., "Limiting Government", Tbilisi, 2003, Note 4, 89, See citation: Montesquieu C., "The Spirit of the Laws", trans. and ed. Cohler A., Miller B. and Stone H., 1992, 4.

interest, that the system of governance and control devices should be a reflection of the human nature.[11]

According to the "Founding Fathers", Government institutions, bodies had to have antagonistic interest to one another and a permanent desire for constant subjugation of power, their strengthening and weakening should have been dependent only on each other, though the confrontation should not have put the branches in front of politically imbalanced deadlocks, in that case, the governance system would be technically unsound.[12] On the other hand, if the branches of government were to gain too much independence, they would have lost contact with each other, so interconnection and mutual control are an integral element of the American system.[13]

Although the provisions of the constitution of the United States are not hierarchical in their meaning, not even within the framework of the Bill of Rights, the structure of the first written constitution is the vital foundation, this innovative model of power-sharing is a primal mechanism for the subsequent exercise of various socio-political rights, and hence the formula of American Exceptionalism.

The governance system of the United States is based on the "seesaw" principle, comparability is dynamic, and after each election, the balance of power is shifted depending on which forces will enter the Senate and which party the president will represent, as the court strives to maintain balance and fluctuates back and forth in order not to lose public esteem.[14] In this regard, the court should adjust the function of a more or less neutral center of gravity on this political arena.

3. The Case of Marbury v. Madison and the Genesis of Constitutional Review

The epic decision of the Supreme Court in 1803 established a completely unprecedented understanding of judicial power, in accordance with the earlier view, judicial power could not go beyond traditional litigation disputes between parties and the constitutional justice and oversight of other branches was an uncommon standard. The labor dispute between the employer and the employee that began in 1800 forever altered the model of American governance and the balance between the branches of government.[15]

John Adams and the Federalists, supporters of a strong central government, lost in the tense election of 1800, the ruling party was first replaced, and Thomas Jefferson, the great admirer of Russo's ideas, became president, who in each case regarded the exercise of the people's direct

[11] Madison J., 51st Federalist Paper, see http://www.federalistpapers.ge/federali51.php [last accessed on November 26, 2019].
[12] Sajó A., supra 10, 92.
[13] Honore T., "About Law: An Introduction", Tbilisi, 2018, 44.
[14] Supra 12, 96-97.
[15] Mountjoy, Shane. *Marbury v. Madison: establishing Supreme Court power*, 2009, p. 8.

common will as primacy; He considered indirectly "elected" judiciary, including indefinitely appointed judges of the Supreme Court in the country as the retained representation of the English aristocracy and treachery for the sake of American democracy.[16]

Just two days before John Adams left the office, he appointed, along with about 60 others ("Midnight Judges"), former Secretary of State John Marshall as a Chief Justice of the Supreme Court, and William Marbury, a Justice of the Peace in the District of Columbia, the commissions could not be timely delivered to the latter. Jefferson, as the third president of the country, instructed his new Secretary of State and one of the "Founding Father" James Madison to withhold the undelivered appointments, based on which Madison repeatedly refused to deliver Marbury's commissions, the latter appealed directly to the Supreme Court with a petition asking the court to issue a writ of mandamus forcing executive government to complete the appointment procedure.[17]

There was a dilemma before the Supreme Court and its Chief, the Court had no army and did not autonomously own the finances.[18] On the opposite side were President Jefferson, the influential Secretary of State, and the entire Congress with a majority of opposition forces, so it would be impossible to execute the decision in this perspective; John Marshall nevertheless considered Marbury's petition[19] and ruled *per se* miscellaneous decision:

1. Firstly, no one, not even the President, is above the law and the Secretary of State's refusal to issue commissions was clearly unlawful by the executive branch. Accordingly, where the right is infringed, there must be *a priori* remedy. It is a separate matter whose discretionary power is to provide a remedy for the person whose rights had been violated.[20]
2. The Court according to the "Judiciary Act of 1789" could have required with a writ of mandamus the executive authority to issue commissions.[21] Marshall saw that the Jeffersonian government explicitly would not enforce such a decision and, in such a case, the Court would be seen incapable in front of the public sight, consequently, not only a legally valid solution was needed, but also a political one. Accordingly, section 13 of the Judiciary Act was regarded by John Marshall as unconstitutional because it, unlike Article 3 of the Constitution, was unreasonably expanding the jurisdiction of the judiciary. It

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[16] Supra 12, 278.
[17] Hartman, Gary R., Roy M. Mersky, and Cindy L. Tate. "Landmark Supreme Court cases: the most influential decisions of the Supreme Court of the United States". 2014, p. 467.
[18] "The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society", Federalist Papers #78, Hamilton A., available at: http://federalistpapers.ge/federali78.php [last accessed on November 26, 2019].
[19] Supra 10, 280.
[20] Ibid.
[21] See the relevant part of the act: https://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=001/llsl001.db&recNum=203 [last accessed on November 26, 2019].

is stated in the text of the decision that the judiciary could not and would not interfere with the discretionary powers of the executive branch laid down in the text of the Constitution.[22] The Court stated that it was not going to disregard the spirit of the Separation of Powers and its model of checks and balances and therefore self-restrained from the writ of mandamus.

3. This last part of the adjudication is an unparalleled example of reasonable self-restraint, self-control by the judiciary. However, Article 2 (2) of the Constitution does not explicitly state the role of the negative legislator as well. Nonetheless, John Marshall believed that the sole authority of the judiciary was to interpret the constitution, oversee the legislation and Congress, and watch over it.[23] Accordingly, the Court broadly defined the judicial jurisdiction of the dispute settlement and thereby astute enough incorporated, *inter alia,* constitutional review.

