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FOREWORD

Since its establishment, the Constitutional Court of Georgia has developed an extensive case law, which has clearly contributed to the rise of public interest in constitutional law in our country and laid the groundwork for the increase of the scope of constitutional review in the development process of the Georgian legal system. At the same time, the meaning of modern constitutionalism has gained new substance due to the dynamics of the legal and socio-political processes, occurring both in Georgia and worldwide. The global pandemic and crisis management, the regulation of new technologies, the humanitarian crisis and the ongoing legal and political processes - these are the issues of international relevance today, to name a few. All of the above puts the development of modern constitutional law on a new frontier and requires an active academic discussion.

The present edition of the "Journal of Constitutional Law" is dedicated to the discussion of a number of constitutional challenges, which are relevant both in Georgia and in other countries. The publication combines six academic papers by Georgian and foreign authors and also includes two case notes on landmark judgments decided by the Constitutional Court of Georgia this year. In particular, the Journal contains the works of Georgian scholars on important legal issues, such as - Analysis of the jurisdictional and procedural framework of the European Court of Human Rights in relation to the human rights violations in an armed conflict (by Giorgi Nakashidze); In consideration of the regional context, the paper providing an overview of the practice of the Inter-American human rights institutions, regarding the application of international humanitarian law is also interesting (by Ana Jabauri). Furthermore, the Journal combines papers on the constitutional aspects of competition, entrepreneurial freedom and consumer protection (by Givi Adamia); and on the restrictions on freedom of expression and freedom of information in a modern democratic administration system during the new Coronavirus (COVID-19) pandemic (by Vazha Datuashvili).

I am glad that this edition of the Journal contains the article by a renowned Justice of the Supreme Court of the United States Ruth Bader Ginsburg and by Professor Deborah Jones Merritt, as well as the work of an authoritative scholar Cass R. Sunstein. The article by Justice Ginsburg and Professor Merritt was first published in 1999 and addresses the essence of affirmative action and its international legal basis, it also overviews the practice of advancing equality between men and women in the United States, India and the European Union. It is noteworthy, that this issue gains particular relevance for the Georgian reality, because not so long ago, the Parliament of Georgia adopted gender quotas to ensure increasing women's representation in the political

life. The article outlines the practice of affirmative action at the time in addressing both gender discrimination and other forms of inequality.

Professor Sunstein's paper addresses an essential social problem of great significance and discusses how people develop anger and resentment in society. The author focuses on existing social norms and notes that when these norms are subject to change, outrage grows, especially in the oppressed part of society. Against the backdrop of recent social protests in the United States, the paper assesses the power of people, who begin to erode established norms and discusses in general, the importance of public sentiment in the success of the fight for minority rights.

In addition, this edition contains case notes of two landmark judgments decided by the Plenum of the Constitutional Court of Georgia in 2020. In particular, the judgments of the Constitutional Court of Georgia of 30 July 2020, №3/1/1459, 1491 ("Public Defender of Georgia v. the Parliament of Georgia") and of 25 September 2020, №3/3/1526 ("N(N)LE 'New Political Center', Herman Sabo, Zurab Girchi Japaridze and Ana Chikovani v. the Parliament of Georgia"). In the first case, the Constitutional Court assessed the constitutionality of the legislative rule for the appointment of a judge of the Supreme Court of Georgia, whereas in the latter judgment the Constitutional Court decided on the constitutionality of the quota mechanism ensuring political representation on the basis of gender in the Parliament of Georgia.

The "Journal of Constitutional Law" is an internationally refereed and peer-reviewed publication, and I am pleased to note that the publication is now available in the Directory of Open Access Journals (DOAJ) and in the European Reference Index for the Humanities and Social Sciences (ERIH PLUS), which is a recognition of the Journal's standards, its openness policy, and ethical criteria. The placement of the "Journal of Constitutional Law" in the mentioned databases will further increase its reputation and make the works published in the Journal widely accessible.

The aim of the "Journal of Constitutional Law" is to develop research-based discussion in the field of constitutional law and to provide opportunities for Georgian authors to present their works to the public, and, on the other hand, to help the Georgian academia to get acquainted with works of many internationally recognised legal scholars and practitioners.

I am honoured to take on the position of the Chair of the Editorial Board of the "Journal of Constitutional Law". It is my hope that with my personal experience in the academic field, I will be able to help the Journal become a broader academic platform for conducting extensive legal discussions.

MERAB TURAVA

PRESIDENT OF THE CONSTITUTIONAL COURT OF GEORGIA

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AFFIRMATIVE ACTION: AN INTERNATIONAL HUMAN RIGHTS DIALOGUE**

Benjamin N. Cardozo Lecture***

ABSTRACT

The Universal Declaration of Human Rights is one of the first international instruments urging states to take specific action to ensure equality. Throughout the years, Ruth Bader Ginsburg had been a leading activist for women's rights and equality. The present article, - which is based on a lecture delivered by Justice Ginsburg in 1999 with respect to affirmative action, its international legal grounds, as well interesting practice on this matter in the USA, India and the European Union, - analyzes the problems existing by the end of the last century, and addresses relevant challenges and practical approaches.

Even though some progress has been made with respect to the right to equality and affirmative action throughout the last 20 years, equality between men and women has not yet been achieved. Currently, this topic is particularly relevant to the Georgian context, given that the country has implemented one of the strongest and arguably the most controversial affirmative actions – mechanism of quotas for ensuring political representation. The article provides an overview of practice regarding affirmative action aiming to eliminate gender-based discrimination, as well as discrimination on some other grounds.

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* The authors acknowledge with appreciation the thoughtful review and assistance of Justice Ginsburg's 1998 Term law clerk, William Savitt.

*** Cardozo Lecture given by Justice Ginsburg at the Association of the Bar of the City of New York on February 11, 1999.

This article emphasizes international legal grounds for affirmative action. Oftentimes, laws supposedly aiming to "protect" women do not appeal to them, but rather restrict competition for men. Accordingly, when assessing gender-based affirmative action, we should distinguish those genuinely aiming to remedy historical disadvantages from those that nourish myths and stereotypes, thereby preventing women from achieving their full potential.****

INTRODUCTION

December 10, 1998 marked the fiftieth anniversary of the United Nations Universal Declaration of Human Rights. I thought it appropriate, in recognition of that anniversary, to select for this lecture a subject that touches and concerns main themes of the Universal Declaration. My topic is affirmative action, as anchored in the Universal Declaration, as the idea unfolded in the United States, and as the concept is employed elsewhere in the world.

This Association's members, in the 1990s, have renewed endeavors to act affirmatively, as counseled by the Committee to Enhance Diversity in the Profession and affiliated committees. The Association's ongoing efforts are trained on trying issues – the retention and promotion, by law firms and corporate legal departments, of minority and female lawyers.[1] Affirmative action is currently among the more vigorously debated human rights issues, and this Association's efforts may be closely watched by critics and skeptics as well as participants and their supporters.

The Universal Declaration of Human Rights encompasses both civil or political rights and economic or social rights. Affirmative action stands at the intersection of these two complementary categories. Affirmative action aims to redress historic and lingering deprivations of the basic civil right to equality, the legacy of slavery in the United States, for example, or of the caste system long entrenched in India. It was also conceived as a means to advance the economic and social well-being of women, racial minorities, and others born into groups or communities that disproportionately experience poverty, unemployment, and ill health. Focusing on affirmative action, we may better comprehend how the two classes of rights (civil and economic), though once and still set apart by politicians, jurists, and scholars, commonly relate to promotion of the health and welfare of humankind.[2]

**** This abstract was drafted by the Editor of the Journal of Constitutional Law.

[1] In addition to monitoring the progress of minority and female attorneys, and setting goals for that progress, the Association has commissioned significant scholarship in this field. See Cynthia Fuchs Epstein et al., *Glass Ceilings and Open Doors: Women's Advancement in the Legal Profession*, 64 FORDHAM L. REV. 291 (1995) (report to the Committee on Women in the Profession, The Association of the Bar of the City of New York); Responses to Glass Ceilings and Open Doors: Women's Advancement in the Legal Profession, 65 FORDHAM L. REV. 561 (1996) (collection of essays responding to Epstein's report); see also Ruth Bader Ginsburg & Laura W. Brill, *Women in the Federal Judiciary: Three Way Pavers and the Exhilarating Change President Carter Wrought*, 64 FORDHAM L. REV. 281, 288-89 (1995) (lecture published as companion to Epstein's report, noting that President Clinton's "highly affirmative action" in appointing women to the federal bench was "not the result of any quota system" but of a concentrated search for qualified candidates; those "appointees achieved higher ABA ratings on average than the less diverse appointees of the three previous administrations").

[2] Two covenants, both adopted by the United Nations in 1966, are designed to implement the Declaration: the

I will begin with a few notes on terminology or definition. I will use primarily the United States expression "affirmative action," but I will also refer to the "reservations" of India and the "positive action" of Europe. Under the heading affirmative action, I would include any program that takes positive steps to enhance opportunities for a disadvantaged group, with a view to bringing them into the mainstream of civic and economic life. The steps may be small and encounter little resistance – for example, advertising job openings in newspapers serving minority communities. Or they may be more radical, costly, and controversial, for example, subsidizing childcare for infants and pre-school children and providing paid parental leave for the weeks immediately after childbirth. Also, in the affirmative action arsenal are the goals, preferences, and quotas that have provoked powerful opposition.

1. THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

I turn first to the foundation document for contemporary human rights discourse, the 1948 Universal Declaration of Human Rights. That document does not mention affirmative action, for at mid-century, the term was not yet in vogue. But the Declaration does contain two intellectual anchors for affirmative action.

First, the Declaration repeatedly endorses the principle of equality. The preamble speaks of "the equal and inalienable rights of all members of the human family," and of "the equal rights of men and women."[3] Article 1 declares that "[a]ll human beings are born free and equal in dignity and rights";[4] Article 2 instructs that "[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind."[5] Reiterating the nondiscrimination principle, Article 7 states that "[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law.[6]

The Declaration aims to ensure that proclamations of equality and other civil rights become more than aspirational. Article 8 states that "[e]veryone has the right to an effective remedy [...] for acts violating the fundamental rights" accorded him or her by the adhering nation's constitution or laws.[7] An "effective remedy," in the context of centuries of discrimination, it

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Covenant on Civil and Political Rights, which follows the first twenty-one articles of the Declaration, and the Covenant on Economic, Social, and Cultural Rights, which centers on social and economic prescriptions of the Declaration. See International Covenant on Civil and Political Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966); International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc A/6316 (1966); Louis Henkin, *The International Bill of Rights: The Universal Declaration and the Covenants*, in INTERNATIONAL ENFORCEMENT OF HUMAN RIGHTS 1, 6–9, 14–16 (Rudolf Bernhardt & John A. Jolowicz eds., 1985). The United States is a party to the Covenant on Civil and Political Rights, but has not joined the Covenant on Economic, Social, and Cultural Rights. For a discussion of the evolution of economic and social rights after the Declaration, see HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 256–264, 267–268 (1996).

[3] Universal Declaration of Human Rights, preamble, G.A. Res. 217A, U.N. GAOR, 3d Sess., pt. 1, at 71, U.N. Doc. A/810 (1948) [hereinafter cited as UDHR].

[4] *Id*. art. 1.

[5] *Id.* art. 2.

[6] *Id*. art. 7.

[7] *Id*. art. 8. While Article 8 mandates remedies for violations of a nation's constitution or laws, the Declaration

has been forcibly argued, must include at least some modes of positive governmental action. U.S. President Lyndon Johnson so indicated when he famously declared: "You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, 'You are free to compete with all the others.'"[8]

The Universal Declaration might be read to touch as well on the major objection to affirmative action, the concern that it promotes one person's equality at the expense of another's right to the same treatment. Article 29 states: "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others."[9] If not a clarion statement, this formulation can be read to suggest a place for accommodation, to prevent continued suppression of people whose rights were once denied, dishonored, or ignored.

In addition to the Universal Declaration's commitment to the ideal of equality, the document provides (as I just indicated) a second support for affirmative action, one rooted in social and economic prescriptions. Article 23 declares that everyone has the right to work, including "free choice of employment," "just and favourable conditions of work," "protection against unemployment," and "equal pay for equal work."[10] Article 25 pledges an adequate standard of living, encompassing "food, clothing, housing and medical care and necessary social services."[11] And Article 26 affirms that "[e]veryone has the right to education," provided "free, at least in the elementary and fundamental stages."[12]

These articles suggest that all members of the human community should have the wherewithal to reap the fruits of that community. The provisions do not command that all will share equally, but they do imply that there are minimum levels of employment, education, and subsistence all should have. If a nation finds that citizens of one race – or sex or religion – endure a markedly inadequate standard of living, then Article 25 suggests an obligation to uncover the cause of, and respond to, that endurance. Similarly, if women or members of minority races suffer higher unemployment rates than do members of the dominant group, Article 23 suggests an obligation to ask why that is so, in order to address, and not ignore, the imbalance.

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no doubt anticipates incorporation of the equality principle into those sources of law.

[8] Lyndon B. Johnson, *To Fulfill These Rights*, in THE AFFIRMATIVE ACTION DEBATE 16, 17 (George E. Curry ed., 1996).

[9] UDHR, *supra* note 3, art. 29(2).

[10] *Id*. art. 23(1); *id.* art. 23(2).

[11] *Id*. art. 25(1). The article also declares the "right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond [the individual's] control." *Id*.

[12] *Id*. art. 26(1). The article also directs that "[t]echnical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit." *Id*. The reference to "merit" in relation to higher education might be read to exclude affirmative action in admission policies. The next section of Article 26, however, suggests that "merit" in the context of higher education might include, among other factors, pursuit of a diverse student population. That section calls for education to "promote understanding, tolerance and friendship among all nations, racial or religious groups." *Id*. art. 26(2); see also *infra* note 58 and accompanying text (noting this portion of Article 26 in connection with Justice Powell's opinion in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978)).

Consider, for example, this statistical picture of the United States. A 1995 United Nations report estimated that white Americans, if ranked as a separate nation, would lead the world in well-being, a measure that combines life expectancy, educational achievement, and income.[13] African Americans, in contrast, would rank a depressing twenty-seventh worldwide, while Hispanic-Americans would rank even lower at thirty-second.[14] After noting these discrepancies, the authors of the U.N. report observed: "full equality still is a distant prospect in the United States, despite affirmative action policies and market opportunities."[15]

Worldwide comparisons between the status of women and that of men are similarly telling. Women shoulder more than half the world's workload, including the lion's share of unpaid housework and childcare.[16] Yet their wages lag behind those of men in every country, and they hold only fourteen percent of administrative and managerial jobs worldwide.[17] More than seventy percent of our planet's poor are women; women suffer more unemployment than men in every world region; and women outnumber men two-to-one among the 900 million who are illiterate.[18]

If we take seriously the promises of employment, education, and sustenance made in the Universal Declaration of Human Rights, these discrepancies demand affirmative government attention. It seems implausible that such marked differences would occur with no discrimination lurking in the background. (Science has now assured us, for example, that the female is not, as was once widely believed, an imperfect or unfinished male. Women today excel in fields once thought beyond their natural talents. Yet another long-held notion fell last summer when Hungarian Judit Polgár defeated world chess champion Anatoly Karpov in match play.[19]). And even without hard proof of discrimination, as I just noted, the Declaration's economic and social prescriptions suggest an affirmative obligation to address marked degrees of disadvantage.

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[13] See UNITED NATIONS DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT 1995, at 22 (1995). When all U.S. populations are combined, the United States ranks second worldwide – after Canada – on the U.N. well-being scale. *Id*. at 18.

[14] See *id.* at 22.

[15] *Id.*

[16] See *id.* at 87-98. [according to 2020 data, women spend 3 times more in unpaid housework than men. PROGRESS ON THE SUSTAINABLE DEVELOPMENT GOALS, THE GENDER SNAPSHOT 2020, UN Women, UN DESA, 2020, p. 11. Available here: https://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2020/progress-on-the-sustainable-development-goals-the-gender-snapshot-2020-en.pdf?la=en&vs=127 {last accessed on November 20, 2020} – Editor's note].

[17] See *id.* at 36-37. [according to 2020 data, women in leadership positions have doubled, yet the number is still low at 28%. PROGRESS ON THE SUSTAINABLE DEVELOPMENT GOALS, THE GENDER SNAPSHOT 2020, UN Women, UN DESA, 2020, p. 11, *supra* note 16 – Editor's note].

[18] See *id.* at 36, 34; see also Remarks by First Lady Hillary Rodham Clinton in Commemoration of the 50th Anniversary of the United Nations General Assembly Adoption and Proclamation of the Universal Declaration of Human Rights (Dec. 10, 1997) <http://www2.whitehouse.gov>. [in 2016 750 adults (2/3 out of them women) were illiterate. UNESCO, Fact Sheet No. 45, September 2017, FS/2017/LIT/45 – Editor's note].

[19] Malcolm Pein, *Chess: Polgar Speeds Past Karpov*, DAILY TELEGRAPH, June 15, 1998, at 22. Polgar is one of three champion chess-playing sisters tutored by their father, Laszlo Polgar. Underscoring the relationship between societal expectations and individual achievement, the senior Polgar refused to allow his daughters to play in women-only tournaments because he believed the lower expectations would hinder their development. *Id.*

In addition to the two anchors for affirmative action – ending equality deprivations and advancing economic well-being – the 1948 Declaration contains a provision some might describe as an affirmative action clause. Article 25, which proclaims the right to an adequate standard of living, also declares that "[m]otherhood and childhood are entitled to special care and assistance."[20] Viewed through one lens, this provision compassionately encourages states to develop special policies protecting the physical and emotional health of mothers and their children.

In my view and experience, however, the language of the provision raises a troubling concern. Patriarchal rules long sequestered women at home in the name of "motherhood," rather than allowing them to integrate parenthood with paid labor. It is not always easy to separate rules that genuinely assist mothers and their children by facilitating a woman's pursuit of both paid work and parenting, from laws that operate to confine women to their traditional subordinate status, and to relieve men of their fair share of responsibility for childraising.[21] Article 25 of the Universal Declaration evokes this tension, which runs throughout discussions of affirmative action for women, without in any way resolving it.[22]

Of more recent vintage, the 1979 Convention on the Elimination of All Forms of Discrimination Against Women,[23] one of several conventions stemming from the Universal Declaration, asserts the state's obligation to protect both parenting *and* women's full workplace participation. Article 5 of that convention first directs states to "take all appropriate measures" to eliminate prejudices underlying the assignment of men and women to stereotyped roles.[24] The same article then calls for education to achieve "recognition of the

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[20] UDHR, *supra* note 3, art. 25(2).

[21] For an earlier discussion of this problem, see Ruth Bader Ginsburg, *Some Thoughts on Benign Classification in the Context of Sex*, 10 Conn. L. Rev. 813 (1978). See also Frontiero v. Richardson, 411 U.S. 677, 684 (1973) (plurality opinion) ("Traditionally, [...] discrimination [on the basis of sex] was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage."); Sail'er Inn, Inc. v. Kirby, 485 P.2d 529, 541 (Cal. 1971) (*en banc*) ("The pedestal upon which women have been placed has all too often, upon closer inspection, been revealed as a cage."). For discussions of the same tension in other legal systems, see, for example, Deirdre A. Grossman, *Voluntary Affirmative Action Plans in Italy and the United States: Differing Notions of Gender Equality*, 14 Comp. Lab. L. J. 185 (1993); Carol Daugherty Rasnic, *Austria's Affirmative Action for Women Workers Versus Protective Legislation for the "Weaker Sex": Incongruous Concepts?*, 46 Labor L.J. 749 (1995).

[22] The problem is especially acute in the English language version of the Declaration, which uses the masculine pronoun "he" for universal references. In that version, section one of Article 25 guarantees "[e]veryone [...] the right to a standard of living adequate for the health and well-being of *himself* and of *his* family," while section two offers "[m]otherhood and childhood [...] special care and assistance." UDHR, *supra* note 3, art. 25 [emphasis added].

The gendered pronouns reinforce the notion that men support their families, while women devote their lives to motherhood. The French text avoids this dichotomy: "Toute personne a droit à un niveau de vie suffisant pour assurer sa santé, son bien-être et ceux de sa famille [...]. La maternité et l'enfance ont droit à une aide et à une assistance spéciales."

[23] G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/46 (1979) [hereinafter cited as CEDAW]. The United States is the only western democracy that has not ratified the Convention. See Malvina Halberstam, *United States Ratification of the Convention on the Elimination of All Forms of Discrimination Against Women*, 31 GEO. WASH. J. INT'L L. & ECON. 49, 50 (1997).

[24] *Id*, art. 5(a).

common responsibility of men and women in the upbringing and development of their children."[25]

Article 11 of the convention prohibits dismissal of pregnant workers and those on maternity leave.[26] The article also directs states to introduce paid maternity leaves; to encourage social services, especially childcare facilities that permit parents to combine work and family life; and to protect pregnant women from harmful working conditions.[27] Somewhat ambivalently, Article 11 accords women a right "to protection of health and to safety in working conditions," including "safeguard[s]" of their reproductive functions.[28] It is not altogether clear that this provision calls upon employers to make the workplace safe rather than to protect a woman's pregnancy or fertility by barring her from well-paid occupations.[29] The article also falls short, in my judgment, in failing to recognize that after the weeks surrounding childbirth, leave for childraising is most neutrally typed parental leave, not maternity leave.

In other provisions, the Convention on the Elimination of All Forms of Discrimination Against Women broadly condemns sex discrimination and directs nations to take positive steps to counter that bias.[30] And Article 4 expressly shields affirmative action programs of the controversial kind; it states that "[a]doption [...] of temporary special measures aimed at accelerating *de facto* equality between men and women shall not be considered discrimination as defined in the [...] Convention."[31] The same article also provides that "special measures [...] aimed at protecting maternity shall not be considered discriminatory."[32]

Preceding the convention on elimination of discrimination against women by fourteen years, the 1965 International Convention on the Elimination of All Forms of Racial Discrimination[33] similarly endorses affirmative action as a means of advancing racial equality. Article 1

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[25] CEDAW, *supra* note 23. art. 5(b). This section also requires education to develop "a proper understanding of maternity as a social function." *Id.*

[26] See *id.* art. 11(2)(a); see also *infra* notes 88, 129 (describing United States and European Union cases on pregnancy leaves and dismissals).

[27] See CEDAW *supra* note 23, art. 11(2)(b); 11(2)(c); 11(2)(d).

[28] *Id.* art. 11(1)(f).

[29] The United States Supreme Court has interpreted Title VII of the Civil Rights Act, 42 U.S.C. §2000e-2(a) (1994), which bars employment discrimination on the basis of "sex," to prohibit sex-specific fetal protection policies. See International Union, United Auto. Workers v. Johnson Controls, Inc., 499 U.S. 187, 211 (1991). As the Court recognized there: "Concern for a woman's existing or potential offspring historically has been the excuse for denying women equal employment opportunities [...]. It is no more appropriate for the courts than it is for individual employers to decide whether a woman's reproductive role is more important to herself and her family than her economic role." *Id.*

[30] For example, Article 2 "condemn[s] discrimination against women in all its forms," and establishes seven undertakings to end that discrimination. CEDAW, *supra* note 23, art. 2.
Article 3 instructs states to "take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men." *Id.*art.3.

[31] *Id.* art. 4(1). The article stresses the temporary nature of these distinctions: the measures "shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved." *Id.*

[32] *Id.* art. 4(2). This prescription is not limited temporally as are other special measures. See *supra* note 31.

[33] G.A. Res. 2106A, U.N. GAOR, 20th Sess., Supp. No. 14, at 47, U.N. Doc. A/6014 (1965) [hereinafter cited as ICRD]. The United States ratified this convention in 1994. See U.S. DEP'T OF STATE, TREATIES IN FORCE 422-23 (1996) (entered into force for the United States on November 20, 1994).

declares that "[s]pecial measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups [...] shall not be deemed racial discrimination.".[34] Notably, this caveat appears in the convention's very first article, even before the document's direct prohibitions of race discrimination.

The race convention also obligates states to take "special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms."[35] The convention thus positively instructs affirmative action to eliminate racial discrimination, "when the circumstances so warrant."[36]

To recapitulate, the Universal Declaration of Human Rights, read together with two of its associated conventions (the one outlawing racial discrimination, and the one proscribing discrimination against women), indicates that affirmative action is not necessarily at odds with human rights principles, but may draw force from them, in particular, from the prescriptions on equality coupled with provisions on economic and social well-being. I turn next to three legal systems that have endeavored to advance equality and economic security through affirmative action measures.

2. AFFIRMATIVE ACTION IN THE UNITED STATES

Concentrating on the legal system I know best; I will describe first the origin and current situation of affirmative action in the United States. Courts sporadically used the term "affirmative action" in the late nineteenth and early twentieth centuries to describe various remedial steps imposed upon a defendant.[37] The words entered the legal lexicon with their contemporary connotation in 1961. That year, President John F. Kennedy, building on an earlier Second World War prescription, signed an executive order requiring government contractors to "take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin."[38] The order also bound executive departments and agencies to recommend

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[34] ICRD, *supra* note 33, art. 1(4). Like the protection for gender-based affirmative action, this authority is limited to temporary measures: Racial distinctions are permissible "provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved." *Id.*

[35] *Id.* art. 2(2). This prescription includes a proviso similar to the one in Article 1. The "measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved." *Id.*; see also *supra* note 31.

[36] ICRD, *supra* note 33, art. 2(2).

[37] See, *e.g.*, Taylor v. Taintor, 83 U.S. (16 Wall.) 366, 375 (1872) (extradition treaty with a foreign nation "might require prompt affirmative action" by the government in yielding a fugitive); City of Galena v. Amy, 72 U.S. (5 Wall.) 705, 708 (1866) (city's powers had to "be exercised in favor of affirmative action" to collect sufficient revenue to pay interest promised bondholders); see also Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 188 (1941) (concerning NLRB's statutory authority to take "affirmative action" to "effectuate the policies" of the NLRA). For a more recent recognition of affirmative action as an equitable remedy, see, for example, Franks v. Bowman Transp. Co., 424 U.S. 747, 777-78 (1976).

[38] Exec. Order No. 10925, §301, 3 C.F.R. 448, 450 (1959-1963); see also *id.* §302(d), 3 C.F.R. at 451 (authorizing the President's Committee on Equal Employment Opportunity to obtain pledges of nondiscrimination and

"positive measures for the elimination of any discrimination, direct or indirect, which now exists."[39]

During most of the 1960s, this vigorous language was not pressed heavily into service. Kennedy's Committee on Equal Employment Opportunity attempted to "jawbone" government contractors into hiring more minority workers,[40] and President Johnson added sex to the list of protected classes in 1967,[41] but muscular implementation postdated the Kennedy-Johnson years.

It bears remembrance that affirmative action was shifted into high gear in the United States by Republican officeholders – President Richard Nixon; his Secretary of Labor George Shultz and Assistant Secretary Arthur Fletcher; and then Labor Solicitor Laurence Silberman.[42] In 1969, Nixon's Labor Department issued its Revised Philadelphia Plan, requiring government contractors in that city to set goals and timetables for hiring minority workers in

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"affirmative [] cooperat[ion]" from labor unions associated with government contract work). Kennedy's order built upon a nondiscrimination order issued by President Franklin Roosevelt during World War II. See Exec. Order No. 8802, 3 C.F.R. 957 (1938-1943). Roosevelt's order prohibited "discrimination in the employment of workers in defense industries or government because of race, creed, color, or national origin" and directed agencies involved with defense production vocational and training programs to "take special measures appropriate to assure that such programs are administered without discrimination because of race, creed, color, or national origin." *Id.* Broad language in the order's preamble, proclaiming "the duty of employers and labor organizations [...] to provide for the full and equitable participation of all workers in defense industries," *id.*, hinted at efforts in the direction of affirmative action but embraced neither those words nor the full concept. For discussion of Roosevelt's order as a source of modern affirmative action, see James E. Jones, Jr., *Twenty-One Years of Affirmative Action: The Maturation of the Administrative Enforcement Process Under the Executive Order 11,246 as Amended*,59 CHI.-KENT L. REV. 67, 70-71 (1982).

[39] Exec. Order No. 10925, §202, 3 C.F.R. 448, 449 (1959-1963). For other language creating positive duties to address discrimination see, for example, *id*. preamble, 3 C.F.R. at 448 ("it is the plain and positive obligation of the United States Government to promote and ensure equal opportunity for all qualified persons, without regard to race, creed, color, or national origin, employed or seeking employment with the Federal Government and on government contracts"); *id.* ("a review and analysis of existing Executive orders, practices, and government agency procedures [...] reveal an urgent need for expansion and strengthening of efforts to promote full equality of employment opportunity"); *id.* §103, 3 C.F.R. at 449 (annual reports by Committee on Equal Employment Opportunity "shall include specific references to the actions taken and results achieved by each department and agency"); *id.*§201, 3 C.F.R. at 449 (Committee shall "consider and recommend additional affirmative steps which should be taken by executive departments and agencies to realize more fully the national policy of nondiscrimination"); *id.* §304, 3 C.F.R. at 451("The Committee shall use its best efforts, directly and through contracting agencies, contractors, state and local officials and public and private agencies, and all other available instrumentalities, to cause any labor union, recruiting agency or other representative of workers who is or may be engaged in work under Government contracts to cooperate with, and to comply in the implementation of, the purposes of this order."); *id.* §307, 3 C.F.R. at 452 (contracting agencies must appoint compliance officers).

[40] See James E. Jones, Jr., *The Genesis and Present Status of Affirmative Action in Employment: Economic, Legal, and Political Realities*, 70 IOWA L. REV. 901, 909 (1985).

[41] See Exec. Order No. 11,375, 3 C.F.R. 684 (1966-1970). Johnson previously had issued an order superseding Kennedy's original order. See Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965). This order incorporated the substantive parts of Kennedy's order but changed the organizational structure for administering the program. Executive Order 11,246, with the addition of sex as a protected class through Executive Order 11,375, has remained the basis of federal affirmative action programs.

[42] Indicative of change over time and experience in perspectives on the legitimacy of affirmative action, Silberman, now a judge on the United States Court of Appeals for the District of Columbia Circuit, recently authored an opinion striking down Federal Communications Commission regulations that required radio stations to take steps aimed at correcting statistical "underrepresentation" of minorities and women on their payrolls. See Lutheran Church- Missouri Synod v. FCC, 141 F.3d 344 (D.C. Cir. 1998).

six construction trades.[43] Contractors who failed to comply risked loss of their valuable contracts. The plan served as a model for imposing affirmative action requirements on other government contractors; subsequent orders also included goals to expand the employment of women.

Nixon's decision to require goals and timetables to break away from historic practices, including trade union nepotism, generated controversy.[44] The program survived both public criticism and legal challenges in the 1970s, I believe, for two reasons. First, the plan did not impose rigid quotas on government contractors. Instead, it required contractors to set their own goals by examining the availability of minority workers in the local workforce. Contractors then pledged to make good faith efforts to meet these goals. The plan was government-monitored, but it left considerable discretion to individual employers.[45]

Second, although Nixon's Philadelphia Plan cited no international covenants, it rested on the twin supports of remedial justice and economic equity. Despite the passage of major civil rights legislation governing the private sector in 1964, overt discrimination still marked workplaces in the United States in 1969. More subtle forms of bias, such as oldboy networks and word-of-mouth hiring among white male workers, further restricted the opportunities of women and minorities. The Labor Department used the government's billion-dollar purse to combat these inequities.[46]

The Philadelphia Plan was propelled by more than government benevolence. It responded to a crisis in the economic well-being of minority Americans. The 1969 plan followed several years of urban unrest, which a blue ribbon investigatory commission attributed in part to economic deprivation.[47] Arthur Fletcher, the Assistant Secretary of Labor who issued the plan, recalls that President Nixon first directed him to fashion a welfare grant program to address this urban poverty. Fletcher persuaded Nixon to raise the standard of living for minority Americans by expanding job opportunities instead.[48] his Labor Department were "necessary and right" because, in his words, "[a] good job is as basic and important a civil right as a good education."[49]

During the 1970s, affirmative action expanded modestly throughout the United States. Government agencies, universities, and private employers, prompted by executive orders and civil rights laws, adopted a variety of plans. These efforts never lacked concerted opposition,

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[43] See Contractors Ass'n v. Secretary of Labor, 442 F.2d 159 (3d Cir. 1971) (upholding constitutionality of plan). For discussion of the plan, its history, and its implications, see, for example, HUGH DAVIS GRAHAM, THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY 1960-1972, at 278-97 (1990); Arthur A. Fletcher, *A Personal Footnote in History*, in THE AFFIRMATIVE ACTION DEBATE 25 (George E. Curry ed., 1996); Jones, *supra* note 40, at 910-14; Robert P. Schuwerk, Comment, *The Philadelphia Plan: A Study in the Dynamics of Executive Power*,39 U. CHI. L. REV. 723 (1972).

[44] See, *e.g.*, Schuwerk, *supra* note 43, at 747-49.

[45] See *id.* at 741.

[46] See, *e.g.*, Contractors Ass'n v. Secretary of Labor, 442 F.2d 159, 173 (3d Cir. 1971); Fletcher, *supra* note 43, at 27.

[47] See KERNER COMMISSION, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 91 (1968); Jones, *supra* note 40, at 910-11.

[48] See Fletcher, *supra* note 43, at 25-26.

[49] RICHARD NIXON, RN: THE MEMOIRS OF RICHARD NIXON 437 (1978).

including charges that the very idea is at odds with the Constitution. The United States Constitution, framed at the end of the eighteenth century and amended most relevantly in 1865-1870 regarding race, and in 1920 to enfranchise women, enumerates some civil and political rights. Unlike the Universal Declaration, however, the U.S. Constitution details no economic and social goals. And it does not expressly contemplate affirmative action; it simply gives Congress authority to "enforce […] by appropriate legislation" the fundamental instrument's equality guarantee.[50] The constitutionality of affirmative action in the United States, therefore, depends in large measure upon judicial interpretation of the Constitution's promise of "equal protection of the laws."[51]

The U.S. Supreme Court first ruled on the constitutionality of a racebased affirmative action plan in 1978, in *Regents of the University of California v. Bakke*.[52] The case produced six opinions from nine Justices, with the views of a single Justice, Lewis F. Powell, Jr., controlling the outcome. Justice Powell disapproved a state-run medical school's affirmative action program, which set aside about one-sixth of the school's seats for minority students, but he wrote that public universities could consider race as one factor, among several, when admitting students.

Like the designers of the Philadelphia Plan, Justice Powell resisted fixed quotas. Schools could consider minority race as a factor favoring admission, but could not designate a set number of seats for minority students. Powell was willing to countenance softer forms of affirmative action that "treat[] each applicant as an individual in the admissions process"; in his words, "[t]he applicant who loses out on the last available seat to another candidate receiving a 'plus' on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname."[53] The concern that affirmative action plans not trench heavily on settled expectations has been salient in U.S. affirmative action jurisprudence. Thus, preferences permissible for hiring have been rejected when laying off workers is the issue; for layoffs, strict seniority systems prevail.[54]

Justice Powell's *Bakke* opinion rejected most of the justifications urged by the government in support of affirmative action. He dismissed entirely the state's remediation rationale, maintaining that a single medical school could not attempt to redress societal discrimination.[55] And he was unpersuaded by the school's claim that affirmative action in medical student admissions would enhance medical service in minority communities.[56]

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[50] U.S. Const. amend. XIV, §5; see also *id.* amends. XVIII, §2; XV, §2; XIX.
[51] U.S. Const. amend. XIV, §1.
[52] 438 U.S. 265 (1978). An earlier contest, concerning a state law school's affirmative action program for admissions, was dismissed as moot. See DeFunis v. Odegaard, 416 U.S. 312 (1974).
[53] 438 U.S. at 318 (opinion of Powell, J., announcing the judgment of the Court).
[54] See Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986).
[55] See 438 U.S. at 309. Powell would have allowed the school to remedy "the disabling effects of identified discrimination" in its own past or practices. *Id.* at 307. The four Justices who would have upheld the challenged set-aside system accepted remediation of societal discrimination as a permissible justification for affirmative action programs. See *id.* at 362-73 (Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part).
[56] On this claim, Powell concluded that the school had introduced insufficient evidence of need and that more

The sole justification Justice Powell accepted for affirmative action in medical school admissions is in line with a social welfare theme placed in the Universal Declaration of Human Rights. A racially diverse student body, Powell concluded, would enrich the educational experience for all students.[57] The Universal Declaration's prescription, contained in Article 26, states that public education "shall be directed" to "promot[ing] understanding, tolerance and friendship among all nations, racial or religious groups."[58] Affirmative action so directed might break down more barriers than it raises by enabling members of diverse groups to share in the everyday business of living, working, and learning together.[59]

The U.S. Supreme Court's next encounter with a constitutional challenge to race-based affirmative action again produced sharp divisions among the Justices, and no opinion to which a majority subscribed. In that 1980 decision, *Fullilove v. Klutznick*,[60] the Court upheld, uneasily, a congressional statute reserving to minority-controlled businesses ten percent of federal funds spent on local public works. Chief Justice Burger's plurality opinion rested on "an amalgam of [Congress's] specifically delegated powers,"[61] including its power to spend public funds for the "general Welfare,"[62] its power to regulate commerce,[63] and its power to "enforce" the Constitution's equal protection clause.[64] In view of that authority, the Court thought it permissible for the National Legislature to target a modest slice of federal funds for minority businesses as a way of compensating for "the present effects of past discrimination."[65]

During the last two decades, however, the Court has become increasingly skeptical of race-based affirmative action practiced or ordered by government actors. A Court majority now exposes such programs to close inspection, which will not be passed absent demonstration of a compelling need for the program and an action plan tightly tied to that need.[66] State and local attempts to remedy "societal discrimination" have not survived Court scrutiny,[67] de-

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precise inquiries could identify students, both white and nonwhite, interested in serving minority communities. See 438 U.S. at 310-11 (opinion of Powell, J., announcing the judgment of the Court).

[57] See *id.* at 312.

[58] UDHR, *supra* note 3, art. 26(2). The article identifies two further ends for education: "the full development of the human personality" and "further[ing] the activities of the United Nations for the maintenance of peace." *Id.*

[59] *Cf.* Malcolm Gladwell, *Six Degrees of Lois Weisberg*, THE NEW YORKER, January 11, 1999 at 52, 62 ("[W]hat matters in getting ahead is not the quality of your relationships, but the quantity – not how close you are to those you know, but, paradoxically, how many people you know whom you aren't particularly close to [...]. Minority admissions programs work not because they give black students access to the same superior educational resources as white students, or access to the same rich cultural environment as white students, or any other formal or grandiose vision of engineered equality. They work by giving black students access to the same white students as white students – by allowing them to make acquaintances outside their own social world and so shortening the chain lengths between them and the best jobs.").

[60] 448 U.S. 448 (1980).

[61] *Id.* at 473.

[62] U.S. CONST. art. I, §8, cl.1.

[63] *Id.*cl.3.

[64] *Id.* amend. XIV, §5.

[65] 448 U.S. at 487. The Court also stressed the government's flexibility in administering the program, including provision for a waiver when compliance with the 10% requirement was not feasible. *Id.* at 468-72, 481-82, 487-89.

[66] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 235 (1995).