John Marshall was by no means a philosopher, he went to the office of the Supreme Court with the malicious intent to balance the radical tendencies of the Jefferson Party, in parallel with the strengthening of the federal court's role; He was characterized as a result-oriented, tactical politician with no flawless knowledge of jurisprudential theories; In fact, for a judge to be considered an influential figure, he must be able to change an established practice and fill the vacuum of the law, that is, be a pragmatist; *vice versa* legal formalism is not inherently innovative; The purpose of formalism as a method is simply to apply and adhere to the principles, that is by nature rhetorical.[24] Consequently, just as the personality of George Washington transformed the American form of executive power, the third Chief Justice, John Marshall similarly defined the future role of the judiciary.[25]

For its part, the institution of the judiciary wisely walked this narrow, dangerous political path in the years of 1800-1803, did not rely on the *status quo* and thus did not put up with actual stagnation-capitulation, upheld the spirit of balance and winner came out of the deadlock, its independence as a constitutional arbiter has been sharply affirmed, all this under the condition that until 1935 the Supreme Court did not even have an independent building. Following one proactive move, it gained authority of control of the legislature and self-restricted from usurping power. At the time, John Marshall, along with several Justices at the federal level considering the insignificant status of the court, tried not to directly oppose to the high legitimacy branches of executive and legislative authorities but strengthened judicial control in exchange for reason-

[22] Marbury v. Madison, 5 U.S. 137, (1803), paragraph 75, 99, See https://openjurist.org/5/us/137 [last accessed on November 26, 2019].
[23] Ibid.
[24] Richard A. Posner, "Law, Pragmatism and Democracy", 2003, p. 86.
[25] Basic Readings in U.S Democracy, edited by Melvin I. Urofsky, p. 53.

able self-restraint.[26] More than 200 years later, this case remains a unique example of rationalized compromise in the history of the practice of the Separation of Powers.

4. The Control Paradigm And Couple of Landmark Decisions of the Supreme Court

The Supreme Court justices are policy-makers in the United States, their decisions are precedent and affect legislative regulation not only for the sake of specific cases but also for similar ones in the future.[27] However, the judiciary was particularly weak in the early years of the republic, the Supreme Court was assembling for only a few weeks for a term, its independence and legitimacy was dubious, thus it avoided confrontation with other branches; For illustration, John Jay, the first Chief Justice, refused to extend his authority in 1801, claiming that the Supreme Court had not obtained the proper energy, weight and dignity to serve a national cause.[28]

Article 3, section 2 of the Constitution literally only provided for appellate and, in some cases, original jurisdiction, not the control of congressional and executive authorities, which, as already noted, is the result of many years of judicial practice. More than 200 years have elapsed since the Marbury case, but throughout history, the Supreme Court has often not applied control authority in order to prevent usurpation of powers acquired. Nevertheless, a few cases in the history of the Supreme Court of the United States can be noticed, in which the Freedom Guard institute[29] acted as the supreme arbiter and created the country's social, economic and political weather.

In the modern state governance systems, the domestic and foreign policies are determined by the highest representative bodies, that is conditioned by popular democratic legitimacy. In the American system, the Senate has a similar set of powers under Article 1, section 8 of the Constitution as well. Nevertheless, a number of cases can be recalled when Justices of the Federal Supreme Court set the policy. Whether or not they have abolished the black rob of justices in this process, which has been reduced to the symbolism of restraint, and whether they have become indirectly quasi-rulers, the answer to this question, because of ideological preferences, cannot be unambiguous.

It would probably not be an exaggeration to say that the Dred Scott case and the decision of the Supreme Court in 1857[30] actually accelerated the American Civil War, exacerbating the mental

[26] Supra 15, 11.
[27] Supra 4, 397.
[28] Ibid 358, See citation McCloskey, 1960, 31.
[29] The following words are cut out on the east side of the Supreme Court building: "Justice, the Guardian of Liberty".
[30] Dred Scott v. Sandford, 60 U.S 393 (1857).

and physical strife between States of the North and the South.[31] The Supreme Court ruled that a "Negro whose ancestors were imported into this country and sold as slaves" could not be an American citizen, whether or not he was freed, therefore, the Supreme Court had no jurisdiction to hear the Dred Scott petition because of procedural grounds.[32] Moreover, the Court struck down the Missouri Compromise of 1820 prohibiting slavery in several states and ruled it unconstitutional; This was the first case of the use of judicial review since the Marbury case, and to the general public sight, it remains as the embarrassment of judicial activism.[33]

The Court held that slaves under the Fifth Amendment were considered the property of their owner and any act depriving the slave owner's property right should be regarded as unconstitutional. [34] The Supreme Court's ruling stoked the wave of protest, abolitionism intensified, and the situation became so tense that it led to a civil war between the southern and northern states. (1861-1865).[35] More than 150 years passed after Dred Scott v. Stanford and it still remains as the most inappropriate decision within the Supreme Court history, Chief justice Charles Evans Hughes later called it "the Court's greatest self-inflicted wound".[36]

The Dred Scott case really damaged the authority of the federal court, its institutional reputation as a body that was meant to protect freedom and prosperity, constantly had to find a balance between freedom, order, and equality, in the case of Dred Scott, the freedom of slave-owners was fatally understood; One of the reason, in turn, was that the will of the majority in America at that time was not explicitly against slavery. Such polarization between the groups was exacerbated by the Court decision, that culminated into a civil war, following the end of the war, Congress changed the Constitution of the United States with the 13th, 14th and 15th amendments, and the decision "Dred Scott v. Stanford" was directly superseded. Slavery was abolished by the Constitution. It is in the light of such resonant decisions that the extent of the Court's substantive role and responsibility can be seen.