[67] See City of Richmond v. J.A. Croson Co., 488 U.S. 469, 498-99 (1989) (plurality opinion).

spite empirical evidence documenting persistent racial discrimination in education, employment, housing, and consumer transactions.[68] The ten percent federal set-asides upheld in the *Fullilove* case might fail under the Court's current standard,[69] although the Court itself has specifically reserved decision on that issue.[70] And some lower courts have forecast that today's Court would reject the diversity rationale advanced by Justice Powell in the *Bakke* case.[71]

On the other hand, the Clinton Administration comprehends the Court's dispositions as allowing Congress some leeway to remedy societal discrimination through carefully crafted race-conscious preferences.[72] It was and remains the law that an enterprise, private or public, may be required to act affirmatively to remedy its own proven discrimination.[73] Congress has so far rejected proposals to bar colleges and universities from using affirmative action in admissions policies if they receive federal funds.[74] The Supreme Court, to date, has not revisited Justice Powell's diversity justification for affirmative action in university admissions,[75] and considerable scholarly research may inform the Court's next encounter

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[68] See *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 273-74 (1995) (Ginsburg, J.,dissenting) (citing studies); GEORGE STEPHANOPOULOS & CHRISTOPHER EDLEY, JR., AFFIRMATIVE ACTION REVIEW: REPORT TO THE PRESIDENT §§4.1-4.3 (1995) (same); BARBARA F. RESKIN, THE REALITIES OF AFFIRMATIVE ACTION IN EMPLOYMENT 19-43 (1998). See also Nicholas LeMann, *Taking Affirmative Action Apart*, N.Y. TIMES, June 11, 1995, §6 (Magazine), at 36 (surveying affirmative action policy and results post-*Bakke*, concluding that affirmative action has helped bridge the nation's racial gap).

[69] Recent commentary has observed that *Fullilove* represented a high-water mark for tolerance of benign racial classifications, and that the ideal of the "colorblind constitution" – with its attendant hostility to race-conscious regulation – has reemerged in the years since. See T. Alexander Aleinkoff, *A Case for Race-Consciousness,* 91 COLUM. L. REV. 1060 (1971). See *generally* ANDREW KULL, THE COLOR-BLIND CONSTITUTION (1992).

[70] See *Adarand Constructors, Inc*., 515 U.S. at 235.

[71] See, *e.g.*, Hopwood v. Texas, 78 F.3d 932, 944 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996); *Adarand Constructors, Inc. v. Pena*, 965 F. Supp. 1556, 1570 (D. Colo. 1997) (on remand). *But cf*. Texas v. Hopwood, 518 U.S. 1033, 1034 (1996) (Ginsburg, J., joined by Souter, J., concurring in denial of certiorari) (noting that the Court "'reviews judgments, not opinions,'" and that no "final judgment on a program genuinely in controversy" remained live in the *Hopwood* litigation when the petition for review was denied (quoting Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842 (1984)).

[72] Statement by the Executive Office of the President, Procurement Reforms: SDB Certification and the Price Evaluation Adjustment Program 2 (June 24, 1998) (on file with the authors). Relying upon this understanding, the Administration has released new guidelines giving minority-owned businesses a small advantage when they bid for government contracts in certain industries. The guidelines target only industries in which minority-owned businesses remain underrepresented. See Small Disadvantaged Business Procurement; Reform of Affirmative Action in Federal Procurement, 63 Fed. Reg. 35,714 (1998).

[73] See United States v. Paradise, 480 U.S. 149, 185-86 (1987); Local 28, Sheet Metal Workers v. EEOC, 478 U.S. 421, 482 (1986) (plurality opinion); *id.* at 483 (Powell, J., concurring in part and concurring in the judgment).

[74] In May 1998, for example, the House of Representatives voted down two proposed amendments to the Higher Education Reauthorization Act that would have restricted the use of preferences in federally funded institutions of higher learning. See 144 CONG. REC. H2914, H2917 (daily ed. May 6, 1998).

[75] *Cf*. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 286 (1986) (O'Connor, J., concurring in part and concurring in the judgment) ("although its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest"). See also Ronald Dworkin, *Is Affirmative Action Doomed?* N.Y. REV. OF BOOKS, Nov. 5, 1998, at 56, 60 (educational diversity is a compelling interest); Goodwin Liu, *Affirmative Action in Higher Education: The Diversity Rationale and the Compelling Interest Test*, 33 HARV. L.R.-C.L. REV. 381, 429 (1998) (concluding that diversity rationale satisfies strict scrutiny). But see Jed Rubenfeld, *Affirmative Action*, 107 Yale L. J. 427, 471-72 (1997) (maintaining that the true purpose of affirma-

with the issue.[76] It is fair to say, in sum, that the channel of constitutionally permissible race-based affirmative action in the United States today is narrow, but not closed.[77]

I move now to the state of things regarding gender-based affirmative action. I would distinguish laws and programs defended as legitimately preferential to or for women from race-based programs in this key respect. Recall that traditional forms of sex discrimination, unlike obviously odious race-based classifications, were once regarded or rationalized as benignly favoring or protecting the second sex – laws that prohibited women from working at night, tending bar, carrying heavy weights, working overtime, for example. Eventually, many women came to see these laws as protecting not women but men's jobs from women's competition.[78] Evaluators of gender-based affirmative action, therefore, must be alert to the difference between measures that genuinely ameliorate the continuing effects of women's historic subordination, and those that perpetuate myths or stereotypes inhibiting women's achievement of their full human potential.

I continue to view with suspicion endeavors to bundle the U.S. Supreme Court's equal protection decisions into neat packages under the headings "strict scrutiny," "intermediate" inspection, relaxed or "rational relationship" review. Nevertheless, I think it is accurate to describe the Supreme Court's current approach to gender-based classifications as more flexible than its current approach to racial classifications. Under the formulation now favored, gender-based linedrawing by lawmakers will fail unless the state advances "an 'exceedingly persuasive justification,'"[79] and does not rely on "generalizations about [to borrow the title of a Mozart opera, *Cosi fan tutti*] 'the way women are.'"[80] Ironically, the less rigid standard for sex classifications has led some decision makers to conclude that efforts to assist women through affirmative action are less vulnerable to constitutional attack than efforts to aid historically disadvantaged racial minorities.[81] That, I think, is a most troublesome notion.

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tive action is not to achieve diversity but rather to bring more minorities into the nation's institutions).

[76] See, *e.g.*, WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS (1998); STEPHEN THERNSTROM & ABIGAIL THERNSTROM, AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE (1997); *Symposium, Twenty Years After Bakke: The Law and Science of Affirmative Action in Higher Education*, 59 Ohio St. L.J. 663 (1998).

[77] See also Steven A. Holmes, *Administration Cuts Affirmative Action While Defending It*, N.Y. TIMES, Mar. 16, 1998, at A17 (noting that Clinton Administration has ended or modified some affirmative action programs, while defending the constitutionality of others).

This lecture trains on constitutional challenges to government-run affirmative action programs. The Court has been more tolerant of voluntary affirmative action programs instituted by private parties, although here too the Court scrutinizes programs closely for compliance with statutory bars on discrimination. See United Steelworkers v. Weber, 443 U.S. 193, 208 (1979) (upholding voluntary race-based program); see also Johnson v. Transportation Agency, 480 U.S. 616, 640-42 (1987) (upholding gender-based program instituted by public agency; claim litigated under Title VII rather than the Constitution).

[78] See, *e.g.*, Ruth Bader Ginsburg, *Sex Equality and the Constitution*,52 TUL. L. REV. 451, 454-55 (1978).

[79] United States v. Virginia, 518 U.S. 515, 531 (1996) (quoting J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 136-37 & n.6 (1994), and Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982)).

[80] United States v. Virginia, 518 U.S. 515, 531 (1996) (quoting J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 136-37 & n.6 (1994), and Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982)). 80. *Id.* at 550.

[81] For an instance in which a federal appellate court upheld a city's preference for women owned businesses but not for minority-owned businesses, see Associated Gen. Contractors v. City of San Francisco, 813 F.2d 922, 931-32, 941-42, 944 (9th Cir. 1987).

In gender cases, the Supreme Court's footing was at first insecure. In *Kahn v. Shevin*,[82] a 1974 case I argued from the advocate's side of the Supreme Court's bench and lost, the Court accepted as a permissible preference a nineteenth century Florida law granting widows a slender real property tax exemption. The State of Florida gave widows that small dispensation along with the blind and the totally disabled. The Court upheld the exemption as a fair means of compensating widows for the disadvantages they faced in the marketplace. In my view, the Court overlooked the provision's roots in women's role as subservient spouse. The Court regarded the law as redressing, albeit in minute measure, workplace discrimination against women. But if that were in fact the design, then why, a careful examiner might ask, didn't the exemption apply to divorced women or single heads of households – the very women who might have suffered most from a lifetime of workplace discrimination?[83]

The following year, however, the Court emphasized that compensatory rationales for sex-based differentials would not be accepted as a matter of course. In 1975, and again in 1977, the Court struck down gender distinctions in social security laws, lump classifications based on breadwinning male/dependent female stereotypes.[84] In these cases, the Court required the Legislature to accord childcare benefits to widowed fathers as well as widowed mothers, and held that female wage earners must be accorded the same social insurance for their families as male workers received. Then in 1977, a year before the *Bakke* decision on race-based affirmative action, the Court upheld a preferential measure plausibly justified as slightly ameliorating the workplace discrimination women experienced.

In *Califano v. Webster*,[85] the Court rejected a male worker's challenge to a social security provision that, for benefit calculation purposes, allowed women to exclude more low-earning years than men could exclude. The Court's opinion upholding the provision referred generally to a need "to remedy discrimination against women in the job market"[86] and "to compensate for particular economic disabilities suffered by women."[87] In short, in this rela-

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[82] 416 U.S. 351 (1974).

[83] See Ginsburg, *supra* note 21, at 816-17. The Court missed the mark again in *Schlesinger v. Ballard*, 419 U.S. 498 (1975), when it upheld a Navy regulation that placed male officers under a strict "up or out" promotion system, but allowed women a longer time before mandatory discharge for failure to advance. Although the Court viewed the differential as compensating women for disadvantages they faced, the regulation's effect was not so clear. In many cases, the regulation operated to women's disadvantage by denying female officers who resigned from service severance pay that male officers could obtain. The regulation, moreover, did nothing to alter the web of rules favoring the advancement of men over women in the military. See Ginsburg, *supra* note 21, at 817-18.

Just last year, the Court confronted a once-pervasive gender-based categorization. The case, *Miller v. Albright*, 118 S. Ct. 1428 (1998), involved a claim to U.S. citizenship pursued by the daughter of a male U.S. citizen. The complainant contended that restrictions on U.S. citizen fathers' ability to pass their citizenship to their children, not applicable to U.S. citizen mothers, violated equal protection. Although the Court denied the daughter relief, five Justices recognized that the statute in question was based on overbroad, and therefore unconstitutional, generalizations about the relationship mothers and fathers bear to their children. See *id.* at 1445-46 (O'Connor, J., joined by Kennedy, J., concurring in judgment); 1449-50 (Ginsburg, J., joined by Souter, J., and Breyer, J., dissenting); 1460-63 (Breyer J., joined by Souter, J., and Ginsburg, J., dissenting).

[84] See Weinberger v. Wiesenfeld, 420 U.S. 636, 637-39 (1975); Califano v. Goldfarb, 430 U.S. 199, 216-17 (1977). These decisions followed a path earlier marked in Frontiero v. Richardson, 411 U.S. 677 (1973).

[85] 430 U.S. 313 (1977).

[86] *Id.* at 319.

[87] *Id.* at 320.

tively noncontroversial gender-classification case, the Court endorsed a societal discrimination rationale resembling the remedial justification it was not willing to embrace, the next year, in the more divisive setting of race and medical school admissions.[88]

In harmony with the Universal Declaration, one can find in U.S. affirmative action rulings both a social welfare strain and a remediation of historic discrimination theme. It is safe to say the governing law is still evolving and variously interpreted.

My account would be inadequate, however, if I did not at least mention the reaction to affirmative action in the U.S. in the media, in lower courts, and on political hustings. Last spring, for example, a *Washington Post* columnist described the case of a white applicant to the University of Washington Law School turned down, the complaint alleged, because of her color, although she had overcome poverty and worked at low-wage jobs throughout her education.[89] This past November, Washington followed California as the second state to curtail by popular initiative state supported affirmative action measures.[90] Due to a federal appellate court ruling controlling in Texas and the California ballot initiative, two of our top universities have been required to end race-based preferences and, instead, admit students on a colorblind basis.[91] And the Court of Appeals for the First Circuit recently decided that racial preferences are impermissible in public high school admissions as well.[92] These decisions and their immediate impact have caused even some long-time opponents of affirmative action to reconsider their opposition.[93] The reaction has also prompted empirical

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[88] *Cf.* Ginsburg, *supra* note 21, at 823-24 (suggesting that *Califano v. Webster* might have informed the Court's *Bakke* decision). The Court has also recognized that legislatures may take into account women's unique childbearing capacity, but only when the legislative distinction furthers women's employment opportunities. See California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 289-90 (1987) (upholding California statute that required employers to provide leave and reinstatement to employees disabled by pregnancy but extended no similar protection to workers suffering from other disabilities; statute was held consistent with Title VII's prohibitions against employment discrimination based on sex, pregnancy, or childbirth); *cf.* Case C-394/96, Brown v. Rentokil Ltd., 1998 E.C.R. I-4185 (1998) (European Union equal treatment directive precludes dismissal of female workers throughout their pregnancy for absences due to pregnancy-related illness). Protective actions that limit women's workplace participation violate federal prohibitions against sex discrimination. International Union, United Auto. Workers v. Johnson Controls, Inc., 499 U.S. 187, 211 (1991); see also *supra* note 29 and accompanying text.

[89] See Nat Hentoff, *The Cost of Checking 'White,'* WASH. POST, May 9, 1998, at A15; see also Laura L. Hirschfeld, *Colleges Try to Explain Why Top Grades, Test Scores Don't Matter*, DET. NEWS, April 26, 1998, at 5B (affirmative action permits "universities [...] to discriminate against individual white males en masse"). More generally, affirmative action has become a lightning rod for broader issues of social policy and relations between the races. See, *e.g.*, Michael Kinsley, *The Spoils of Victimhood*, THE NEW YORKER, March 27, 1995, at 62, 69 ("Affirmative action has become a scapegoat for the anxieties of the white middle class" even though its "actual role [...] in denying opportunities to white people is small compared with its role in the public imagination and the public debate.").

[90] See Sam Howe Verhovek, *From Same-Sex Marriages to Gambling, Voters Speak*, N.Y. Times, Nov. 5, 1998, at B1, B10.

[91] See Hopwood v. Texas, 78 F.3d 932, 934 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996); California Proposition 209, *codified as* Cal. Const. art. 1, §31; *cf.* Podberesky v. Kirwan, 38 F.3d 147, 161-62 (4th Cir. 1994) (invalidating the University of Maryland's Banneker scholarship program for African American students).

[92] See Weissman v. Gittens, 160 F. 3d 790 (1st Cir. 1998); see also Latin Lesson, The New Republic, Dec. 14, 1998, at 7, 8 (concluding that the Weissman decision demonstrates "just how flimsy" Bakke's diversity rationale has become).

[93] See, *e.g.*, Nathan Glazer, *In Defense of Preference*, NEW REPUBLIC, Apr. 6, 1998, at 18. In 1997, the entering class at the University of Texas's law school included only four African Americans and twenty-six Mexican Americans. The previous year, when the school considered race as a "plus" factor in admissions, thir-

studies reporting the effects of affirmative action in both classrooms and workplaces.[94] What we are witnessing now, in conclusion, may show the sagacity of the comment that the true symbol of the United States is not the bald eagle, but the pendulum.

3. INDIA

For comparative side-glances, I turn first to India's affirmative action in regard to disfavored castes, a set of initiatives both older and more extensive than any program ventured in the United States. In view of time constraints, I will mention only the caste-based programs, although India is also engaged in endeavors to elevate the status and welfare of women.[95] India

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ty-one African Americans and forty-two Mexican Americans enrolled. See Janet Elliott, *Hopwood Appeal Focuses on Future Without Racial Preferences*, TEX. LAW., May 25, 1998, at 8. The University of California at Berkeley enrolled just one African American law student in 1997, although revised admissions standards somewhat increased offers to African American and Latino law students for 1998. See John E. Morris, *Boalt Hall's Affirmative Action Dilemma*, AM. LAW., Nov. 1997, at 4; Jenna Ward, *Boalt Boosts Minority Enrollment by Downplaying Grades, Scores*, Nat'l L.J., May 18, 1998, at A16. Sharp declines marked undergraduate minority admissions at Berkeley's campus in the spring of 1998, the first year that the college implemented colorblind admissions. See Frank Bruni, *Blacks at Berkeley Are Offering No Welcome Mat*, N.Y. TIMES, May 2, 1998, at A1.

Although these declines are dramatic, they remain a phenomenon of elite universities. Less selective campuses of the University of California experienced smaller declines in minority admissions last year – or even some increase. *Id.* at A8. A nationwide study of college admissions suggests that race-based affirmative action affects admission decisions only at the selective schools attended by one-fifth of all students. "[A]t the less exclusive institutions that 80 percent of 4-year college students attend, race plays little if any role in admissions decisions." Thomas J. Kane, *Racial and Ethnic Preferences in College Admissions*, 59 Ohio St. L.J. 971, 972 (1998).

The elimination of preferences has also spurred lawmakers and educators to consider other strategies to promote diversity in the student body. Under Texas's recently adopted "10 percent plan," students in the top 10 percent of their high school class are automatically admitted to the state's most selective public colleges, irrespective of their S.A.T. scores. One result has been an increase in the number of qualified minority students accepted to these schools. The policy has also increased opportunity for white high school graduates from parts of rural Texas, whose performance on standardized tests also lags. See Lani Guinier, *An Equal Chance*, N. Y. TIMES, April 23, 1998, at A25. In the same vein, the incoming governor of California has proposed to guarantee students in the top four percent of their high school class a place in the University of California system. See *In Search of the Golden Mean*, THE ECONOMIST, Jan. 9, 1999 at 27, 28. Educational institutions unable to rely on racial preferences might also attempt to assure racial diversity by race-neutral means such as geographical or socioeconomic preferences. See Kathleen M. Sullivan, After Affirmative Action, 59 OHIO ST. L.J. 1039 (1998) (arguing that such race-neutral preferences should be held constitutionally permissible); see also Samuel Issacharoff, *Can Affirmative Action Be Defended*, 59 OHIO ST. L.J. 669 (1998) (concluding that modest affirmative action efforts are indispensable to the mission of U. S higher education).

[94] See, *e.g.*, BOWEN & BOK, *supra* note 76; RESKIN, *supra* note 68; Maureen Hallinan, *Diversity Effects on Student Outcomes: Social Scientific Evidence*, 59 OHIO ST. L.J. 733 (1998).

[95] I note, however, that India's constitution, like the Universal Declaration, is ambiguous with respect to gender-based programs. Article 15 of India's constitution, which bans discrimination based on sex and other grounds, declares that: "Nothing in this article shall prevent the State from making any special provision for women and children." INDIA CONST. art. 15(3); see also *id.* art. 42 (nonjusticiable provision instructing state to "make provision for securing just and humane conditions of work and for maternity relief"). Indian courts have invoked Article 15 to uphold some affirmative action measures benefiting women. See, *e.g.*, Dattatraya v. State of Bombay, 1953 A.I.R. 40 (Bom.) 311 (approving reservation of seats for women on elected municipal council). Legislators basing programs on India's constitutional language may of course endeavor to "provi[de] for women and children" in a way that furthers India's constitutional commitment to equality. See, *e.g.*, INDIA CONST. art. 39 (nonjusticiable provision advising state to "direct its policy towards securing – (a) that the citizen, men and women equally, have the right to an adequate means of livelihood; [...] [and] (d) that there is

boldly announced a commitment to affirmative action in its 1950 Constitution, which reserves seats for members of India's lowest social castes in both the House of the People and the state legislative assemblies.[96] The constitution also permits the government to "reserv[e]" public "appointments or posts" for members of "any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State."[97] This permission expressly qualifies a clause otherwise prohibiting discrimination in government employment.[98]

Furthermore, India's constitution imposes a duty on the state to "promote with special care the educational and economic interests of the weaker sections of the people, and in particular, of the [most disadvantaged castes]."[99] Although this language appears in a portion of the constitution that is not judicially enforceable, it enunciates a positive governmental responsibility to assist disadvantaged classes. India's constitution thus unambiguously authorizes affirmative action and affirmatively encourages it.