In the sense of changing the social weather, we should also mention the landmark case of "Brown v. Board of Education,"[37] the ruling of the Supreme Court's decision, which prohibited *de jure* segregation in the public schools and had a significant positive impact on American governance from today's perspective. A class-action suit handed down before the Supreme Court in 1951 could not be resolved until 1954, the hearing was postponed several times, moreover, after the first hearing the opinions were radically divided between the justices, they were faced with real danger and choice, either they could not consider the case or they had to find a

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[31] Karichashvili I., *Dred Scott Case*, Methods of Law, Second Issue, 2018,117, See citation: Linderman G.E., "Embattled Courage: The Experience of Combat in the American Civil War", New York, 1987.
[32] See Oyez, Dred Scott v. Sandford, available at: https://www.oyez.org/cases/1850-1900/60us393 [last accessed on November 26, 2019].
[33] Supra 4, 38.
[34] Karichashvili I., *Dred Scott Case*, Methods of Law, Second Issue, 2018, 121.
[35] Ibid.
[36] Hughes C. E., "The Supreme Court of the United States", 1928, 50–51
[37] Brown v. Board of Education, 347 U.S. 483 (1954)

consensus because a decision of such social weight that would divide their opinions would result in a fiasco for the judiciary and a cause of inevitable confrontation within the community.[38] In a situation like this, the former California governor, Earl Warren, was appointed as Chief Justice after being nominated by the Republican President but appeared to have a liberal outlook on a number of issues, among them, he believed that segregation in public schools was violating the 13th, 14th (Equal Protection Clause) and 15th Amendments. Warren, as the administrative leader of the federal courts, managed to create unity among the justices, and in 1954 the Supreme Court issued a nine-vote unanimous decision on prohibiting segregation in the public schools.[39]

With this judgment, the Court changed its "separate but equal" approach and has overruled the precedent of *Plessy v. Ferguson*,[40] whereby the public racial segregation was deemed legal insofar as the conditions were equally applicable. This judgment of 1954 was not followed by homogenous reactions and assessments, - for instance, one of the most heavily-cited judges of the Appellate Court - Judge Learned Hand claimed that through its *Brown* judgment, the Supreme Court has assumed the role of a third legislative chamber.[41] Similarly, an originalist Raoul Berger notes in his book "Government by Judiciary" that the decision taken by the court under the 14th Amendment was not correct, because the original purpose of 1875 Civil Right Act and that of the 14th Amendment was not the prohibition of segregation. In addition, the future Chief Justice of the Supreme Court - William Rehnquist considered that *Brown* was not democratic and that the Court should have adhered to *Plessy v. Ferguson* under the *stare decisis* doctrine,[42] with due respect to majoritarianism.[43]

Was the American society ready for a change and who should have responded to this question? Who should have changed the political climate on a federal level - was it the Senate or the Court? What did the country's main law say in this regard? Whether or not did the federal government have the legitimate right to intervene within the independence of States and whether or not should the Court have overruled the precedent - these questions will have different answers depending on who is responding - whether it is a supporter of judicial activism, a supporter of judicial self-restraint, a conservative or a liberal. However, the fact remains as follows: the Federal Supreme Court has made a political decision in 1954, when the Senate was abstaining

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[38] Karlan P., "What Can Brown Do For You?" (2008), cited Kluger R., "Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality", 1975, 614.
[39] Supra 4, 355-357.
[40] Plessy v. Ferguson, 163 U.S. 537 (1896)
[41] Klarman M., T*he Supreme Court 2012 Term – Comment: Windsor and Brown: Marriage Equality and Racial Equality*, 127 Harv. L. Rev. 127, 142 (2013) cited Learned Hand, The Bill of Rights at 55 (Oliver Wendell Holmes Lecture, 1958).
[42] (lat. "stand by things decided") this principle reflects self-restraint and is unknown to other branches of the government.
[43] Rehnquist W., *A Random Thought on the Segregation Cases*, available at: https://web.archive.org/web/20070615154055/http://a255.g.akamaitech.net/7/255/2422/26sep20051215/www.gpoaccess.gov/congress/senate/judiciary/sh99-1067/324-325.pdf [last accessed on November 26, 2019].

from doing so, and it became a part of the Civil Rights Movement (1896-1954), which was culminated by the adoption of the Civil Rights Act after 10 years, in 1964.

Regardless of the fact that moral correctness of *Brown* is not disputed today, the US in the 50-ies, like in the case of *Dred Scott*, was at the verge of starting a civil war and political crisis, and after the judgment was announced, the southern states commenced disobedience and demanded to put Earl Warren and other "traitors" on trial.[44]

Felix Frankfurter, who was one out of nine judges participating in the hearing of *Brown*, stated that if he had to adjudicate upon the issue of racial segregation in schools before 1950, he would have upheld the *Plessy* precedent because it was "not evident that the opposing public view existed".[45] We can see the scare of *Brown* in this quote by Frankfurter, its paradigm and the phenomenon of cautiousness of the judicial branch in the American model of separation of powers. It should also be noted that throughout its history the Federal Supreme Court has not invoked judicial activism frequently, - whenever it assumed the role of a secondary legislator, it has been doing so with precaution. According to one report, where 146 judgments of the Supreme Court were compared to relevant public opinion surveys of that time, the latter was apparently coinciding with the judgments of the Court in 60% of cases.[46] This statistics indicate the extent to which the Court respects national laws and policies. One the other hand, the relationship cannot be too qualified, since pluralistic democracy is characterized by antagonism of interests, and judges should represent not only the values of the majority, but also those of the entire population and in doing so, they create policies.