Indeed, a desire to ensure the legitimacy of affirmative action prompted the first amendment to India's Constitution in 1951. In April that year, the Supreme Court of India struck down a "reservation" or quota for students from disadvantaged classes at a state-run medical school, noting that the constitution allowed such reservations only in allocating legislative seats or government employment.[100] Within two months, India altered its constitution to permit affirmative action in education and other contexts. Article 15(4) now expressly provides that "[n]othing in [the constitution's anti-discrimination articles] shall prevent the State from

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equal pay for equal work for both men and women").

[96] See INDIA CONST. art. 330; *id.* art. 332. The constitution reserves these seats for members of "Scheduled Castes" and "Scheduled Tribes." The "Scheduled Castes" are India's untouchables, citizens at the bottom of the traditional Hindu class system. See Marc Galanter, COMPETING EQUALITIES: LAW AND THE BACKWARD CLASSES IN INDIA 122 (1984). The "Scheduled Tribes" are "groups distinguished by 'tribal characteristics' and by their spatial and cultural isolation from the bulk of the population." *Id.* at 147. Members of scheduled castes make up about 15.8% of India's population, while the scheduled tribes constitute about 7.8%. See E.J. Prior, *Constitutional Fairness or Fraud on the Constitution? Compensatory Discrimination in India*, 28 CASE W. RES. J. INT'L L. 63, 67 nn.18-19 (1996).

[97] INDIA CONST. art. 16(4). A 1995 amendment added a similar proviso for promotions within the public service, although the latter protection applies only to members of "the Scheduled Castes and the Scheduled Tribes." *Id.* art. 16(4A). The category "backward classes" in Article 16(4), as well as in the articles mentioned below, includes the scheduled castes, the scheduled tribes, and other castes suffering from disadvantage. As decisions of the Indian Supreme Court show, the proper definition of "backward classes" under these constitutional provisions is not self-evident. See, *e.g.*, Balaji v. State of Mysore, A.I.R. 1963 S.C. 649 (caste may constitute one criterion for determining backwardness, but the state must look to other factors as well); Chitralekha v. State of Mysore, A.I.R. 1964 S.C. 1823 (consideration of caste in determining backwardness is permissible but not mandatory); P. Rajendran v. State of Madras, A.I.R. 1968 S.C. 1012 (state may determine that entire caste is backward and then use caste to designate backwardness); Vasanth Kumar v. State of Karnataka, A.I.R. 1985 S.C. 1495 (affirming use of caste as unit for identifying backward classes); Indra Sawhney v. Union of India, A.I.R. 1993 S.C. 477 (stating standards to determine backwardness).

[98] See INDIA CONST. art.16(2); see also *id.* art. 16(1) (guaranteeing "equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State").

[99] *Id.* art. 46. The final portion of the article directs special attention to the "Scheduled Castes and the Scheduled Tribes," but the initial clause appears to include other "weaker sections of the people" as well. *Id.*

[100] See State of Madras v. Champakam Dorairajan, A.I.R. 1951 S.C. 226.

making any special provision for the advancement of any socially and educationally backward classes of citizens."[101]

Some of India's states have maintained affirmative action or "reservation" programs at least since the nation's independence.[102] These programs reserve public university seats or government positions for members of India's disadvantaged castes.[103] In a series of decisions dating back to 1963, India's Supreme Court has upheld the core constitutionality of these programs, although the court has imposed some constraints on their administration. Notably, the court placed a 50 percent ceiling on the number of positions that can be reserved for disadvantaged citizens.[104]A limit so high may appear startling to observers from legal systems more skeptical of affirmative action.

Since 1970, India's affirmative action programs have expanded in both geographic scope (more states have adopted programs) and magnitude (more classes have been catalogued as disadvantaged). The central government was slower than some states to support preferences.[105] In 1990, however, Prime Minister V.P. Singh announced that he would carry out the expansive recommendations of the ten-year-old Mandal Commission Report.[106] Three years later, India's Supreme Court upheld the constitutionality of most of those recommendations and the central government began to implement them.[107]

Affirmative action (sometimes called "compensatory discrimination") has provoked its share of controversy, including violent resistance, in India. A 1968 survey showed that high caste and highly educated citizens strongly opposed reservations in government employment.[108] In 1990, when Prime Minister Singh first announced implementation of the Mandal Commission Report, riots erupted across India, and the protests contributed to the fall of Singh's government.[109] More isolated episodes of violence occurred after India's Supreme Court, in

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[101] INDIA CONST. art. 15(4). Paralleling other constitutional references to the most disadvantaged castes, the provision adds: "or for the Scheduled Castes and the Scheduled Tribes." *Id.*

[102] Some of the programs continue systems imposed under British rule, which heightens the controversy surrounding them. See Prior, *supra* note 96, at 72-73.

[103] See, *e.g.*, Galanter, *supra* note 96, at 87; SUNITA PARIKH, THE POLITICS OF PREFERENCE: DEMOCRATIC INSTITUTIONS AND AFFIRMATIVE ACTION IN THE UNITED STATES AND INDIA 159-64 (1997).

[104] See Balaji v. State of Mysore, A.I.R. 1963 S.C. 649; see also Devadasan v. Union of India, A.I.R. 1964 S.C. 179 (limiting carry forward of unfilled reserved positions); Indra Sawhney v. Union of India, A.I.R. 1993 S.C. 477 (affirming 50% rule). For other Indian Supreme Court decisions during the 1960s and 1970s, see cases cited *supra* note 97; State of Kerala v. N.M. Thomas, A.I.R. 1976 S.C. 490 (state could give members of the scheduled castes or scheduled tribes a two-year grace period to pass promotion exam; constitution permits means other than reservations to advance the interests of backward classes).

[105] The central government appointed its first Backward Classes Commission in 1953 and received that Commission's report two years later. Parliament, however, rejected the report and the Commission's recommendations were never implemented. See Prior, *supra* note 96, 80-81. The government did not appoint a second commission until 1978, when the commission led by B.P. Mandal began work. The Mandal Commission submitted its report and recommendations at the end of 1980. For a decade, nothing was done to implement them. *Id.* at 69, 81-86.

[106] See *id.* at 63-69.

[107] See Indra Sawhney v. Union of India, A.I.R. 1993 S.C. 477; Prior, *supra* note 96, at 70, 90-94.

[108] See GALANTER, *supra* note 96, at 76.

[109] See Prior, *supra* note 96, at 63-66, 69.

1993, upheld the constitutionality of the Commission's approach.[110] The judicial ruling, however, may have tempered opposition to some degree.[111]

Few citizens of India deny either a long history of overt discrimination against disfavored castes or the persistence of deep-seated bias against those groups. Perhaps that public recognition explains, in part, why "reservations" beyond any set-asides tolerable in the United States have survived in India. A 1964 opinion of the Mysore High Court stated the case this way:

> "[T]here can be neither stability nor real progress if predominant sections of an awakened Nation live in primitive conditions, confined to unremunerative occupations and having no share in the good things of life, while power and wealth [are] confined in the hands of only a few […]. [The] Nation's interest will be best served – taking a long range view – if the backward classes are helped to march forward and take their place in a line with the advanced sections of the people."[112]

4. EUROPEAN UNION

Positive action in the European Union is less complex than in India, where thousands of castes or classes qualify as "backward." The quest for equality within the Union has centered on nationality and on the status of men and women,[113] although the Amsterdam Treaty will permit the Union to address other forms of discrimination as well, including discrimination based on race, religion, disability, age, and sexual orientation.[114]

Affirmative action or "positive discrimination" has so far come before the European Court of Justice only in the context of equal treatment for men and women. At the Community's 1957 birth, the Treaty of Rome required equal pay for male and female workers for work of equal value.[115] This rather early commitment to equal wages did not stem from a lofty desire to promote sex equality and human rights. Instead, the treaty provision reflected a more prosaic concern, the fear that cheap female labor in some countries would undercut the price of

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[110] See Prior, *supra* note 96, at 69-70.
[111] See PARIKH, *supra* note 103, at 190.
[112] D.G. Viswanath v. Government of Mysore, 1964 A.I.R. 51 (Mys.) 132, 136.
[113] See Treaty Establishing the European Community, *effective* Nov. 1, 1993, art. 6, 4 EUR. UNION L. REP. (CCH) ¶ 25,400, at 10,221-4 (prohibiting "any discrimination on grounds of nationality"); *id.* art. 48(2) (prohibiting nationality discrimination in "employment, remuneration and other conditions of work and employment"); *id.* art. 119 (requiring "equal pay for equal work" by men and women); see also Treaty on European Union, Feb. 7, 1992, art. F(2), 4 EUR. UNION L. REP. (CCH) ¶ 25,300, at 10,056 (requiring "respect [for] fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms").
[114] Treaty of Amsterdam, Oct. 2, 1997, art. 2(7), 4 EUR. UNION L. REP. (CCH) ¶ 25,500, at 10,517 (inserting Article 6A, to be renumbered as Article 14) (empowering the Union's "Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament," to "take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation").
[115] See Treaty Establishing the European Economic Community, Mar. 25, 1957, art. 119, 298 U.N.T.S. 11, 62.

goods in other nations.[116] But the equality principle, rudimentary as it was at the start, had growth potential.

In 1976, the European Union's Council issued a directive designed to promote "the principle of equal treatment for men and women as regards access to employment, including promotion."[117] Article Two of the directive instructs that "the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex."[118] Shortly after that nondiscrimination prescription, however, Article Two adds: "This Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities […]."[119]

Reconciling this caveat with the more general prohibition against discrimination is the daunting challenge. The European Court of Justice has twice dealt with the matter. In its first encounter, in 1995, the Court rejected a German (Bremen) local law designed to help women gain civil service appointments and promotions.[120] Bremen, one of the German länder, had adopted a measure making gender a tie-breaker for some positions. If women constituted less than half the employees in the salary bracket to which the appointment or promotion was sought, and if a man and woman with equal qualifications pursued the position, the Bremen prescription required selection of the woman.

A male worker who lost out on a promotion challenged the local law as incompatible with the EU equal treatment directive, and the German labor court referred the question to the European Court of Justice. That court held the local law incompatible with the EU directive. "National rules which guarantee women absolute and unconditional priority for appointment or promotion," the Court instructed, "go beyond promoting equal opportunities."[121] Following the lead of the Advocate General, the court condemned the Bremen prescription because it sought to achieve "equal representation" rather than the "equality of opportunity" contemplated by the equal treatment directive.[122]

Some two years later, in 1997, the Court of Justice took a second look. In *Marschall v. Land Nordrhein-Westfalen*,[123] the Court took up, on reference from a German administrative court, another local law-making gender the tie-breaker in civil service promotions. This time, however, the local provision permitted a male applicant to prevail, despite the tie-breaker, if "reasons specific to [his situation] tilt[ed] the balance in his favour."[124] The European Court

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[116] See Kent Källström, *Article 23*, in THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMENTARY 357, 370 (Asbjørn Eide et al. eds., 1992).
[117] Council Directive No. 76/207, art.1(1), 1976 O.J. (L 39) 40. The directive also governs vocational training and working conditions.
[118] *Id.* art. 2(1).
[119] *Id.* art. 2(4).
[120] See Case C-450/93, Kalanke v. Freie Hansestadt Bremen, 1995 E.C.R. I-3051 (1995).
[121] *Id.* at I-3078.
[122] *Id.* For discussion of *Kalanke*, see Dagmar Schiek, *Positive Action in Community Law*, 25 INDUS. L.J. 239 (1996).
[123] Case C-409/95, [1998] 1 C.M.L.R. 547 (1997).
[124] *Id.* at 566 (quoting the Land Nordrhein-Westfalen law).

of Justice, *against* the recommendation of the Advocate General, held that this clause saved the preference.[125]

The judgment in the *Marschall* case bears more than a little kinship to Justice Powell's controlling opinion in the *Bakke* case. Both opinions stress the need for individualized decision making and the infirmity of automatic preferences. Under *Bakke* and *Marschall*, race and sex may constitute plus factors favoring employment, promotion, or admission to an educational institution, but the preference may not be absolute and unyielding.

The decision in *Marschall* is perhaps most notable for its sensitivity to sometimes unconscious bias. "[T]hat a male candidate and a female candidate are equally qualified does not mean that they have the same chances," the Court of Justice observed.[126] Traditional habits of thought may lead to the selection of males in preference to females, because employers fear women will be distracted from their work by "household and family duties," the European Court said.[127] In other words, a tie-breaker preference for women may do no more than ensure actual adherence to the nondiscrimination principle. Without such positive action by government, unconscious or half-conscious discrimination might continue unchecked.[128]

The approach most recently taken by the Court of Justice runs little risk of confusing preferences designed to aid women with paternalism effective to constrain them. With fidelity to

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[125] See *supra* note 123, at 570-71.
[126] *Id.* at 570.
[127] *Id.*
[128] See *id.* at 566, 569-70. I noted the existence of unconscious bias in a 1978 comment and suggested as illustrative a case in which white male managers decided on promotions under a "total person concept." Ginsburg, *supra* note 21, at 825 (citing Leisner v. New York Tel. Co., 358 F. Supp. 359 (S.D.N.Y. 1973)). The results were predictable: "White men [...] consistently chose white men for the job or promotion." Unconscious bias has not yet vanished from the scene. See Nicholas Katzenbach and Burke Marshall, *Not Color Blind: Just Blind*, N. Y. Times, Feb. 22, 1998, §6 (Magazine), at 42, 44 ("The natural inclination of predominantly white male middle managers is to hire and promote one of their own. Most of the time the decision honestly reflects their judgment as to the best candidate without conscious appreciation of how much that judgment may have been conditioned by experience in the largely segregated society we still live in. To hire or promote an African-American is often viewed as risky."); RESKIN, *supra* note 68, at 24-25 ("[D]iscrimination is not simply the result of deliberate attempts to discriminate"; often organizations discriminate "simply by doing business as usual."); *cf.* Deborah Jones Merritt & Barbara F. Reskin, *Sex, Race, and Credentials: The Truth About Affirmative Action in Law Faculty Hiring*, 97 COLUM. L. REV. 199 (1997) (discussing possible presence of unconscious bias in law faculty hiring as well as role of affirmative action in overcoming that bias).
In *Johnson v. Transportation Agency*, 480 U.S. 616 (1987), a case decided under Title VII of the Civil Rights Act, the United States Supreme Court upheld a county affirmative action plan that allowed supervisors to consider sex as one factor in promoting employees to positions in which women were significantly underrepresented. The county had adopted the plan, in part, because it believed that "'the selection and appointment processes are areas where hidden discrimination frequently occurs.'" *Id.* at 653 (O'Connor, J., concurring in the judgment) (quoting the county's plan). Indeed, the job history of the woman who secured a promotion with the plan's help confirms that she might have suffered from "hidden discrimination" absent a conscious commitment to affirmative action. *Id.* at 624 n.5 (opinion of the Court) (recounting that one of three panel members who rated applicants for the promotion had earlier refused to issue the female applicant coveralls given to male workers on the same job, while another panel member had referred to the female applicant as "a 'rebel-rousing, skirtwearing person'"). The Court did not focus as explicitly as the European Court of Justice did on this rationale for affirmative action measures, but Johnson strikes some of the same chords as *Marschall*. See *Johnson*, 480 U.S. at 641 n.17 ("'Especially where the job is an unexceptional, middle-level craft position, without the need for unique work experience or educational attainment and for which several well-qualified candidates are available, final determinations as to which candidate is 'best qualified' are at best subjective.'") (quoting Brief for the American Society for Personnel Administration as *Amicus Curiae*).

the 1976 directive on equal treatment, the *Marschall* judgment trains carefully on the EU's undertaking to "promote equal opportunity [...] by removing existing inequalities which affect women's opportunities."[129]

While debate continues over the *efficacy* of affirmative action in the form of preferences, the *legitimacy* of affirmative action has been confirmed in the 1997 Treaty of Amsterdam. Article 119, a bare equal pay provision in the 1957 Rome Treaty, now includes a commitment to "ensuring full equality *in practice* between men and women in working life" [emphasis added].[130] The amended article further provides that "the principle of equal treatment shall not prevent any member state from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers."[131] Antidiscrimination laws in the United States contain no similarly explicit provision.

CONCLUSION

Time and the limits of my own information counsel me to attempt no further comparative side-glances. I will add just a few closing remarks. Affirmative action sends both inspiring and disturbing messages.[132] It has potential, I have tried to emphasize, both to redress deprivations of equality as a civil right, and to promote economic and social well-being. But it also and inevitably generates opposition as an unfair turn of the tables, reverse discrimination against individuals not responsible for society's past discrimination.

Experience in one nation or region may inspire or inform other nations or regions in this area, as generally holds true for human rights initiatives. India's Supreme Court, for example,

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[129] Council Directive, *supra* note 117, art. 2(4). The Union has been equally sensitive to some instances of pregnancy discrimination. See, *e.g.*, Council Directive 92/85, art. 10, 1992 O.J. (L 348) (prohibiting dismissal of workers from beginning of pregnancy through end of maternity leave). In *Dekker v. Stichtung Vormingscentrum voor Jong Volwassenen (VJVCentrum) Plus*, Case C-177/88, 1990 E.C.R. I-3941 (1990), the Court of Justice recognized that "only women can be refused employment on grounds of pregnancy and such a refusal therefore constitutes direct discrimination on grounds of sex." *Id.* at I-3973. Just last summer, the same court ruled that the EU's equal treatment directive precludes dismissal of workers for absences stemming from pregnancy-related illnesses. Case C-394/96, Brown v. Rentokil, Ltd., 1998 E.C.R. I-4185 (1998). The court again stressed that pregnancy affects only women, so that such dismissals constitute sex discrimination.
The U.S. Supreme Court did not reason as clearly when it confronted similar questions during the 1970s. See General Elec. Co. v. Gilbert, 429 U.S. 125, 145-46 (1976) (disability plan excluding pregnancy-related disabilities does not violate Title VII's prohibition against sex discrimination); Geduldig v. Aiello, 417 U.S. 484, 496-97 (1974) (similar plan does not violate constitutional guarantee of equal protection); *id.* at 496 n.20 ("The program divides potential recipients into two groups – pregnant women and nonpregnant persons.").

[130] Treaty of Amsterdam, Oct. 2, 1997, art. 2(22), 4 EUR. UNION L. REP. (CCH) ¶ 25,500, at 10,527 (amending Article 119 of the EC Treaty). The provision will become Article 141 in the consolidated treaty. *Id.* at 10,568; see also *id.* art.2(2),4 EUR. UNION L. REP. (CCH) at 10,515 (amending Article 2 of the EC Treaty) ("The Community shall [...] promote [...] equality between men and women."); *id.*art.2(3),4 EUR. UNION L. REP. (CCH) at 10,516 (amending Article 3 of the EC Treaty) ("In all the activities referred to in this article, the Community shall aim to eliminate inequalities, and to promote equality, between men and women.").

[131] *Id.* art. 2(22), 4 EUR. UNION L. REP. (CCH) at 10,527 (amending Article 119 of the EC Treaty) (to become Article 141 in the new consolidated treaty).