The doctrine of "living constitutionalism" which was evoked by the Court in *Brown* and according to which the teleological purpose of constitutional norms changes with the passage of time, is one of the mechanisms for judicial control, which serves as the means for demonstrating its powers.[47] This method of interpretation is justified for pragmatic purposes, since the interest and motives that existed in 18th century cannot be relevant to modern times. On the other hand, however, the interpreters of "living constitutionalism" are blamed for being manipulative and using their own political preferences in judicial proceedings,[48] which casts doubt on the stability of constitutionalism and constant principles.[49]

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[44] Michele J. Klarman, *Brow v. The Board of Education and Civil Rights Movement* (2007), 149.
[45] Supra 41, 130, cited William O. Douglas, Memorandum (Jan. 25, 1960), in THE DOUGLAS LETTERS 169, 169 (Melvin L. Urofsky ed., 1987) (quoting Justice Frankfurter) (internal quotation marks omitted).
[46] Supra 4, 383.
[47] For example, a well-known precedent of *Roe v. Wade* (1973) is the reflection of "living constitutionalism", which brought upon a huge social impact according to different studies, during the presidency of Reagan and George Bush, and according to the opinion of economists, even on the rate of crime. In this judgment, the Court, while adjudicating the case regarding abortion, relied on the 9th Amendment of the Constitution, which does not explicitly mention this right and made a reference to private life, about which, similarly, the Constitution is silent and which has previously been deemed to exist under the 14th Amendment through the case Griswold v. Connecticut (1965).
[48] Originalist Justice of the Supreme Court Antonin Scalia was one of the biggest opponents of the "living constitutionalism" until the end of his life. In his opinion, although the Constitution was 200 years old and the society has

The US Federal Supreme Court is structurally anachronistic. This is a body creating policies, which has not been elected by the people. Furthermore, there is no time limitation for appointed judges, there are no legal provisions regarding the retirement age and, as long as they act in good faith and in accordance with the law, they can enjoy the highest degree of liberty. Nevertheless, the Supreme Court does not act in a vacuum and it is perfectly aware of the fact that public support and respect is what they can rely on during the confrontation with other branches of the government, which is also where the judicial self-restraint comes from.[50]

It is the very judgment of *Brown* that is to be marked as a momentum for creation of modern, robust and bold Court, whereby all nine judges unanimously stood against political and social conjuncture, against elected representatives of states, against half of the population and ignored obstacles, went beyond the scope of classical limited model of judicial proceedings, appeared beyond the consensual legitimacy and assumed the role of the healer of social disease. Based on this step as well as several other similar controversial judgments, we can now probably say that the judiciary is no more the weakest or the least dangerous branch of the government.[51]

5. MODERN POLITICAL DRAMA

For a long time, politicians have regarded the Supreme Court as a calm, untroubled and weak institution. However, the reality has changed in the political arena and, in the light of legislative nominality of the Congress, the role of executive and judiciary branches becomes more and more extensive. For instance, politically sensitive decisions such as the one regarding gay marriage, abortion, drug-policy or the gun control are taken by the nine appointed Justices.[52]

Taking into account that with the passage of time, concurrently with civil and world wars on one hand and economic crises and social challenges on the other hand, the central government has been growing, so has been the Federal Supreme Court. With *Brown*, the Court not only kept getting bigger, but it also has substantially changed - the myth of tranquil and trivial institution has become weaker during the times of Warren (1953-1969) and then completely disappeared. Bearing this in mind, the largest legate of the ruling political power is appointing judges for indefinite term.

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been changing throughout this time, judges should not have turned the Constitution into a living organism. He believed that people who were relying on this doctrine had malintentions and wanted to enact changes while bypassing the democratic regime. See Washington Times, Scalia jeers fans of 'living' charter, Tuesday, February 14, 2006, available at: https://www.washingtontimes.com/news/2006/feb/14/20060214-110917-5396r/ [last accessed on November 26, 2019].

[49] David A. Strauss, "The Living Constitution", 2010, 2.

[50] Richard L. Pacelle Jr., "The Supreme Court in a separation of powers system", Routledge, 2015, 134-136.

[51] Supra 50, 253-254.

[52] The Economist, Sept. 14th 2018, 17-18.

With the growth of the Court's importance, the times when republican presidents were appointing liberal or "swing" justices, or when democrat presidents were appointing conservative justices have come to an end. This politically cautious approach has been developed through the 1980ies, after both politicians and the people saw the real influence the Court could have had and did in fact have while the decision-making process in Congress has been becoming more and more complicated.[53] After Antonin Scalia's death in February 2016, Barack Obama nominated his candidate, but the republican block in the Senate rejected to hold the confirmation hearings, which became one of the tangible chances for Donald Trump during the campaign to assure the electorate to vote for him. [54]

It would be naïve to believe that the Court has ever been or will be an apolitical branch. Even Tocqueville was pointing out that no such political issue could have been found in the US, which sooner or later would not become an issue of dispute before the Court.[55] Nevertheless, it is undeniable that political polarization of the US Supreme Court has become a major challenge.

2019-2020 will be the first term after many years when conservative judges hold the majority in the Supreme Court; the balance has changed after Donald Trump appointed two unequivocally conservative judges. During this year, the Court will have to consider such sensitive issues as labor rights of transgender people, immigration, abortion, religion and gun control.[56] In addition to such a crowded list of cases, since the impeachment proceedings have recently moved to the Senate, John Roberts will unluckily be in the epicenter of the political battle, since it is him who, under Article 1.3 of the Constitution should preside over the impeachment procedures of the President and Vice-president, which for him, as for the "moderate mediator" would be difficult and might also be fatal for the reputation of the Court.[57]

Judgments regarding these cases should be delivered by the end of June 2020, which coincides with the period of elections, when political campaigns will be especially polarized between two

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[53] Supra 52, 24-26.

[54] A statement made by Donald Trump in July 2016 during his campaign in Iowa: "If you really like Donald Trump, that's great, but if you don't, you have to vote for me anyway[.] "You know why? Supreme Court judges, Supreme Court judges. Have no choice, sorry, sorry, sorry. You have no choice. See Jacob Pramuk, *Trump has packed federal courts in his first year, pleasing once-wary conservatives*, CNBC, January 22, 2018, available at: https://www.cnbc.com/2018/01/22/trump-news-trump-makes-mark-with-judge-confirmations-in-first-year.html [last accessed on November 26, 2019].

[55] Jeffrey A. Segal, Harold J. Spaeth and Sara C. Benesh, The Supreme Court in American Legal System, 364, See citation Alexis de Toequeville, Democracy in America (Garden City, NY: Anchor, 1969), 270.

[56] See Ian Millhiser, *The new Supreme Court term starts today. Expect fireworks on abortion, LGBTQ rights, and immigration*, VOX, Updated Oct 7, 2019, available at: https://www.vox.com/2019/10/4/20869206/supreme-court-abortion-immigration-guns-lgbtq-obamacare [last accessed on November 26, 2019].

[57] See Tessa Berenson, *Why Impeachment Could Be a Nightmare for Chief Justice John Roberts*, TIME, October 31 2019, available at: https://time.com/5713951/john-roberts-impeachment-oversee/ [last accessed on November 26, 2019]; Also see: Noah Feldman, *Trump Impeachment Trial is Chief Justice Roberts' Nightmare*, Bloomberg, December 27, 2019, available at: https://www.bloomberg.com/opinion/articles/2019-12-27/trump-impeachment-trial-is-chief-justice-roberts-nightmare [last accessed on December 28, 2019].

candidates and two parties. This will put the Court in the tornado of public interest.[58] In the society where ideological differences between two political parties grow more and more before the elections, the destiny of the Court is horrendous.

Naturally, we could not demand from the highest instance court to heal the society from the disease as the role of the arbiter should not be equated to that of the oracle. Besides, before science fiction becomes the reality and we give up the role of judges either voluntarily or involuntarily to "perfect" Artificial Intelligence, we will have to tolerate the human nature, which is described by Aristotelian formula of a political animal;[59] a human being is essentially either political or a hermit, and so are judges. What matters the most is for this process to be as transparent as possible and therefore accountable, on one hand, and institutionalized, on the other hand. In addition, an arbiter should not prescribe a counter majoritarian or a majoritarian agenda, - the main task of the Supreme Court of the US is to decide legal disputes in accordance with the Constitution and the law, and in doing so, judges ought to follow the Marshallian pragmatism.

6. CONCLUSION

Today, just like in 1800, the Court is standing at the edge of a strong and turbulent whirlpool, and, for this time, it is John Robert's lot to find the way out of this political crisis. It is him, who, after appointment of Brett Kavanaugh as a SC justice in 2018, assumed Anthony Kennedy's role of "Swing justice"[60] and he switched from a conservative to *de facto* centrist position. Accordingly, at least for as long as the balance remains the same, John Roberts will be in the middle of "gravitational center" and will try to balance the pace in order to preserve the public confidence for the institution as well as the status of a neutral arbiter, and will try not to intensify the skepticism regarding the Court's politization.[61]

It is more likely that in the highest court of the US, justices have always been politicized and were taking decisions based on their beliefs and ideological preferences, which was further masked by various jurisprudential theories, including originalism and textualism.[62] There is a bias based on values that hides behind this deception: liberals put liberty higher than order and

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[58] See, Adam Liptak, *As the Supreme Court Gets Back to Work, Five Big Cases to Watch*, The New York Times, Published Oct. 6, 2019, Updated Nov. 11, 2019, available at: https://www.nytimes.com/2019/10/06/us/as-the-supreme-court-gets-back-to-work-five-big-cases-to-watch.html [last accessed on November 26, 2019].
[59] Aristotle, "Politics", Book 1, section 1253a.
[60] „Swing Justice". Since 5 votes are required for the Supreme Court to make a decision, whenever there are 4 liberal and 4 conservative judges, the role of the ninth most centrist justice involuntarily becomes decisive on vectoral conservative issues.
[61] See Lawrence Hurley, *U.S. chief justice's 'swing' role shown in census, gerrymandering rulings*, Reuters, June 28, 2019. available at: https://www.reuters.com/article/us-usa-court-chiefjustice/u-s-chief-justices-swing-role-shown-in-census-gerrymandering-rulings-idUSKCN1TS3A4 [last accessed on November 26, 2019].
[62] Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CAL. L. Rev. 519 (2012).

equality higher than liberty, while conservative put order higher than liberty, and liberty - higher than equality.[63]

Does such kind of premeditation harm the reputation and legitimacy of the US Supreme Court, which directly affects its importance on the American seesaw of separation of powers?! According to recent studies, only 51% of respondents trust this institution.[64] Today, the highest instance of the Federal Supreme Court is criticized for biased judicial activism both by liberals (*Bush v. Gore*)[65] and by conservatives (*Obergefell v. Hodges*).[66] In order to find a relevant answer to the critique, it is necessary to consolidate judges, which, given the current American political polarization, is impossible, especially taking into account that one of the most famous judges - Oliver Wendell Holmes has characterized the Federal Supreme Court as "nine scorpions in a bottle".[67].