[132] See Robert Gordon, What It Does and What It Says: Equity, Expressive Harm, and Race-Based Affirmative Action 50 (unpublished manuscript, on file with the authors).

has considered United States precedents when judging the constitutionality of affirmative action measures.[133] Defenders of Germany's tie-breaker preferences invoked several international covenants before the European Court of Justice.[134] Opponents of affirmative action, too, have referred to U.S. decisions noting, pointedly, that "affirmative action seems to be [in] a state of crisis in its country of origin."[135]

The same readiness to look beyond one's own shores has not marked the decisions of the court on which I serve. The United States Supreme Court has mentioned the Universal Declaration of Human Rights a spare five times, and only twice in a majority decision.[136] The most recent citation appeared twenty-eight years ago, in a dissenting opinion by Justice Marshall.[137] Nor does the U.S. Supreme Court invoke the laws or decisions of other nations with any frequency. When Justice Breyer referred in 1997 to federal systems in Europe, dissenting from a decision in which I also dissented,[138] the majority responded: "We think such comparative analysis inappropriate to the task of interpreting a constitution."[139]

In my view, comparative analysis emphatically *is* relevant to the task of interpreting constitutions and enforcing human rights. We are the losers if we neglect what others can tell us about endeavors to eradicate bias against women, minorities, and other disadvantaged groups. For irrational prejudice and rank discrimination are infectious in our world. In this reality, as well as the determination to counter it, we all share.

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[133] See, *e.g.*, Indra Sawhney v. Union of India, A.I.R. 1993 S.C. 477, 529-36.
[134] See Case C-409/95, Marschall v. Land Nordrhein-Westfalen, [1998] 1 C.M.L.R. 547, 564-65 (1997) (opinion of Advocate General Jacobs).
[135] Case C-450/93, Kalanke v. Freie Hansestadt Bremen, 1995 E.C.R. I-3051, I-3058 n.10 (1995) (opinion of Advocate General Tesauro); see also Gabriel A. Moens, *Equal Opportunities Not Equal Results: "Equal Opportunity" in European Law After Kalancke* [sic], 23 J. Legis. 43, 55 (1997) (asking "Is the Rehnquist Court to 'Blame' for *Kalancke* [sic]?").
[136] See Dandridge v. Williams, 397 U.S. 471, 520 n.14 (1970) (Marshall, J., dissenting); Zemel v. Rusk, 381 U.S. 1, 14 n.13 (1965); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 161 n.16 (1963); International Ass'n of Machinists v. Street, 367 U.S. 740, 776-77 (1961) (Douglas, J., concurring); American Fed'n of Labor v. American Sash & Door Co., 335 U.S. 538, 549 n.5 (1949) (Frankfurter, J., concurring). Although the Declaration was adopted simply as a resolution of the United Nations General Assembly, and is not binding law, courts in other nations have recognized its importance as a fundamental statement of human rights. See UNITED NATIONS DEPARTMENT OF PUBLIC INFORMATION, THE UNITED NATIONS AND HUMAN RIGHTS, 1945-1995, at 27 (1995).
[137] See Dandridge v. Williams, 397 U.S. 471, 520 n.14 (1970) (Marshall, J., dissenting).
[138] See Printz v. United States, 117 S. Ct. 2365, 2404-05 (1997) (Breyer, J., dissenting).
[139] *Id.* at 2377 n.11 (majority opinion).

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GROWING OUTRAGE *

ABSTRACT

Why and when does outrage grow? This essay, based on the 2018 LSE Behavioural Public Policy Lecture delivered in February 2018, explores two potential answers. The first points to a revision or weakening of social norms, which leads people to express outrage that they had previously suppressed. The second points to a revision or weakening of social norms, which leads people to express outrage that they had not previously felt (and may or may not now feel). The intensity of outrage is often a product of what is most salient. It is also a product of 'normalization'; people compare apparently outrageous behavior to behavior falling into the same category in which it is observed, and do not compare it to other cases, which leads to predictable incoherence in judgments. These points bear on the #MeToo movement of 2017 and 2018 and the rise and fall (and rise again, and fall again) of discrimination on the basis of sex and race (and also religion and ethnicity).

I BEGIN WITH TWO TALES

1. In the late 1980s, when I was a visiting professor at Columbia Law School, I happened to pass, in the hallway near my office, a law student (female) speaking to an older law professor (male). To my amazement, the professor was stroking the student's hair. I thought I saw, very briefly, a grimace on her face. It was a quick flash. When he left, I said to her, "That was completely inappropriate. He shouldn't have done that." Her response was immediate and dismissive: "It's fine. He's an old man. It's really not a problem." Thirty minutes later, I heard a knock on my door. It was the student. She was angry, and she was outraged, and she was in tears. She said, "He does this all the time. It's horrible. My boyfriend thinks I should make a formal com-

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plaint, but I don't want to do that. Please – I don't want to make a fuss. Do not talk to him about it and do not tell anyone."[1]

2. In 2015, I was walking through a cafeteria at my law school when a group of African American students stopped me to ask, "What do you think of the seal?" I had no idea what they were asking about. My immediate thought was that something bad might have happened to a seal – say, at the New England Aquarium – and so I almost asked, "Is the seal ok?" But they were asking about the Harvard Law School seal, which had come from a slave-owner. The seal became the source of considerable local outrage and spurred student protests on a wide variety of race-related issues. It was eliminated in 2016.

My topic here is outrage, its growth, and its relationship to the idea of #MeToo, writ very large. In 2017, that particular hashtag went viral, spurred as it was by disclosures of sexual assault and related behavior by Harvey Weinstein, and also of sexual harassment by a wide range of public figures. Both of the tales just told have #MeToo features, but the dynamics are different. I am acutely aware of the sheer size of the topic, and will mostly restrict myself to two propositions, which the tales respectively exemplify.

The first is that when norms start to collapse or to be revised, people are unleashed, in the sense that *they feel free to reveal what they believe and prefer, to disclose their experiences, and to talk and act as they wish*. If they are outraged, they can disclose that fact. New norms, and laws that entrench or fortify them, lead to the discovery of pre-existing beliefs, preferences, and values. Discovery of the intensity of people's outrage, and even its existence, can be startling, at least to many people.

In various times and places, the women's movement has been an example. The same is true for the civil rights movement of the 1960s, the movement for LGBT rights, and the disability rights movement. It is also true for the pro-life movement. Often an antecedent feeling of humiliation is the foundation for outrage. Once norms are relaxed, outrage can become an immensely powerful force.

The second proposition, exemplified by the second tale, is that revisions of norms can construct preferences and values, leading to an expression of outrage that did not exist before. No one is unleashed. People are changed in ways large or small. They express outrage that they may not actually feel – and if they feel it, it is for the first time. Something like this can be said for the anti-smoking movement, the objections to genetically modified organisms, and the rise of Nazism.

For new or revised norms to be effective, of course, they usually have to be able to attach themselves to pre-existing preferences or values; that is certainly true in my second tale. Outrage about the Harvard Law School seal was connected with pre-existing judgments about race and racism. The only point is that people come to make judgments (whether particular or general) that they did not hold before, and that they had no occasion to suppress (Before 2014, hardly anyone was exercised about the Harvard Law School seal).

[1] What I did, in response to this exchange, is a story for another occasion.

With respect to the phenomenon of unleashing: when certain norms are in force, people falsify their preferences, their values, and their experiences, or are silent about them. As a result, strangers and even friends and family members may not be able to know about them. They may have no idea. People with certain political or religious convictions, or simply painful experiences, might just shut up, even if they are outraged. Once norms are revised, people will reveal pre-existing preferences and values, which norms had successfully suppressed. What was once unsayable is said, and what was once unthinkable is done.

In the context of sexual harassment, something like this account is broadly correct: before the term itself existed, women did not like being harassed, or even hated it, and revision of social norms was necessary to spur expression of their feelings and beliefs (This account is incomplete, and I will complicate it). As we shall see, law often plays a significant role in fortifying existing norms, or in spurring their revision. Part of the importance of judicial rulings that forbid sexual harassment is that they revised norms. Whenever a new leader is elected, or whenever new legislation is enacted, it may have a crucial and even transformative signaling effect, offering people information about what other people think. If people hear the signal, norms may shift, because people are influenced by what they think other people think. Outrage is often fueled in that way.

But some revisions of norms, and the laws that entrench those revisions, do not liberate anything. As norms begin to be altered, people come to hold, or to act as if they hold, preferences and values that they did not hold before. Revisions of norms, and resulting legal reforms, do not uncover suppressed desires. They produce new ones, or at least statements and actions that are consistent with new ones. Outrage can fill a vacuum.

PREFERENCE FALSIFICATION AND NORM ENTREPRENEURS

Jon Elster emphasizes that social norms are "sustained by the feelings of embarrassment, anxiety, guilt, and shame that a person suffers at the prospect of violating them".[2] Elster's quartet is worth underlining: embarrassment, anxiety, guilt, and shame are different from one another. The student at Columbia Law School felt all four.

My central topic here is discrimination. In the simplest cases, the objects of discrimination (emphatically including sexual harassment) are outraged, and the norm prevents them from stating or acting on it. Their beliefs and preferences may even be falsified (as it was when the law student initially assured me that she did not object to what the professor was doing). In that respect, the objects of discrimination are like actors in a play; they are reciting the expected lines. In cases of sex and race discrimination, that is a familiar phenomenon. The legitimation of outrage brings it out of the closet.

In circumstances of this kind, large-scale change is possible. Suppose that many people within a population object to discrimination, but because of existing norms, they do not say or do

[2] Elster, J. (1994), "Rationality, Emotions, and Social Norms", Synthese, 98(1): 21–49. p. 23.

anything. They falsify their preferences.[3] Suppose that the objectors have different thresholds for raising an objection. A few people will do so if even one person challenges or defies the norm; a few more will do so if a few people challenge or defy the norm; still more will do so if more than a few people challenge or defy the norm; and so on. Under the right conditions, and with the right distribution of thresholds, a small spark can ignite a conflagration, eventually dismantling the norm.[4]

There is an important role here for 'norm entrepreneurs', operating in the private or public sector, who oppose existing norms and try to change them. Norm entrepreneurs draw attention to what they see as the stupidity, intrusiveness, or ugliness of current norms. They may insist that many or most people secretly oppose them (and thus reduce pluralistic ignorance, understood as ignorance about what most people actually think). They may describe their experiences. Norm breakers – those who simply depart from existing norms, and refuse to speak or act in accordance with them – may or may not be norm entrepreneurs, depending on whether they seek to produce some kind of social change, or instead wish merely to do as they like.

Norm entrepreneurs might turn out to be effective, at least if the social dynamics work out in their favor. They might be able to signal not only their outrage and personal opposition to the norm, but also the existence of widespread (but hidden) outrage and opposition as well. The idea of a 'silent majority' can be a helpfully precise way to signal such outrage and opposition. Importantly, norm entrepreneurs might also change the social meaning of compliance with the norm: if they succeed, such compliance might suggest a lack of independence and look a bit pathetic, whereas those who defy the norm might seem courageous, authentic, and tough.

THE OUTRAGE HEURISTIC

A number of years ago, I was involved in a series of studies of outrage, punitive intentions, and monetary punishments. Our basic finding was that when ordinary people are thinking about how much to punish people, they use the *outrage heuristic*.[5] They begin by deciding how outrageous the underlying conduct was, and their judgments about punishment build on that decision. We found that people's outrage judgments, on a bounded numerical scale, almost exactly predicted their punitive intentions on the same scale. That means that people are *intuitive retributivists*. Unless prompted, they do not think about optimal deterrence (and even when prompted, they resist the idea).

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[3] The best discussion of the general phenomenon and its importance is Kuran, T. (1997), *Private Truths, Public Lies*, Cambridge: Harvard University Press.

[4] The classic account is Granovetter, M. (1978), 'Threshold Models of Collective Behavior', American Journal of Sociology, 83(6): 1420–1443; the idea is productively extended in Kuran, T., *supra* note 3.

[5] Most of the work was done in collaboration with Daniel Kahneman and David Schkade. For a collection, see Sunstein, C. R. et al. (2007), *Punitive Damages: How Juries Decide*, Chicago: University of Chicago Press.

One of our studies tested the effects of deliberation on both punitive intentions and monetary judgments.[6] The study involved about 3000 jury-eligible citizens; its major purpose was to determine how individuals would be influenced by seeing and discussing the punitive intentions of others. Our central goal was to explore how social interactions heighten outrage.

People were initially asked to record their individual judgments privately, on a bounded scale, and then to join six-member groups to generate unanimous 'punishment verdicts'. Hence, subjects were asked to record, in advance of deliberation, a 'punishment judgment' on a scale of 0–8, where 0 indicated that the defendant should not be punished at all and 8 indicated that the defendant should be punished extremely severely (Recall that outrage judgments on such scales are mirrored by punishment judgments, so we were essentially measuring outrage). After the individual judgments were recorded, jurors were asked to deliberate to a unanimous 'punishment verdict'.

It would be reasonable to predict that the verdicts of juries would be the median of punishment judgments of jurors, but that prediction would be badly wrong. The finding that I want to emphasize here is that deliberation made the lower punishment ratings decrease when compared to the median of pre-deliberation judgments of individual jurors – while deliberation made the higher punishment ratings increase when compared to that same median. When the individual jurors favored little punishment, the group showed a 'leniency shift', meaning a rating that was systematically lower than the median pre-deliberation rating of individual members. That means that when people began with low levels of outrage, deliberation produced lower levels still. But when individual jurors favored strong punishment, the group as a whole produced a 'severity shift', meaning a rating that was systematically higher than the median pre-deliberation rating of individual members. In groups, outrage grows.

OUTRAGE AND GROUP POLARIZATION

What accounts for the leniency shift and the severity shift? The simplest answer lies in the phenomenon of group polarization.[7] This is the pervasive process by which group members end up in a more extreme position in line with the pre-deliberation tendencies of group members. It is now well known that if a group has a defined median position, members will shift toward a more extreme version of what they already think. Consider some examples of the basic phenomenon, which has been found in over a dozen nations:[8] (a) a group of moderately

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[6] Schkade, D. et al. (2000), "Deliberating About Dollars: The Severity Shift", Columbia Law Review, 100(4): 1139–1175.

[7] See Sunstein, C. R. (2009), *Going to Extremes*, Oxford: Oxford University Press.

[8] See Brown, R. (1985), *Social Psychology*, 2nd ed. New York: Free Press, p. 222.
These include the United States, Canada, New Zealand, India, Bangladesh, Germany, and France (see, *e.g.*, Zuber, J. et al. (1992), "Choice Shift and Group Polarization", Journal of Personality and Social Psychcology, 62(1): 50–61 [Germany]; Abrams, D. et al. (1990), "Knowing What To Think By Knowing Who You Are", British Journal of Social Psychology, 29(2): 97–119, p. 112 [New Zealand]). Of course, it is possible that some cultures would show a greater or lesser tendency toward polarization; this would be an extremely interesting area for empirical study.

pro-feminist women will become more strongly pro-feminist after discussion;[9] (b) after discussion, citizens of France become more critical of the United States and its intentions with respect to economic aid;[10] (c) after discussion, whites predisposed to show racial prejudice offer more negative responses to the question of whether white racism is responsible for conditions faced by African–Americans in American cities;[11] and (d) after discussion, whites predisposed not to show racial prejudice offer more positive responses to the same question.[12]

Why does deliberation drive low punishment ratings down and move high punishment ratings up? There are three answers. The first involves the exchange of information within the group. In a group that favors a high punishment rating, group members will make many arguments in that direction and relatively few the other way. Speaking purely descriptively, the group's 'argument pool' will be skewed in the direction of severity. Group members, listening to the various arguments, will naturally move in that direction. The initial dispositions of group members will determine the proportion of arguments in the various directions. And individuals will respond, quite rationally, to what they have heard, thus moving in the direction suggested by the dominant tendency. In this way, outrage breeds more outrage.

The second explanation involves social influences. Most people want to be a certain way and also to be perceived in a certain way. If you are in a group that is outraged and wants to punish someone severely, you might find it uncomfortable to be urging relative leniency. To protect your reputation, and perhaps your self-conception, you might move, if you move at all, in the most favored direction. To be sure, some hardy souls will not move at all, and those who are self-identified contrarians might deliberately move in the opposite direction, rejecting the dominant view just because it is the dominant view. But what we observed, and what is generally observed, is that most of those who move tend to go in the group's preferred direction – and that as a result, the group will be more extreme than its members before deliberation began. With respect to outrage, the lesson is clear. To preserve their preferred self-image, individuals, finding themselves in an outraged group, will tend to become more outraged still.

The third explanation begins by noting that people with extreme views tend to have more confidence that they are right and that as people gain confidence, they become more extreme in their beliefs. The intuition here is simple: those who lack confidence, and who are unsure what they should think, tend to moderate their views. It is for this reason that cautious people, not knowing what to do, are likely to choose the midpoint between relevant extremes. But if other people seem to share one's view, that person is likely to become more confident that that view is right – and hence to move in a more extreme direction.

We can easily see how the third explanation might apply to outrage in particular. Someone has done something that seems wrong. It might be a spouse, who has spoken unkindly, rude-

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[9] See Myers, D. G. (1975), "Discussion-Induced Attitude Polarization", Human Relations, 28(8): 699–714.
[10] Brown, R. (1985), *supra* note 8, p. 224.
[11] Myers, D. G. and G. D. Bishop (1976), "The Enhancement of Dominant Attitudes in Group Discussion", Journal of Personality and Social Psychology, 20(3): 386–391.
[12] *ibid*.

ly, or cruelly. It might be an employer, who has exceeded the appropriate bounds in one or another way. It might be a corporation. It might be a public official. If people are asked about their reactions in their purely individual capacities, they might think: 'not good'. But if they are speaking with one another, they might end up confirming one another's initial instincts, leading to greater confidence and eventually to the thought: 'horrific; intolerable'. A supplemental point involves salience. Discussion of bad conduct will heighten people's attention to it, leading to more intense reactions. What was once a background fact, or part of life's furniture, might become one of the most important things in the world.

NORMALIZATION AND CATEGORIES

Levels of outrage are specific to categories. If someone is very rude on Twitter, at a lunch table, on the highways, in a security line, in a meeting, or in comments on an academic paper, people might see red; it is as if something truly awful has been done. By contrast, some actual crimes (say, shoplifting or in some cases tax evasion) might produce only a modest level of outrage. But on reflection, people would agree that rudeness is less outrageous than criminality (or at least most forms of criminality). In the context of outrage and punishment decisions, our most striking finding is that *people's judgments about cases, taken one at a time, are very different from their judgments about the very same cases, taken in the context of a problem from another category*.[13]

An example: people were asked to assess a case involving personal injury on a bounded punishment scale and also on a monetary scale. People were also asked to assess a case involving financial injury, again on a bounded punishment scale and on a monetary scale. When the two cases are judged in isolation, the financial injury case receives a more severe rating and a higher monetary award. But when the two cases are seen together, there is a significant 'judgment shift', in which people ensure that the financial award is not much higher, and for many respondents is lower, than the personal injury award. In short, people's decisions about the two cases are very different, depending on whether they see the case alone or in the context of a case from another category.

Notice that monetary awards shift, and that outrage (the foundation of intention to punish) shifts as well. Apparently, the level of outrage will differ depending on whether a case is seen in isolation or instead in the context of cases from other categories.

Exactly the same kind of shift is observed for judgments about two problems calling for government regulation and expenditures: skin cancer among the elderly and protection of coral reefs. Looking at the two cases in isolation, people will pay more to protect coral reefs, and register more satisfaction from doing that. But looking at the two cases together, people will be quite disturbed at this pattern, and will generally want to pay more to protect elderly people from cancer. Here, too, there is a significant shift in judgment.

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[13] See Sunstein, C. R. et al. (2002), "Predictably Incoherent Judgments", Stanford Law Review, 54(6): 1153–1215.

Is this a problem? And what accounts for the switch? Consider a preliminary account. When people see a case in isolation, they naturally 'normalize' it by comparing it to a set of comparison cases that it readily calls up. If you are asked, 'Is a Great Dane big or small?', you are likely to respond that it is big; if you are asked, 'Is a Toyota Tercel big or small?', you are likely to respond that it is small. But people are well aware that a Great Dane is smaller than a Toyota Tercel. People answer as they do because a Great Dane is compared with dogs, whereas a Toyota Tercel is compared with cars. So far, so good; in these cases, everyone knows what everyone else means. We easily normalize judgments about size, and the normalization is mutually understood.

In the context of outrage, something similar happens, but it is less innocuous. In general, the level of outrage undergoes a similar process of normalization. If an academic colleague has offended you, for example by saying that your recent work is 'dreadful' and 'should not have been published', you might be extremely outraged, simply because you compare the comments to ordinary collegial behavior, and do not naturally compare them to other sorts of behavior, such as rape and assault. It might take a self-conscious cognitive exercise to decide that the offensive comments are not, in the scheme of things, deserving of a high level of outrage.

When evaluating a case involving financial injury, people apparently 'normalize' the defendant's conduct by comparing it with conduct in other cases *from the same category*. They do not easily or naturally compare that defendant's conduct with conduct from other categories. Because of the natural comparison set, people are likely to be quite outraged by the misconduct, if it is far worse than what springs naturally to mind. The same kind of thing happens with the problem of skin cancer among the elderly. People compare that problem with other similar problems – and conclude that it is not so serious, within the category of health-related or cancer-related problems. So too with personal injury cases (normalized against other personal injury cases) and problems involving damage to coral reefs (normalized against other cases of ecological harm).

The key point is that when a case from another category is introduced, this natural process of comparison is disrupted. Rather than comparing a skin cancer case with other cancers, or other human health risks, people see that it must be compared with ecological problems, which (in most people's view) have a lesser claim to public resources. Rather than comparing a financial injury case to other cases of business misconduct, people now compare it to a personal injury case, which (in most people's view) involves more serious wrongdoing. As a result of the wider view screen, judgments of outrageousness and appropriate punishment shift, often dramatically.

Most of the time, people's failure to use a wide view screen, in thinking about the appropriate degree of outrage, is not damaging. That failure is a way of economizing on thinking. But for law and policy, the process of normalization, and the use of a narrow view screen, produces serious problems. The difficulty is that when people assess cases in isolation, their view screen is narrow, indeed limited to the category to which the case belongs, and that as a result, people produce a pattern of outcomes that makes no sense by their own lights. In other words, the overall set of outcomes is one that people would not endorse, if they were only to

see it as a whole (With respect to outrage, readers can think of their own preferred examples).

PARALLEL WORLDS AND MULTIPLE EQUILIBRIA

It is important to emphasize that with small variations in starting points, and inertia, resistance, or participation at the crucial points, significant changes in statements or in actions may or may not happen. Outrage may fizzle or grow.

Suppose that a community has long had a norm in favor of discrimination on the basis of sexual orientation; that many people in the community abhor that norm; that many others dislike it; that many others do not care about it; that many others are mildly inclined to favor it; and that many others firmly believe in it. If norm entrepreneurs make a public demonstration of opposition to the norm, and if the demonstration reaches those with relatively low thresholds for opposing it, opposition will immediately grow. If the growing opposition reaches those with relatively higher thresholds, the norm might rapidly collapse. In many places in the world, that is exactly what happened in recent decades. But if the early public opposition is barely visible, or if it reaches only those with relatively high thresholds, it will fizzle out, and the norm might not even budge. In many places in the world, that has happened, too.

These are the two extreme cases. We could easily imagine intermediate cases, in which the norm suffers a slow, steady death, or in which the norm erodes but manages to survive. It is for this reason that otherwise similar communities can have multiple equilibria, understood here as apparently or actual stable situations governed by radically different norms. After the fact, it is tempting to think that because of those different norms, the communities are not otherwise similar at all, and to insist on some fundamental cultural difference between them. But that thought might well be a product of an illusion, in the form of a failure to see that some small social influence, shock, or random event was responsible for the persistence of a norm in one community and its disintegration in another.

Some of the most interesting work on social influences involves the existence of informational and reputational 'cascades'; this work has obvious relevance to the growth of outrage.[14] A starting point is that when individuals lack a great deal of private information (and sometimes even when they have such information), they are attentive to the information provided by the statements or actions of others. If A is unaware whether genetic modification of food is a serious problem, he may be moved in the direction of alarm if B seems to think that alarm is justified. If A and B believe that alarm is justified, C may end up thinking so too, at least if she lacks independent information to the contrary. If A, B, and C believe that genetic modification of food is a serious problem, D will have to have a good deal of confidence to reject their shared conclusion. The result of this process can be to produce cascade effects, as large groups of people eventually end up believing something simply

[14] See Bikhshandani, S., D. Hirshleifer, and I. Welch (1992), "A Theory of Fads, Fashion, Custom, and Cultural Change as Informational Cascades", Journal of Political Economy, 100(5): 992–1096.

because other people seem to believe it too. It should be clear that cascade effects may occur, or not, depending on seemingly small factors, such as the initial distribution of beliefs, the order in which people announce what they think, and people's thresholds for abandoning their private beliefs in deference to the views announced by others.

Though the cascades phenomenon has been discussed largely in connection with factual judgments, the same processes are at work for norms; we can easily imagine outrage cascades (information-induced or otherwise), which may well produce social change and legal reform.[15] Some such cascades may be a product of information; some may involve values. Suppose, for example, that A believes that discrimination against transgender people is wrong, that B is otherwise in equipoise but shifts upon hearing what A believes, that C is unwilling to persist in his modest approval of discrimination against transgender people when A and B disagree; it would be a very confident D who would reject the moral judgments of three (apparently) firmly committed others. In such contexts, many people, lacking firm convictions of their own, may end up believing what (relevant) others seem to believe.

Stylized as the example is, changes in social attitudes toward smoking, recycling, and sexual harassment have a great deal to do with these effects. And here as well, small differences in initial conditions, in thresholds for abandoning private beliefs because of reputational pressures, and in who hears what when, can lead to major differences in outcomes. And again: after the fact, it may all seem inevitable, a product of historical forces, even if serendipity played an essential role.

A 'DOWN LOOK'

For discrimination, of course, it is too simple to say that its objects are opposed and suppress their outrage. When discrimination is widespread, and when existing norms support it, its objects might see it as part of life's furniture. That metaphor buries a lot of complexity. Sometimes people may feel hurt or burdened, but their sense of pain or injury may not be transformed into a claim or even a feeling of injustice. Some preferences are adaptive; they are a product of existing injustice. If a victim of sexual harassment genuinely believes that 'it's not a big deal', it might be because it's most comfortable or easiest to believe that it's not a big deal. There is a spectrum here, from real pain (but still, it's not a big deal) to a feeling that it is just life (and not really painful).

Consider Gordon Wood's account of the pre-revolutionary American colonies, when "common people" were "made to recognize and feel their subordination to gentlemen," so that those "in lowly stations […] developed what was called a 'down look'," and "knew their

[15] An intriguing wrinkle is that when a cascade gets going, people might underrate the extent to which those who join it are reacting to the signals of others, and not their own private signals. For that reason, they might see the cascade as containing far more informational content than it actually does (see Eyster, E. and M. Rabin (2010), "Naïve Herding in Rich-Information Settings", American Economic Journal: Microeconomics, 2(4): 221–243. Eyster, E., M. Rabin and G. Weizsacker (2015), An Experiment on Social Mislearning. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2704746 [Accessed: 10 November 2020]). Norm entrepreneurs have a strong interest in promoting this mistake.

place and willingly walked while gentlefolk rode; and as yet they seldom expressed any burning desire to change places with their betters".[16] In Wood's account, it is impossible to "comprehend the distinctiveness of that premodern world until we appreciate the extent to which many ordinary people *still accepted their own lowliness* [emphasis added]".[17] (Is Wood right? Did they really accept their own lowliness? It's hard to know – but let's bracket that point).

Wood urges that as republicanism took hold, social norms changed, and people stopped accepting their own lowliness. His account is one of an outrage cascade, but not as a result of the revelation of pre-existing preferences. With amazement, John Adams wrote that "Idolatry to Monarchs, and servility to Aristocratical Pride, was never so totally eradicated from so many Minds in so short a Time".[18] David Ramsay, one of the nation's first historians (himself captured by the British during the American Revolution), marveled that Americans were transformed "from subjects to citizens," and that was an "immense" difference, because citizens "possess sovereignty. Subjects look up to a master, but citizens are so far equal, that none have hereditary rights superior to others".[19] Thomas Paine put it this way: "Our style and manner of thinking have undergone a revolution more extraordinary than the political revolution of a country. We see with other eyes; we hear with other ears; and think with other thoughts, than those we formerly used".[20]

Adams, Ramsay, and Paine appear to be speaking of new preferences, beliefs, and values, rather than the revelation of suppressed ones. In their account, nothing is unleashed. How new preferences arise remains imperfectly understood. While the framework of preference falsification and unleashing captures much of the territory I am exploring, it is complemented by situations in which adaptive preferences are altered by new or revised norms.

There are also intermediate cases, involving what might be called *partially adaptive preferences*. Objects of discrimination may not exactly accept discrimination. As noted, they might feel pain or a burden. They might live with it, and do so with a degree of equanimity, thinking that nothing can be done. It is not a lot of fun to beat your head against the wall. In cases of partially adaptive preferences, objects of discrimination are not like actors in a play; they are not falsifying their preferences. They hear a small voice in their heads. They might even feel outrage, but it simmers. Once norms change, some inchoate belief or value might be activated that was formerly suppressed, or that was like that small voice. It is fair enough to speak of liberation, but the case is not as simple as that of the law student at Columbia.

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[16] Wood, G. (1998), *The Radicalism of the American Revolution*, Rev. ed. New York: Vintage Books, pp. 29-30.
[17] *ibid*.
[18] *ibid*, p. 169.
[19] *ibid*.
[20] Paine, T. (1908), "Letter to the Abbe Raynal", In D. E. Wheeler (ed), Life and Writings of Thomas Paine, New York: Vincent Parke and Company, p. 242.

LIBERATING OUTRAGE

Some norms reduce discrimination, but others increase it. Suppose that people have antecedent hostility toward members of social groups; suppose that social norms constrain them from speaking or acting in ways that reflect that hostility. On one view, this is the good side of 'political correctness'; it prevents people from expressing ugly impulses. But norms that constrain sexism and racism are of course stronger in sometimes and places than in others, and they can be relaxed or eliminated. In the aftermath of the election of President Donald Trump, many people fear that something of this kind has happened (and are fearing that it continues to happen). The basic idea is that President Trump is a norm entrepreneur; he is shifting norms in such a way as to weaken or eliminate their constraining effects. He is allowing people to express their real concerns, including their sense of outrage. It is difficult to test that proposition in a rigorous way, but consider a highly suggestive experiment.

Leonardo Bursztyn of the University of Chicago, Georgy Egorov of Northwestern University, and Stefano Fiorin of the University of California at Los Angeles attempted to test whether President Trump's political success affects Americans' willingness to support, in public, a xenophobic organization.[21] Two weeks before the election, Bursztyn and his colleagues recruited 458 people from eight states that the website Predictwise said that Trump was certain to win (Alabama, Arkansas, Idaho, Nebraska, Oklahoma, Mississippi, West Virginia, and Wyoming). Half the participants were told that Trump would win. The other half received no information about Trump's projected victory.

All participants were then asked an assortment of questions, including whether they would authorize the researchers to donate $1 to The Federation for American Immigration Reform, accurately described as an anti-immigrant organization whose founder has written, "I've come to the point of view that for European–American society and culture to persist requires a European–American majority, and a clear one at that".[22] If participants agreed to authorize the donation, they were told that they would be paid an additional $1. Half the participants were assured that their decision to authorize a donation would be anonymous. The other half were given no such assurance. On the contrary, they were told that members of the research team might contact them, thus suggesting that their willingness to authorize the donation could become public.

For those who were not informed about Trump's expected victory in their state, giving to the anti-immigration group was far more attractive when anonymity was assured: 54% authorized the donation under cover of secrecy as opposed to 34% when the authorization might become public. But for those who were informed that Trump would likely win, anonymity did not matter at all. When so informed, about half the participants were willing to authorize the donation regardless of whether they received a promise of anonymity.[23] The central point is that information about Trump's expected victory altered social norms, making many peo-

[21] Bursztyn, L., G. Egorov and S. Fiorin (2017), From Extreme to Mainstream: How Social Norms Unravel. Available at: http://www.nber.org/papers/w23415 [Accessed: 10 November 2020].
[22] *ibid*, p. 14.
[23] Bursztyn, L., et al (2017). *supra* note 21.

ple far more willing to give publicly and eliminating the comparatively greater popularity of anonymous endorsements.

As an additional test, Bursztyn and his colleagues repeated their experiment in the same states during the first week after Trump's election. They found that Trump's victory also eliminated the effects of anonymity – again, about half the participants authorized the donation regardless of whether the authorization would be public. The general conclusion is that if Trump had not come on the scene, many Americans would refuse to authorize a donation to an antiimmigrant organization unless they were promised anonymity. But with Trump as president, people feel liberated. Anonymity no longer matters, apparently because Trump's election has weakened the social norm against supporting anti-immigrant groups. It is now more acceptable to be known to agree "that for European–American society and culture to persist requires a European– American majority, and a clear one at that".[24]

The central finding can be seen as the mirror image of the tale of the law student and the law professor. For a certain number of people, hostility to anti-immigrant groups is a private matter; they do not want to voice that hostility in public. But if norms are seen to be weakening or to be shifting, they will be willing to give voice to their beliefs.

We can easily imagine much uglier versions of the central finding. When police brutality increases, when hateful comments or actions are directed at members of certain religious groups, when white supremacy marches start, when ethnic violence breaks out, when mass atrocities occur, and when genocide is threatened, one reason is the weakening or transformation of the social norms that once made the relevant actions unthinkable.

INTERNALIZED NORMS

My emphasis has been on situations in which people have an antecedent sense of outrage, whose expression a norm blocks; revision of the norm liberates them, so that they can talk or act as they wish. I have also noted that some norms are internalized, so that people do not feel chained at all. Once the norm is revised, they speak or act differently, perhaps expressing outrage, either because they feel constrained by the new norm to do that, or because their preferences and values have actually changed. Orwell's Nineteen Eighty-Four is a chilling tale of something like that, with its terrifying closing lines: "But it was all right, everything was all right, the struggle was finished. He had won the victory over himself. He loved Big Brother"[25].

That is the dark side. But return to the case of sexual harassment. Many men are appalled by the very thought of sexual harassment. They endorse, and do not feel constrained by, norms against it. For them, norms and legal rules against sexual harassment are not a problem, any more than norms and legal rules against theft and assault are a problem. For such men, we do not have cases of preference falsification. For some of them, it might be clarifying to speak

[24] Bursztyn, L., et al (2017). *supra* note 21, p. 14.
[25] Orwell, G. (1949), *Nineteen Eighty-Four*, New York: Signet, p. 289.

of adaptive preferences. But it is better to say that the relevant people are committed to the norm, so that defying it would not merely be costly; it would be unthinkable.

Something similar can be said for many actions that conform to social norms. Most people are not outraged by the nonexistence of a social norm against dueling. For many people, seatbelt buckling and recycling are not properly characterized as costs; they are a matter of routine, and for those who buckle their seatbelts or recycle, the relevant actions may well be taken as a net benefit. When the social norm is one of considerateness,[26] those who are considerate usually do not feel themselves to be shackled; they want to be considerate. When this is so, the situation will be stable; norm entrepreneurs cannot point to widespread, but hidden, outrage or dissatisfaction with the norm. But for both insiders and outsiders, it will often be difficult to distinguish between situations in which norms are internalized and situations in which they merely seem to be. That is one reason that stunning surprises are inevitable.[27]

ACKNOWLEDGMENTS

This essay draws on, and can be seen as a companion piece to, Cass R. Sunstein, *Unleashed*, Social Research.[28] I am grateful to the editors of Social Research for permission to draw on that essay here.

[26] Ullmann-Margalit, E. (2017), *Normal Rationality*, Oxford: Oxford University Press.

[27] Recall that another reason for unpredictability involves interdependencies among agents, which can produce changes that cannot be anticipated in advance. Lohmann, S. (2000), "I Know You Know He or She Knows We Know You Know They Know: Common Knowledge and the Unpredictability of Informational Cascades", In D. Richards (ed), *Political Complexity: Nonlinear Models of Politics*, Ann Arbor: University of Michigan Press.

[28] Cass R. Sunstein (2018), "Unleashed", Social Research: An International Quarterly Johns Hopkins University Press Volume 85, Number 1, Spring 2018. pp. 73-92.

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THE EUROPEAN COURT OF HUMAN RIGHTS IN A NEW REALITY: DOES IT HAVE SUFFICIENT PROCEDURAL INFRASTRUCTURE TO DEAL WITH ARMED CONFLICTS?

ABSTRACT

Over the last decades, the European Court of Human Rights had to deal with a large number of individual and interstate cases related to armed conflicts. Despite the fact that its original mandate was not designed for such type of cases, the ECtHR plays a significant role in enforcing the European Convention of Human Rights in armed conflict and, in certain cases, the international humanitarian law. The ECtHR's increased involvement in armed conflict cases is urged by the lack of special enforcement judicial forum for IHL. Leaving aside the jurisdictional, mandate-related and conceptual legal questions arising from the ECtHR's involvement in armed conflict, this article aims to demonstrate that the ECtHR is sufficiently equipped with adequate procedural infrastructure to ensure effective response to numerous applications alleging human rights violations occurred during an armed conflict.

INTRODUCTION

As of 2020, the European Court of Human Rights (hereinafter, 'the ECtHR' or 'the Court'), which was created to address human rights violations during peacetime, is flooded by cases related to armed conflicts,[1] which are *primarily* (albeit, not exclusively) regulated by international humanitarian law (hereinafter, the 'IHL')[2] and not by the European Convention on Human Rights (hereinafter 'the Convention'),[3] as such. Despite the detailed *corpus juris* of IHL, it lacks a special *judicial* enforcement mechanism on regional or international level.[4]

* The author would like to thank the Editorial Board of the Journal of Constitutional Law for their kind review of the earlier draft of this paper and for their valuable suggestions and comments.

[1] For a general overview of the relevant case law, see 'Factsheet – Armed conflicts' (March 2020), Press Unit of the European Court of Human Rights <https://www.echr.coe.int/Documents/FS_Armed_conflicts_ENG.pdf> accessed 14 April 2020.

[2] The main framework of IHL consists of so-called Hague Conventions of 1907, Geneva Conventions of 1949 with their Additional Protocols of 1977 and customary IHL.

[3] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).

[4] On the necessity of such mechanism, see Jann K. Kleffner and Liesbeth Zegveld, 'Establishing an Individual Complaints Procedure for Violations of International Humanitarian Law' (2000) 3 YIHL 384. For an overview

This weakness of IHL has urged victims of armed conflicts to make recourse to international human rights mechanisms, including the ECtHR, to adjudicate alleged violations during armed conflicts.[5]

While much ink has been spilled on the relationship between IHL and international human rights law (hereinafter, the 'IHRL') during last 50 years,[6] analysing IHRL courts' actual engagement with armed conflicts and their role in enforcement of IHL through their developed machinery is drawing more attention from academics,[7] as well as from the Convention system itself.[8] Most of these debates focus on jurisdictional and methodological uncertainties these mechanisms face when they confront cases related to armed conflicts, since none of them are expressly mandated to apply IHL,[9] including the ECtHR.[10]

In 1994, Professor Kamminga raised the question whether the Convention was sufficiently equipped to deal with gross and systematic violations.[11] The conclusion, based on the failure of the Convention system to respond to the applications from Cyprus and Turkey, gave the negative answer to that question, summarizing that '[t]he more serious and widespread the violations, the less adequate has been the response.'[12] This conclusion, which may have been the plausible answer by 1994, needs re-evaluation due to the major developments under the Convention system: firstly, in 1998 Protocol 11 to the Convention[13] entered into force,

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of the initiatives to establish IHL enforcement mechanisms, see Gerd Oberleitner, *Human Rights in Armed Conflict: Law, Practice, Policy* (CUP 2015) 318-20.