[63] Supra 4, 375.
[64] See Gallup, Supreme Court, available at: https://news.gallup.com/poll/4732/supreme-court.aspx [last accessed on November 26, 2019].
[65] By the end of his dissenting opinion Justice John Paul Stevens joined by Justices Ginsburg and Breyer noted with criticism that one may never know with complete certainty the identity of the winner of the 2000 Presidential elections, but the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law (Justice Stevens, dissenting, Bush v. Gore, 531 U.S 98 (2000), 128-129).
[66] John Roberts noted that the idea behind his dissenting opinion was not the refusal to expand the institution of marriage but to underline that in a democratic republic, such decisions should be taken by representatives of the people, and not 5 lawyers. Appropriating such a mechanism would cast a shadow on gay marriage and would make tolerance towards such a drastic social change even harder. (Justice Roberts, dissenting Obergefell v. Hodges, 576 U.S (2015), 2-3).
[67] Supra 4, 347, cited Linda Greenhouse "At the Bar", 21.

CASE NOTES OF THE CONSTITUTIONAL COURT OF GEORGIA

ABSTRACT

In the Volume 2, 2019 the Journal of Constitutional Law will once again provide its audience with short summaries of the Judgements rendered by the Constitutional Court of Georgia recently. Three cases discussed below have been adopted since September till December period and are rather significant. The case notes go through the case facts and party arguments briefly and provides the argumentation as well as the final decision taken by the Court. We hope these three cases will be interesting for our readers worldwide and we will see further deliberations regarding the practice of the Constitutional Court of Georgia.

BADRI BEZHANIDZE V. PARLIAMENT OF GEORGIA

On September 20, 2019, the Second Chamber of the Constitutional Court of Georgia rendered a judgement on the case "Badri Bezhanidze v. Parliament of Georgia" (Constitutional Claim №1365). The subject of the dispute was the constitutionality of Article 2 of Law №5196-რს of July 4, 2007 "On Amendments and Additions to the Criminal Code of Georgia" in terms of Article 11 (1) and the second sentence of Article 31 (9) of the Constitution of Georgia.

Based on the aforementioned legislative act, the notion of repeated crime was newly defined, according to which repeated crime should mean the commission by a previously convicted person of the crime provided for by the same article of the Criminal Code of Georgia. Prior to the aforementioned legislative amendment, qualification of repeated act was carried out without prior conviction for the previously committed crime. The disputed norm stated that its force did not extend to actions committed before the entry into force of the amending law, unless the person had committed the last act after the entry into force of the law.

According to the claimant, he was convicted in two episodes of murder. The conviction was based on criminal law that was in force at the time of the commitment of the crime, and although the claimant had not previously been convicted of murder, his action was qualified as repeated murder and he was sentenced to life imprisonment.

The claimant pointed out, that in the light of the changes made to the disputed law, his action would not qualify as a repeated crime, because he was not previously convicted for the same action. Such a qualification would, in itself, result in the imposition of a less severe sentence, as existence of repeated crime is in any case an aggravating circumstance of the offence and requires a more severe sentence than it does in case of cumulative crimes. Thus, the claimant was

of the opinion that the impugned provision was contrary to the constitutional rights of retroactive force of the law reducing or abrogating responsibility and equality before the law.

According to the respondent, the legitimate aims of the restriction established by the impugned norm were to impose adequate sentence for the danger arising from the action and to prevent the retroactive force of the law aggravating responsibility.

The Constitutional Court of Georgia has defined, that the second sentence of Article 31 (9) of the Constitution of Georgia stipulates the obligation to use the law reducing responsibility in cases where the adoption of a new law is dictated by the humanity of society or the absence of need for the penalty before the change. According to the Constitutional Court, repeated crime with a number of offences was defined as an aggravating circumstance and usually resulted in the imposition of a more severe sentence, than qualification of cumulative crimes. In addition, according to the position of the Parliament of Georgia, the notion of repeated crime was defined as a result of the amendments responded more adequately to the public and social challenges and there was no need for the use of more severe penalties. Therefore, the disputed provision prohibited retroactive use of the law reducing responsibility and restricted the right protected by the second sentence of Article 31 (9) of the Constitution of Georgia.

The Constitutional Court noted that restricting the right to retroactive use of the law reducing responsibility for the purpose of severely punishing perpetrators of crimes in the past ran counter to the very essence of the same right. Therefore, adequately sentencing a person, imposing severe liability on him may not be a legitimate aim that could justify a restriction on the constitutional right to use the law reducing or abrogating responsibility retroactively.

The Constitutional Court stated that preventing the retroactive use of the law aggravating responsibility is extremely important goodness. The Court did not exclude that in some cases, qualification of cumulative crimes would lead to more severe sentence compared to repeated crimes, however according to Article 3 (1) of the Criminal Code of Georgia, any new norm of the criminal code was applicable to the past relations in so far as it reduces or abrogates responsibility. Thus, risk of aggravating responsibility under the impugned law was excluded and there was no causal link between the disputed provision and legitimate aim mentioned by the respondent. Based on the above, the Constitutional Court held that the impugned provision was contrary to the right guaranteed by the second sentence of Article 31 (9) of the Constitution of Georgia and declared it unconstitutional.

In discussing the constitutionality of the disputed provision with regard to the right to equality, the Court noted that there was no differentiation between non-convicted persons, who committed the same crime two or more times before and after the entry into force of the disputed law. In such a case, the norm did not treat persons unequally, instead it constituted different treatments on the acts depending on the period of its commitment rather than by whom they were committed. Thus, it could not be regarded as different treatment of persons.