[5] The present article employs the notion of 'armed conflict' with respect to situations, which, due their intensity and organization of the parties, can be *objectively* qualified as an armed conflict under IHL, notwithstanding the views of parties to the conflict or absence of judicial assessment by national or international courts.

[6] For some of the recent scholarship on this topic, see Paul De Hert, Stefaan Smis, Mathias Holvoet (eds), *Convergences and Divergences between International Human Rights, International Humanitarian and International Criminal Law* (Intersentia 2018); Erika de Wett and Jann Kleffner (eds), *Convergence and Conflicts of Human Rights and International Humanitarian Law in Military Operations* (Pretoria University Law Press 2014); Orna Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law* (OUP 2011).

[7] See Gerd Oberleitner, 'The Development of IHL by Human Rights Bodies' in Ezequiel Heffes, Marcos D. Kotlik and Manuel J. Ventura (eds), *International Humanitarian Law and Non-State Actors: Debates, Law and Practice* (TMC Asser Press 2020); Dominic Steiger, 'Enforcing International Humanitarian Law through Human Rights Bodies' in Heike Krieger (ed), *Inducing Compliance with International Humanitarian Law: Lessons from the African Great Lakes Region* (CUP 2015).

[8] See Report on the place of the European Convention on Human Rights in the European and international legal order, adopted by the CDDH at its 92nd meeting (26–29 November 2019) 72-80 <https://rm.coe.int/steering-committee-for-human-rights-cddh-cddh-report-on-the-place-of-t/1680994279> accessed 14 April 2020.

[9] The only exception is the Committee on the Rights of the Child, which can consider IHL under the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict.

[10] Although the Court's *ratione materiae* jurisdiction extends to 'all matters concerning the interpretation and application of the Convention and the Protocols thereto' (article 32 of the Convention), some provisions of the Convection, such as article 7 and article 15, indirectly authorizes the Court to refer to international law, including IHL. The Court also heavily relies on general rules of treaty interpretation and interprets the provision of the Convention 'in so far as possible in light of the general principles of international law, including the rules of international humanitarian law', *Varnava and Others v Turkey* [GC] App no 16064/90 (ECtHR, 18 September 2009) para 185.

[11] Menno T. Kamminga, 'Is the European Convention on Human Rights Sufficiently Equipped to Cope with Gross and Systematic Violations?' [1994] 2 NQHR 153.

[12] *ibid* 163.

[13] Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby, ETS No.155 (Protocol 11).

which transformed the entire monitoring system of the Convention; secondly, by 1994 the ECtHR had encountered the nascent case law of armed conflict cases, being in a diametrically different situation as compared to the current one; and finally, the Court adopted new procedures in its Rules of Court, which had not been discussed even in the 1990-ies.

Leaving aside mandate-related and conceptual legal questions arising from the ECtHR's approach to IHL,[14] the present article will analyse to what extent the Court has practical procedural readiness and what its options are when it confronts the applications from armed conflicts. The central assertion is that the ECtHR, which has directly applied IHL on an exceptional basis,[15] has efficient *primary* and *secondary* procedural infrastructure to ensure effective response to human rights violations committed in armed conflicts. In regard of *primary* procedures, the Convention is enforced by both individual and interstate applications.[16] As for the *secondary* procedural tools, the author argues that the Court can utilise its secondary procedural tools to ensure the effective response to armed conflict cases in a broad manner. Such tools, author submits, are the following features of the Court's judicial operation: duty of the parties to cooperate with the Court; fact-finding and investigation by the Court; interim measures; pilot judgment procedure and 'principal' judgments; coordination of individual and interstate applications related to the same situation, and the ability to award reparations through 'just satisfaction'.

1. PROCEDURE OF INDIVIDUAL APPLICATION IN ARMED CONFLICTS

One of the main weaknesses of IHL is its enforcement, particularly the absence of an individual procedure to lodge an application.[17] IHRL, on the other hand, can change this situation by engaging its judicial organs in providing redress to individual victims of an armed conflict.

The ECtHR enjoys highly developed procedural framework for individual applications. According to article 34 of the Convention, it may receive applications from any person, non-

[14] See *e.g.* Cedric De Koker, 'The European Court of Human Rights' Approach to Armed Conflict and Humanitarian Law: Ivory Tower or Pas De Deux?' in Paul De Hert (n 6). Linos-Alexandre Sicilianos, 'Les Relations entre Droits de L'homme et Droit International Humanitaire dans la Jurisprudence de la Cour Européenne des Droits de L'homme' in James Crawford and others (eds), *The International Legal Order: Current Needs and Possible Responses - Essays in Honour of Djamchid Momtaz* (Brill Nijhoff 2017).

[15] The most obvious example of direct application and enforcement of IHL by the ECtHR is its widely discussed case of *Hassan v UK* [GC] App no 29750/09 (ECtHR, 16 September 2014). For further analysis of this case see Andreas von Arnauld, 'An Exercise in Defragmentation: The Grand Chamber Judgment in Hassan v UK' in Robin Geiß and Heike Krieger, *The 'Legal Pluriverse' Surrounding Multinational Military Operations* (OUP 2020); Robin Geiß, 'Toward the Substantive Convergence of International Human Rights Law and the Laws of Armed Conflict: *The Case of Hassan v. the United Kingdom*' in Leila Nadya Sadat (ed), *Seeking Accountability for the Unlawful Use of Force* (CUP 2018).

[16] ECHR (n 3) arts 33 and 34.

[17] Although article 3 of the Hague Convention (IV) and article 91 of the Additional Protocol I to the Geneva Conventions envisage liability to 'pay compensation' for violations of laws of armed conflict, none of these provisions establish individual cause of action to seek reparations. See *e.g.* Marco Sassòli, *International Humanitarian Law: Rules, Solutions to Problems Arising in Warfare and Controversies* (Edward Elgar Publishing 2019) 92.

governmental organisation or group of individuals, who claims to be the victim of a violation of the rights set forth in the Convention. This article entitles persons to start litigation against a state at the international level.[18] Although initially this mechanism was intended as a voluntary option,[19] nowadays it is 'a key component of the machinery for protecting the rights and freedoms set forth in the Convention'[20] and 'one of the fundamental guarantees of the effectiveness of the Convention system'.[21]

1.1. 'VICTIM' REQUIREMENT IN INDIVIDUAL CASES

To enjoy 'a real right of action'[22] under individual application, two elements shall be present. An applicant shall be: 'person, nongovernmental organisation or group of individuals' and 'the victim of a violation.'[23] The first element is not problematic in practice. With regard to being 'the victim of a violation', the Court refuses to apply this criterion 'in a rigid, mechanical and inflexible way'[24] or by 'excessive formalism'.[25] This approach by the Court resulted in establishing three categories of victims: (1) direct victim - person directly affected by the act or omission;[26] (2) indirect victim – when specific and personal connection exists between the victim and applicant;[27] and (3) potential victim – in exceptional circumstances the Court may rule that applicant may become the victim of the Convention violation in future.[28] More importantly, the notion of 'victim' is subject to autonomous interpretation, interpreted by the Court irrespective of domestic concepts.[29]

Such flexible interpretation of 'victim' ensures for authors of armed conflict related applications to easily seize the Court: direct and indirect victims cover both types of applicants, those who are direct victims of military operations during armed conflict and those applicants who seize the Court on behalf of their dead relatives or family members. The latter would not be possible without the notion of 'indirect victim'. Additionally, autonomous interpretation of 'victim' further enables applicants to submit their allegations to the Court, as in armed conflict situations, due to various political or procedural obstacles, it would not often be feasible for applicants to be granted victim status pursuant to their domestic legislation, which would deprive individuals from 'a real right of action'.[30]

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[18] Alastair Mowbray, 'The European Convention on Human Rights' in Mashood A. Baderin, Manisuli Ssenyonj (eds), *International Human Rights Law: Six Decades after the UDHR and Beyond* (Ashgate Publishing 2010) 271, 288.
[19] In the original text of the Convention, article 25 stated that the Commission could receive petitions from any person, non-governmental organisation or group of individuals claiming to be the victim, provided that a State Party against which the complaint had been lodged had declared that it recognized the competence of the Commission to receive such petitions. This regime was cancelled by Protocol 11.
[20] *Mamatkulov and Abdurasulovic v Turkey* App nos 46827/99, 46951/99 (ECtHR, 6 February 2003) para 122.
[21] *ibid* para 100.
[22] *ibid* para 122.
[23] *Vallianatos and Others v Greece* [GC] App no 29381/09 (ECtHR, 7 November 2013) para 47.
[24] *Micallef v Malta* [GC] App no 17056/06 (ECtHR, 15 October 2009) para 45.
[25] *Gorraiz Lizarraga and Others v Spain* App no 62543/00 (ECtHR, 27 April 2004) para 38.
[26] *Amuur v France* App no 19776/92 (ECtHR, 25 June 1996) para 36.
[27] See *e.g. Varnava* (n 10) para 112.
[28] See *e.g. Klass and Others v Germany* (1978) Series A no 28.
[29] *Gorraiz Lizarraga* (n 25) para 35.
[30] As Weill observes, national courts are usually reluctant or unwilling to adjudicate cases relating to active

1.2. ADMISSIBILITY CRITERIA OF INDIVIDUAL APPLICATIONS: EXHAUSTION OF ALL DOMESTIC REMEDIES IN ARMED CONFLICT CASES

Article 35 of the Convention sets forth the requirements that must be met to authorize the Court to deal with the applications on merits. The Court will proceed with the applications provided that an applicant has exhausted all effective domestic remedies and an application is submitted to the Court within six months after the final domestic decision.[31] It may refuse to examine the case on other grounds as well.[32] It had been often argued that human rights mechanisms are not designed to effectively cope with massive violations of human rights in armed conflicts because it is difficult to reconcile the conditions of armed conflict with the admissibility procedures they are following, in particular exhaustion of all domestic remedies and a so called six-month rule.[33]

This argument has lost its persuasiveness in light of the Court's case law. The Court and the former European Commission have on various occasions held that requirement of exhaustion of domestic remedies should be applied in a flexible manner, without excessive formalism.[34] This requirement is subject to 'certain reservations', rendering this rule more operational, which is of significant importance in armed conflict cases.[35] Exhaustion of domestic remedies in armed conflict cases is not feasible, pushing the Court to relax this admissibility criterion for victims of military operations.[36]

In this regard, the case of *Akdivar* is of precedential value. It concerned destruction of the applicants' houses during the 'serious disturbances' in the South-East of Turkey between the security forces and the members of the Workers' Party of Kurdistan (PKK).[37] In this context, the Court held that there is no obligation to exhaust those remedies which are inadequate or ineffective, or where an administrative practice makes domestic proceedings futile or ineffective.[38] However, the Court expressly emphasised that this finding was confined to the particular circumstances of the case. Consequently, the Court, on one hand, remained loyal

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hostilities by the government armed forces. See Sharon Weill, *The Role of National Courts in Applying International Humanitarian Law* (OUP 2014) 153-155. Therefore, it is conceivable that persons who are actual victims of government's military operations may not be granted victims status under national legislation by domestic courts.

[31] ECHR (n 3) art 35(1).

[32] *ibid* art 35, paras (2)-(3). Pursuant to these paragraphs, the Court will dismiss anonymous applications; applications which has already been adjudicated by the Court or is simultaneously submitted to other international body; applications which concern matters out of the material scope of the Convention or its Protocols; unsubstantiated applications; application which are abuse of such right and applications which allege non-significant damage. These grounds are less relevant for the present article and will not be discussed.

[33] Dietrich Schindler, 'Human Rights and Humanitarian Law: Interrelationship of the Laws' (1982) 31 Am.U.L.Rev. 935, 941.

[34] *Ringeisen v Austria* (1971) Series A no 13 para 89; *Lehtinen v Finland* (dec.) App no 34147/96 (ECtHR, 27 January 2004).

[35] Lutz Oette, 'Bringing Justice to Victims? Responses of Regional and International Human Rights Courts and Treaty Bodies to Mass Violations' in Carla Ferstman, Mariana Goetz and Alan Stephens (eds) *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making* (Brill Nijhoff 2009) 225-26.

[36] Christine Byron, 'A Blurring of the Boundaries: The Application of International Humanitarian Law by Human Rights Bodies' (2007) 47(4) Va.J.Int'l L. 839, 884-5.

[37] *Akdivar and Others v Turkey* [GC] ECHR 1996-IV.

[38] *ibid* para 67.

to traditional application of this rule and, on the other hand, by utilising this 'new procedural approach',[39] made it possible to declare cases stemming from South-East of Turkey admissible.[40]

Relying on the requirement to exhaust all domestic remedies was the main strategic argument by Russia in the cases related to armed conflict in Chechnya. However, the Court employed a 'realistic approach'[41] and, with reference to *Akidivar*'s reasoning,[42] formed 'a reasonably clear and settled opinion that neither civil nor criminal domestic remedies have, in practice, proved capable of providing effective redress in respect of cases of egregious human rights violations committed by state agents in Chechnya.'[43]

2. INTERSTATE APPLICATIONS: MORE FLEXIBLE THAN INDIVIDUAL APPLICATIONS?

In accordance with article 33 of the Convention, any state party of the Convention may refer to the Court any alleged breach of the provisions of the Convention and the Protocols thereto by another state party. This article guarantees the right to start interstate litigation and is another important mechanism to seek redress for human rights violation in armed conflict. Interstate proceedings, which is a less-known side of the jurisdiction of the Court,[44] is often described as a mean of 'collective enforcement' of the Convention.[45] Although the Court is known for its efficiency in deciding individual applications, at the time of entry into force of the Convention, only interstate application was mandatory in the sense that the right to start interstate litigation was the automatic result of the Convention's membership,[46] whereas the procedure of individual applications as it exists today came into effect only in 1998.[47]

Interstate cases mainly concern the situations when a state espouses the claims of individuals in the context of widespread violations of the Convention,[48] what is particularly illustrated by the applications lodged by Georgia[49] and Ukraine[50] against Russia.[51] Besides, the Court is

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[39] Onder Bakircioglu and Brice Dickson, 'The European Convention in Conflicted Societies: The Experience of Northern Ireland and Turkey' (2017) 66 ICLQ 263, 265, 280-281.
[40] Hans-Joachim Heintze, 'The European Court of Human Rights and the Implementation of Human Rights Standards during Armed Conflicts' (2002) 45 GYIL 59, 71-72.
[41] Federico Sperotto, 'Law in Times of War: The Case of Chechnya' (2008) 8(2) Global Jurist, 17-18.
[42] See *e.g. Baysayeva v Russia* App no 74237/01 (ECtHR, 5 April 2007) paras 103-09; *Isayeva, Yusupova and Bazayeva v Russia* App nos 57947/00, 57948/00, 57949/00 (ECtHR, 24 February 2005) paras 143-151.
[43] Philip Leach, 'The Chechen Conflict: Analysing the Oversight of the European Court of Human Rights' (2008) 6 EHRLR 732, 739.
[44] Dean Spielmann, 'The European Court of Human Rights as Guarantor of a Peaceful Public Order in Europe' (7 November 2014) <https://echr.coe.int/Documents/Speech_20141107_Spielmann_GraysInn.pdf> accessed 14 April 2020.
[45] *Austria v Italy* App no 788/60 (Commission Decision, 11 January 1961) 138; *Cyprus v Turkey* App no 25781/94 (Commission Report, 4 June 1999) para 70.
[46] William A. Schabas, *The European Convention on Human Rights: A Commentary* (OUP 2015) 723.
[47] See, *supra*, note 19.
[48] See *e.g. Greece v UK* (dec.) App no 176/56 (Commission Decision, 2 June 1956); *Ireland v UK* (1978) Series A no 25. See also *Cyprus v Turkey* (just satisfaction) [GC] App no 25781/94 (ECtHR, 12 May 2014).
[49] *Georgia v Russia (I)* [GC] App no 13255/07 (ECtHR, 3 July 2014); *Georgia v Russia (II)* (dec.) App no 38263/08 (ECtHR, 13 December 2011); *Georgia v Russia (III)* (dec.) App no 61186/09 (ECtHR, 16 March

often involved in 'quasi-interstate' applications where sensitive political issues are at stake, urging the states to intervene in the proceedings as a third party.[52]

2.1. LESS ADMISSIBILITY REQUIREMENTS FOR INTERSTATE APPLICATIONS

Interstate applications, according to article 35 of the Convention, are subject only to two admissibility requirements: six-month rule and exhaustion of all domestic remedies.[53] However, the Court is still able to dismiss applications 'under general principles governing the exercise of jurisdiction by international tribunals' on the grounds of territorial, subject-matter, personal and temporal jurisdiction.[54]

Six-month rule is applied in the same manner in both types of applications.[55] It does not apply to a continuing situation and is calculated from the date of the act or decision which is said not to comply with the Convention, where domestic remedies do not exist.[56] The requirement of exhaustion of domestic remedies is affected by existence of *administrative practice.*

2.2. ADMINISTRATIVE PRACTICE IN INTERSTATE CASES: WHEN DOES NOT EXHAUSTION OF DOMESTIC REMEDIES APPLY?

The rule does not apply if administrative practice is present, i.e. 'where the applicant state complains of a practice as such, with the aim of preventing its continuation or recurrence, but does not ask the Court to give a decision on each of the cases put forward as proof or illustrations of that practice'.[57] The Court has also explained the essence of administrative practice, setting out that it involves two distinct elements: a repetition of acts and official tolerance.[58]

2010); *Georgia v Russia (IV)* App no 39611/18 (22 August 2018).

[50] There are currently five *Ukraine v Russia* interstate applications before the Court: *Ukraine v Russia (re Crimea)* App no 20958/14; Ukraine v Russia (re Eastern Ukraine) App no 8019/16; Ukraine v Russia (II) App no 43800/14; *Ukraine v Russia (VII)* App no 38334/18 and *Ukraine v Russia (VIII)* App no 55855/18.

[51] In this respect, of particular interest are the cases of *Georgia v Russia (II)*, concerning 2008 august international armed conflict between Russia and Georgia and *Ukraine v Russian Federation (re Crimea)* and *Ukraine v Russian Federation (re Eastern Ukraine)*, concerning military operations by Russia and armed groups allegedly under its control in the Ukrainian territory.

[52] 'Background Paper for Seminar Opening of the Judicial Year January 2016', 18 <https://www.echr.coe.int/Documents/Seminar_background_paper_2016_part_1_ENG.pdf> accessed 14 April 2020 (Background Paper).

[53] Paragraph 1 of Article 35, which refers only to six-month rule and exhaustion of remedies, applies to both individual and interstate applications. Contrary to this, paragraphs 2 and 3 of Article 35 of the Convention, which deal with various grounds of inadmissibility, specifically regulate only individual applications under Article 34 of the Convention.

[54] 'Background Paper' (n 52) 18.

[55] Isabella Risini, *The Inter-State Application under the European Convention on Human Rights: Between Collective Enforcement of Human Rights and International Dispute Settlement* (Brill Nijhoff 2018) 50.

[56] *Georgia v Russia (II)* (n 49) para 97.

[57] *Georgia v Russia (I)* (dec.) App no 13255/07 (ECtHR, 30 June 2009) para 40; *Georgia v Russia (I)* (n 49) para 125; *Georgia v Russia (II)* (n 49) para 85.

[58] *ibid* (with further references to the previous case law).