The Constitutional Court held that the impugned norm treated unequally, on the one hand, the non-convicted persons, who had committed two or more offences under one article or part of the article of the Criminal Code before the entry into force of the impugned law and no longer committed the offence under the same article after the entry into force of the impugned law and, on the other hand, persons, who had committed the same offence and committed it again after the entry into force of the disputed law. According to the impugned law, the offence committed by the first category of persons should be qualified as a repeated crime, and the second category of persons, who had committed one or more offences under same article and committed the same offence after the entry into force of the new law, would fall under the new law and their actions would qualify as cumulative crimes instead of repeated crime, which could lead to a less severe sentencing. According to the Constitutional Court, considering that in the present case reducing responsibility was a consequence of committing an additional offence, it was clear that such a distinction had no logical explanation and that it was contrary to the constitutional right to equality before the law.

ZURAB SVANIDZE V. THE PARLIAMENT OF GEORGIA

On November 14, 2019 the Second Chamber of the Constitutional Court of Georgia adopted the judgment in the case of "Zurab Svanidze v. The Parliament of Georgia" (constitutional complaint №879). The complainant challenged the provisions, which determine that if any duly held auction (consisting of the first and two repeat auctions) fails and the property is not sold, such property shall be discharged from the attachment effected in favour of the creditor carrying out the compulsory sale.[1] No enforcement proceeding involving the same claim in favour of the same creditor shall be conducted with respect to such property.

In view of the complainant, in case of discharging the property from attachment effected in favour of the creditor carrying out the compulsory sale and returning it to the debtor, the creditor would no longer have the opportunity to effectively enforce a court decision in his favour. Complainant assumed that this regulation was incompatible with the right to a fair trial enshrined in Article 31(1) of the Constitution of Georgia.

The respondent explained, that after the impossibility of sale of the property at three auctions, lifting the attachment from the property served the interests of other creditors involved in enforcement proceedings and ensuring timely and effective enforcement of the court's decision. The respondent indicated that by holding three auctions, the State applied all reasonable measures of realization of the property. Therefore, conducting additional auctions would only delay the enforcement process and increase the administrative costs required to conduct the auction.

The Constitutional Court of Georgia did not accept the respondent's argument that the restriction of the right of the creditor carrying out compulsory sale was justified by the interests of other creditors. Particularly, the Court explained that creditors of the same order had an equal constitutional interest in satisfying their claims. Moreover, it has not been demonstrated that the creditor who has continued enforcement on the property discharged from the attachment, had a higher interest. Thus, by referring to the protection of the other creditors' interests, the respondent actually restricted the property interests of one person in favour of another, who had the same position. The Constitutional Court held that in case of the same property interests, the protection of one person's interests would not be a legitimate aim of limiting the interests of another.

The Constitutional Court did not share the respondent's argument with regard to ensuring timely and effective enforcement by the limitation set by the disputed provision. According to the Court, the inability to sell the property at three auctions did not indicate that it had no value. Specifically, the value of the property is determined by its market price and not by the fact

[1] The subject of the dispute fully: constitutionality with regards to Article 42(1) of the Constitution of Georgia (version in force until December 16, 2018) of the first and second sentences of first paragraph of Article 75(8) of the law of Georgia on Enforcement Proceedings.

whether it could be sold at auction or not. The disputed regulation spread to the property with the market value of GEL 5000 or more. Moreover, the Court indicated that there were many factors affecting the sale of the property through auction. The interest in the item, the market demand for it and/or the likelihood of its sale may vary according to specific time periods or other factors. Thus, the impossibility of sale of the item at the auction in an established manner did not necessarily indicate that the property had no value. Furthermore, the property might not be sold because of its high market value. Accordingly, the Court held that releasing the property from attachment and returning it to the debtor not only did not serve timely and effective enforcement of the judgment in favour of the creditor but also deterred the enforcement of the judgment.

The Constitutional Court also assessed whether the disputed regulation constituted proportional means of achieving the legitimate aim of sparing administrative resources. The Court pointed out that it was possible to create an enforcement model that would equally ensure the interest of sparing administrative resources and the enforcement of a judgment in favour of the creditor. For example, the Court considered that in case the sale of the property at the auction was impossible, it would be possible to transfer the property in kind to the creditor. Thus, there was another, less restrictive way of sparing administrative resources. The Court also noted that after passing some time since the auction failed, market interest in alienating the property could increase. Consequently, if the auction failed three times, the possibility of alienation should not be excluded forever.

Thus, the Constitutional Court considered that disputed provision disproportionately restricted the right to a fair trial (Article 31 (1) of the Constitution of Georgia) and declared it unconstitutional.

LLC "Stereo+", Luca Severini, Lasha Zilpimiani, Robert Khakhalevi v. The Parliament of Georgia And The Minister of Justice of Georgia

On 17 December 2019, the Second Chamber of the Constitutional Court of Georgia rendered a decision on the Case of "LLC 'Stereo+', Luca Severini, Lasha Zilpimiani, Robert Khakhalevi v. the Parliament of Georgia and the Minister of Justice of Georgia" (the Constitutional Complaint №1311). The complainant contested constitutionality of the regulations governing the procedure for acquiring title to property purchased at compulsory auction. Pursuant to the disputed regulations, any person *inter alia* a legal person registered in an offshore zone could acquire shares or stocks of a licence holder and/or authorised person in the field of broadcasting, in case of compulsory auction. At the same time, according to the Georgian legislation, ownership of the aforementioned shares or stocks of a licence holder and/or authorised person in the field of broadcasting by a person registered in the offshore zone would result in revocation of the broadcasting license and/or authorisation.

Simultaneously, on the basis of impugned regulations, acquisition of the ownership interest or shares of an authorised person in the field of electronic communications was allowed without prior notification to the Georgian National Communications Commission (thereafter, the Commission). Under such circumstances, authorised person may, involuntarily, become an authorised person with significant market power over the relevant segment of the service market. This, in accordance with the Georgian legislation, would result an imposition of one or several specific obligations in the field of electronic communications to an authorised person with significant market power in the relevant segment of the service market. In the light of all the foregoing, the complainant party indicated that the contested regulations disproportionately restricted the right to property and freedom of expression, thereby, contradicted the requirements of the Constitution of Georgia.

The respondents – the representatives of the Parliament of Georgia and Minister of justice of Georgia indicated that the disputed provisions served legitimate aims such as satisfying the creditors' lawful claims in a timely and effective manner, as well as the protection of the proprietary interests of the legal persons registered in the offshore zone wanting to acquire property by means of compulsory public auction.

The Constitutional Court of Georgia has clarified the importance of broadcasting licenses or authorisations and indicated that the broadcasting license/authorisation is a prerequisite for doing business in this area and has high economic value. On the basis of the contested regulations, the acquisition of share/stocks of a license holder/authorised person in the field of broadcasting by an entity registered in an offshore zone may cause the revocation of the company's license and/or authorisation. As a result, it would no longer be authorised to carry on broadcasting activities. It would in itself reduce the value of the company and result significant financial losses for its partners/shareholders and deprive them from ability to impart information through broadcasting. In this regard, the Constitutional Court of Georgia held that the impugned provi-

sions restricted applicant Company's and its partners' right to property and freedom of expression.

The Constitutional Court of Georgia shared respondents' position and indicated that the creation of proper legal guarantees for the acquisition of property by the auctioneer and the satisfaction of the creditors' recognised claims are valuable constitutional interests and to achieve such legitimate aims it was allowed to restrict complainants' right to property and freedom of expression.

The Constitutional Court of Georgia, further acknowledged that even in the case of restrictions on the acquisition of ownership of a license holder/authorised company in the field of broadcasting by person registered in the offshore zone, creditors still had a real opportunity to satisfy their claims by selling the mentioned property. In particular, shares/stocks of license holder or an authorised broadcasting company, itself, given the nature of the said property, did not belong to such a category of property, which proprietorship interest solely (significantly) comes from a legal entity registered in an offshore zone. In contrast, there might exist an unlimited number of other potential buyers who are interested in acquiring such property.

In connection with the ownership interest of legal entities registered in the offshore zone regarding the license holder/authorised entity's stocks/shares, the Constitutional Court of Georgia referred that the acquisition interest could not be related to the economic benefits derived from the broadcasting activities, as far as acquisition of shares/stocks by a person registered in an offshore zone would cause the Company the loss of the right to operate in the broadcasting field. At the same time, the Constitutional Court of Georgia held that the desire to purchase share/stocks of the company may be related to the interest of acquiring other property of the company and/or earning profits from other areas of business that do not require a broadcasting license/authorisation. Nevertheless, mentioned interest are not valid to the extent to justify such intense restriction of broadcasting company's and its partners'/shareholders' rights. Due to all the foregoing, the Constitutional Court of Georgia concluded that such model of balancing the opposing interests did not meet the requirements of the Constitution of Georgia, the interests of the creditors to satisfy their legal claims and proprietary interests of the legal persons registered in the offshore zone to acquire shares/stocks of the broadcasting company could not outweigh the broadcasting company's and its partners' interests. Respectively, the Constitutional Court of Georgia held that the impugned regulations violated freedom of expression and the right to property.

Furthermore, the Constitutional Court of Georgia indicated that under the terms of the contested normative content, which allowed acquisition of the ownership interest or shares of an authorised person in the field of electronic communications without prior notification to the Commission, authorised person may, involuntarily, become an authorised person with significant market power over the relevant segment of the service market. All above-mentioned led to imposition of numerous specific obligations in this field. The Constitutional Court of Georgia considered that imposing such burden on the company was a restriction of the ownership rights. At the

same time, this burden was not considered as severe to cause the restriction of the freedom of expression.

The Constitutional Court of Georgia stated that it was possible to regulate the process of selling the property at a compulsory public auction in such way to exclude the realisation of the shares/interests of company without the control of the Commission. Particularly, it was possible to secure the participation of the Commission in the process of selling of shares/stocks of the authorised person in the field of electronic communication prior to the sale of the shares/stocks. The Constitutional Court of Georgia emphasised the importance of establishing the system of compulsory auction in such manner that the sole parties excluded from the list of potential purchasers of the property at compulsory auction were those, whose purchase of this property led to breach of healthy competition and turned this company into authorised person with significant market power over the relevant segment of the service market.

In such circumstances, the need to protect the interests of the creditors and the interest of the potential acquirer could not outweigh the interest of the authorised company and its partners to carry on their business without interruption. Accordingly, the impugned provision unjustly established the balance of interests and unnecessarily restricted the company's and its' partners property right.

In the light of all the foregoing, the Constitutional Court of Georgia held that the normative content of the contested regulations, which permitted selling of shares/interests of the authorised person in the field electronic communications at the compulsory auction without the prior notification to the Commission did not contradict the freedom of expression guaranteed by Article 17 of the Constitution of Georgia, but violated the right to property enshrined in Article 19 of the Constitution of Georgia.