As to 'repetition of acts', the Court describes it as 'an accumulation of identical or analogous breaches which are sufficiently numerous and inter-connected not to amount to merely isolated incidents or exceptions but to a pattern or system', while 'official tolerance' means that 'illegal acts are tolerated in that the superiors of those immediately responsible, though cognisant of such acts, take no action to punish them or to prevent their repetition; or that a higher authority, in face of numerous allegations, manifests indifference by refusing any adequate investigation of their truth or falsity, or that in judicial proceedings a fair hearing of such complaints is denied'.[59] At the admissibility stage, the required evidentiary threshold to demonstrate the existence of an administrative practice is *prima facie* evidence, which must be more than mere allegation. However, 'full proof' is not required.[60]

This approach was relied on by the Court in admissibility decision in *Georgia v Russia (II)*, where it found that Georgia's 'allegations cannot be considered as being wholly unsubstantiated or lacking the requirements of a genuine allegation for the purposes of Article 33 of the Convention.'[61] All the other questions concerning the administrative practice were reserved for merits.[62]

2.3. NO 'VICTIM' REQUIREMENT IN INTERSTATE CASES

Victim requirement does not apply to interstate applications as a matter of standing before the Court,[63] which further confirms the *erga omnes* nature of the interstate application.[64] Victim status of a state who initiates an interstate dispute before the Court may be questioned only if those allegations could be brought by individual applications as well.[65] Whereas an individual applicant shall substantiate the direct, indirect or potential affection by the alleged violations of the Convention, interstate application is admissible simply because of 'the general interest attaching to the observance of the Convention'.[66] Therefore, it need not be made on behalf of an individual, which, however, does not exclude an applicant state from seeking the just satisfaction for specific individuals.[67]

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[59] *Georgia v Russia (I)* (n 49) paras 123-124.
[60] *Georgia v Russia (I)* (dec.) (n 57) para 41.
[61] *Georgia v Russia (II)* (n 49) para 89.
[62] *ibid* para 90.
[63] Risini (n 55) 52-53.
[64] Schabas (n 46) 726.
[65] *Cyprus v Turkey* (n 45) para 77.
[66] Schabas (n 46) 726. This is clearly illustrated by those interstate cases where one of the members of the Council of Europe initiates the proceedings against another member in the absence of specific legal interests and the only interest is to respond to situation in the respondent state, see *e.g. Denmark, Norway, Sweden and the Netherlands v Greece (I)* (Commission Report, 05 November 1969); *Denmark, Norway and Sweden v Greece (II)* (Commission Decision on Admissibility, 16 July 1970).
[67] *Cyprus v* Turkey (just satisfaction) (n 48). This is also confirmed by just satisfaction judgment in *Georgia v Russia (I)* [GC] (Just satisfaction) App no 13255/07 (ECtHR, 31 January 2019). See also Concurring Opinion of Judge Pinto de Albuquerque, Joined by Judge Vučinić, para 4.

3. DUTY TO COOPERATE WITH THE EUROPEAN COURT OF HUMAN RIGHTS AND FACT-FINDING

Article 38 of the Convention stipulates that the Court shall examine the case together with the representatives of the parties and, if need be, undertake an investigation, for the effective conduct of which the respondent states shall furnish all necessary facilities. This article covers the various elements of proceedings, including the manner of examination of the case, fact-finding and investigation, issues of evidence, duty of cooperation, estoppel and *jura novit curiae*.[68] The author elaborates on two of these elements, which enable the Court to effectively examine the armed conflict cases: (1) fact-finding and investigation and (2) parties' obligation to cooperate with the Court in terms of providing the necessary information.

3.1. FACT-FINDING AND INVESTIGATION: THE EUROPEAN COURT OF HUMAN RIGHTS AS 'THE TRIBUNAL OF FIRST INSTANCE'

Fact-finding by the Court is a process when a court attempts to clarify an unclear or disputed facts referred to by parties to litigation.[69] As a general approach, the Court often recalls its subsidiary nature and distances itself from the role of a first-instance tribunal of fact, unless it is unavoidable given the circumstances of the case.[70] Thus, when sufficient information is not furnished to the Court, under the general framework of article 38 and Rules of Court,[71] it may initiate its own fact-finding through various techniques, including but not limited to conducting fact-finding hearings of witnesses and experts and on-the-spot investigations.[72] Whereas the Court often undertakes fact-finding activities in interstate cases, this rarely happens in individual cases.[73]

3.1.1. Fact-finding in individual armed conflict cases

In individual armed conflict cases, the Court essentially relies on a body of evidence submitted by the parties. In this respect, cases of *Isayeva (I)*[74] and *Isayeva (II)*[75] should be highlighted. They concerned air bombardments and deprivations of life of civilian population by Russia's armed forces during intense military operations in Chechnya, bringing the Court in adjudicating highly disputed facts. In both cases the Court relied on various information submitted by the parties, including witness statements, interviews with the military commanders, Human Rights Watch report, documents from Russia's criminal investigation

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[68] Schabas (n 46) 807-815.
[69] Philip Leach, 'Fact-Finding: European Court of Human Rights (ECtHR)' in Max Planck Encyclopedias of International Law (OUP 2018) para 1; For detailed analysis of ECtHR's fact-finding, see Jasmina Mačkić, *Proving Discriminatory Violence at the European Court of Human Rights* (Brill Nijhoff 2018) 91-124.
[70] See *e.g. Dzhioyeva v Georgia* (dec.) App no 24964/09 (ECtHR, 20 November 2018) para 27.
[71] See Annex to the Rules (concerning investigations) to the Rules of Court (1 January 2020).
[72] Simone Vezzani, 'Fact-Finding by International Human Rights Institutions and Criminal Prosecution' in Fausto Pocar, Marco Pedrazzi and Micaela Frulli (eds), *War Crimes and the Conduct of Hostilities: Challenges to Adjudication and Investigation* (Edward Elgar Publishing 2013) 351.
[73] Schabas (n 46) 807-810.
[74] *Isayeva v Russia* App no 57950/00 (ECtHR, 27 January 2005) (*Isayeva (I)*).
[75] *Isayeva, Yusupova and Bazayeva v Russia* App nos 57947/00, 57948/00, 57949/00 (ECtHR, 24 February 2005) (*Isayeva (II)*).

file and documents related to the establishment of facts in the domestic courts.[76] More importantly, on 14 October 2004, the Court held a hearing in Strasbourg to further establish the disputed facts.[77]

The Court adopted a similar approach in cases related to Turkey's security operations against the PKK. At various occasions, the Court conducted significant fact-finding to establish the factual circumstances to hold Turkey responsible for incidental loss of civilian life or lack of proper care in planning and conduct of the military operations.[78] The Court also made efforts to reconstruct the factual background to assess the lawfulness of destruction of applicants' property.[79] Some criticize the Court's approach to establishment of facts in Chechen cases as 'the Court had to establish the facts based on the written evidence (that is, without cross-examining a single witness) and other documents provided by the parties.'[80] In contrast with the Chechen cases, the Commission did undertake fact-finding visits in several Turkish cases.[81]

Overall overview of *Chechen* and *Turkish* cases reveals that 'in situations alleging both violations of the ECHR and IHL, the ECtHR and ECommHR have resorted to fact-finding missions (a bit) more frequently than when dealing with less serious allegations.'[82] However, the Court is unwilling to undertake *in loco* investigations despite the advantages of such activities. This stance may be explained by the obstacles associated with conflict or post-conflict situations. For example, in *Özkan* the Commission's on-site investigation failed to collect crucial information to reconcile factual discrepancies in the case.[83]

As summarized by Leach, Paraskeva and Uzelac, 'the 1990s can be described as Strasbourg's fact-finding golden age, for, in a series of cases, primarily against Turkey, the former Commission and, since 1998, the new Court, conducted a considerable number of fact-finding missions in order to adjudicate on fundamental and significant factual differences between the parties.'[84] The Court's notable unwillingness to engage in *in loco* fact-finding activities is explained by its permanently increasing caseload[85] and by its intended shift in its policy as a result of its subsidiary nature.[86] However, holding witness hearings in Strasbourg remains a viable option.

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[76] *Isayeva (I)* (n 74) paras 37-115; *Isayeva (II)* (n 75) paras 43-107.
[77] *Isayeva (I)* (n 74) para 8; *Isayeva (II)* (n 75) para 9.
[78] See *e.g. Ergi v Turkey* ECHR 1998-IV; *Ahmet Özkan and Others v Turkey* App no 21689/93 (ECtHR, 6 April 2004); *Akpınar and Altun v Turkey* App no 56760/00 (ECtHR, 27 February 2007).
[79] See *e.g. Akdivar and Others v Turkey* [GC] ECHR 1996-IV; *Selçuk and Asker v Turkey* ECHR 1998-II.
[80] Kirill Koroteev, 'Legal Remedies for Human Rights Violations in the Armed Conflict in Chechnya: The Approach of the European Court of Human Rights in Context' (2010) 1 International Humanitarian Legal Studies, 275, 279-283.
[81] See *Özkan* (n 78), *Ergi* (n78), *Selçuk* (n 79) cases.
[82] Vezzani (n 72) 356.
[83] *Özkan* (n 78) paras 9, 139-150.
[84] Philip Leach, Costas Paraskeva, Gordana Uzelac, 'Human Rights Fact-Finding: The European Court of Human Rights at a Crossroads' (2010) 28(1) NQHR 41, 42, 77.
[85] *ibid*.
[86] Michael O'Boyle and Natalia Brady, 'Investigatory Powers of the European Court of Human Rights' in Olga Chernishova and Mikhail Lobov (eds), *Russia and the European Court of Human Rights: A Decade of Change - Essays in Honour of Anatoly Kovler, Judge of the European Court of Human Rights in 1999-2012* (Wolf Legal Publishers 2014) 141.

3.1.2. Fact-finding in interstate and 'quasi-interstate' cases related to armed conflict

Although the Court cannot be said to be specifically designed for fact-finding in course of large-scale human rights violations and particularly in armed conflicts, it is nevertheless urged to do so in interstate cases where matters often of exceptional importance are at stake.[87] One of the recent examples of fact-finding by the Court in interstate cases is witness hearing in the *Georgia v Russia (II)* from 6 to 17 June in 2016.[88] Besides, the Court did the same in *Georgia v Russia (I)* in Strasbourg from 31 January to 4 February 2011.[89]

In interstate cases the Court is more eager to take on the role of a first-instance tribunal of fact than in individual cases as in the former situation the requirement to exhaust domestic remedies is subject to more exceptions and the Court is usually unable to rely on facts established by the domestic authorities.[90] Nevertheless, the Commission played the role of 'a first-instance tribunal' in interstate applications, heavily invested in fact-finding, taking testimony in different locations and producing its own detailed reports of factual background of the cases.[91] As for 'quasi-interstate' cases, in *Ilaşcu* the Court conducted a fact-finding hearing, on issues of effective control and jurisdiction in relation to the region of Transdniestria.[92]

3.2. Duty to cooperate with the European Court of Human Rights and military operations

Cooperation by parties with the Court gains a whole new dimension in armed conflict cases. Despite the absence of such express obligation in the Convention, rule 44A of the Rules of Court stipulates that '[t]he parties have a duty to cooperate fully in the conduct of the proceedings and, in particular, to take such action within their power as the Court considers necessary for the proper administration of justice.'[93] This obligation is further reinforced by rules 44B and 44C. The former authorizes the President of the Court to take any necessary steps where party fails to comply with duty of cooperation, while the latter makes it possible for the Court to 'draw such inferences as it deems appropriate' where a party fails to adduce evidence or provide information requested by the Court.

To what extent is article 38 complied with in armed conflict cases where the proper cooperation by parties, in particular by the respondent state, is of critical importance? According to one research, violations of Article 38 in cases against Russia and Turkey 'are context-related' with their security operations against alleged Chechen rebels and PKK members

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[87] Background Paper (n 52) 20.
[88] 'Witness hearing in the Inter-State case of Georgia v. Russia (II)', Press Release issued by the Registrar of the Court, 17.06.2016 <https://www.coe.int/en/web/tbilisi/-/witness-hearing-in-the-inter-state-case-of-georgia-v-russia-ii-> accessed 14 April 2020. A delegation of seven Judges of the Court heard 33 witnesses in total: 16 summonsed through the Georgian Government, 11 summoned through the Government of Russia and six summonsed directly by the Court.
[89] *Georgia v Russia (I)* (n 49) annex (witness hearing summary).
[90] Risini (n 55) 150, 168.
[91] Background Paper (n 52) 20.
[92] *Ilaşcu and Others v Moldova and Russia* [GC] ECHR 2004-VII paras 12-15.
[93] Rule 44A, inserted by the Court on 13 December 2004. Rules of Court of the European Court of Human Rights. 1 January 2020.

with 85% and 96% failures, respectively.[94] These figures demonstrate that respondent states refuse to cooperate with the Court in armed conflict cases. One of the rationales behind this may be the context of non-international nature of those security operations when states perceive them as a pure internal matter and maximise their efforts to avoid external judicial control by human rights bodies such as the ECtHR. This gives rise to another question: does the Court have any possible means of leverage to make the states comply with their obligation to cooperate under the Convention?

3.2.1. Information classified as a state secret: valid grounds to refuse cooperation?

States often argue that information regarding their military operations are classified as a state secret and refuse to furnish such information with the Court by way of referring to their national legislation or Court's organizational incapacity to ensure protection of such classified materials.

It can be asserted that states parties to the Convention are under obligation to develop national law and procedures in that manner to facilitate the cooperation with the Court. At the same time, it is a general principle of international law that a state may not invoke the provisions of its national law as justification for its failure to perform a treaty.[95] The Court is not also persuaded by the explanation for a failure to produce the information on the pretext that some documents are not relevant to the case[96] as it is only for the Court to decide on the relevance of information.[97] The only scenario when the Court abstains from ruling on violation of article 38 is when the failure to produce the documents does not hinder the establishment of the facts in the proceedings.[98] Russia often appealed to the Court that disclosure of information on alleged participation of the security or military forces in the killings in Chechnya was impossible because they contained information about the location and actions of military and special units.[99] In addition to national security, on various occasions Russia relied on article 161 of its Code of Criminal Procedure (CCP), which prohibits the disclosure of information from the preliminary investigation file. However, the Court always rejected these arguments because Russia did not ask the Court to apply rule 33(2) of the Rules of Court, which permits to keep the adduced evidence confidential 'for legitimate purposes, such as the protection of national security and the private life of the parties, and the interests of justice.'[100] Russia also often argues that the absence of any sanctions against a disclosure of confidential information means that the Court is unable to protect such information.[101] Nev-

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[94] Helena De Vylder and Yves Haeck, 'The Duty of Cooperation of the Respondent State during the Proceedings before the European Court of Human Rights' in Yves Haeck and Eva Brems (eds), *Human Rights and Civil Liberties in the 21st Century* (Springer 2014) 45.
[95] Art 27, Vienna Convention on the Law of Treaties, UNTS vol. 1155, 331.
[96] *Khashiyev and Akayeva v Russia* App nos 57942/00, 57945/00 (ECtHR, 24 February 2005) para 138.
[97] *Süheyla Aydin v Turkey* App no 25660/94 (ECtHR, 24 May 2005) paras 142-143.
[98] *Karov v Bulgaria* App no 45964/99, (ECtHR, 16 November 2006) paras 96-98.
[99] See *e.g. Bitiyeva and X v Russia* App nos 57953/00, 37392/03 (ECtHR, 21 June 2007) para 124.
[100] *ibid* para 125.
[101] *Musikhanova and Others v Russia* App no 27243/03 (ECtHR, 4 December 2008) para 104; *Ayubov v Russia* App no 7654/02 (ECtHR, 12 February 2009) para 108; *Sadykov v Russia* App no 41840/02 (ECtHR, 7 October 2010) para 280.

ertheless, in Court's opinion, such arguments are not plausible explanation to justify withholding necessary information and it finds the violation of article 38.

3.2.2. 'Drawing appropriate inferences': the result of non-cooperation

If the Court finds a violation of article 38, it 'may draw such inferences as it deems appropriate',[102] such as inferences as to the well-foundedness of the applicant's allegations.[103] This response by the Court to non-cooperation is practical and effective approach, resulting in shifting the burden of proof to the respondent state if the applicant makes out a *prima facie* case.[104] This approach is to be welcomed as the Court lacks other means to compel a respondent state to provide necessary information for examination of case, which is often rejected by a state on the basis of its irrelevance to the case, its classified nature as a state secret or inability to supply information under its national law. 'Drawing appropriate inferences' can be viewed as a principal pragmatic procedural tool to deal with armed conflicts as an information related to military operations are usually protected by high degree of confidentiality.

4. THE EUROPEAN COURT OF HUMAN RIGHTS AND INTERIM MEASURES IN ARMED CONFLICT CASES

Generally, provisional measures indicated by international judicial organs in situations of armed conflict are poorly complied with by states.[105] However, the ECtHR is not hesitant to indicate interim measures in individual and interstate cases emerging from active hostilities or those related to armed conflict situations.

4.1. INTERIM MEASURES IN CONFLICT-RELATED INDIVIDUAL CASES

The Court may, under rule 39 of its Rules of Court, indicate interim measures to any State party to the Convention provided that there is a risk that serious violations of the Convention might occur while it continues examination of the case. Although interim measures are provided in the Rules of Court and not in the Convention itself, in *Mamatkulov* the Court ruled for the first time that interim measures are binding, and the states' failure to comply with them results in the breach of obligations under article 34 of the Convention, i.e. individual applicant's right of application.[106] In the Court's case law, the most typical cases when interim measures are granted are related to expulsions or extraditions.[107]

A survey of case law of 2000-2010 by Haeck and Herrera asserts that the majority of cases in which states have not complied with interim measures are specifically 'conflict-related'.[108]

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[102] Rule 44C(1), Rules of Court of the European Court of Human Rights. 9 September 2019.
[103] *Timurtaş v Turkey* ECHR 2000-VI para 66.
[104] De Vylder and Haeck (n 94) 66.
[105] See *e.g.* Gentian Zyberi, 'Provisional Measures of the International Court of Justice in Armed Conflict Situations' [2010] 23 LJIL 571.
[106] *Mamatkulov and Askarov v Turkey* [GC] ECHR 2005-I paras 103-129.
[107] For a general overview of the case law on interim measures, see 'Factsheet – Interim Measures' (March 2020), <https://www.echr.coe.int/Documents/FS_Interim_measures_ENG.pdf> accessed 14 April 2020.
[108] Yves Haeck and Clara Burbano Herrera, 'The Use of Interim Measures Issued by the European Court of

The reasons of such non-compliance may be both political considerations[109] and legal perception of interim measures as a rule developed not by states under the Convention, but by the Court itself in its Rules as a 'consensual law'.[110] Thus, despite the ground-breaking finding in *Mamatkulov* on their binding nature, interim measures may lack legitimacy from states' perspective.

4.2. Interim measures in intestate cases: Georgia's and Ukraine's cases against Russia

It is argued that 'translation' of Court's argumentation on binding force of interim measures in *Mamatkulov's* individual case into the specifics of interstate applications is more than a challenging task,[111] due to the differences in terms of breadth and specificity between interstate cases and individual applications.[112] The Court can easily assess compliance with interim measures in individual cases, whereas in interstate cases the Court may find itself in a completely new reality.

Following the outbreak of the armed conflict between Russia and Georgia in August 2008, on 11 August 2008 Georgia asked the Court to indicate interim measures to Russia to 'refrain from taking any measures which may threaten the life or state of health of the civilian population and to allow the Georgian emergency forces to carry out all the necessary measures in order to provide assistance to the remaining injured civilian population and soldiers via humanitarian corridor'.[113] That request was made in the context of an application against Russia lodged with the Court on the same day by Georgia. At that time, active hostilities were still ongoing.

The Court granted Georgia's request on the following day, on 12 August 2008. The President of the Court, considering that situation could give rise to a real and continuing risk of serious violations of the Convention, called upon both Russia and Georgia to comply with their engagements under the Convention particularly in respect of articles 2 and 3 of the Convention. They were further requested to inform the Court of the measures taken to ensure that the Convention was fully complied with.[114] It should be noted that these measures are still in force.[115]

Human Rights in Times of War or Internal Conflict' in Antoine Buyse (ed), *Margins of Conflict: The ECHR and Transitions to and from Armed Conflict* (Intersentia 2011) 120-123 (citing relevant cases).

[109] *ibid* 121.

[110] Stefan Kirchner, 'Interim Measures in Inter-State Proceedings before the European Court of Human Rights: *Ukraine v Russia*' (2014) 3(1) University of Baltimore Journal of International Law, 33, 52.

[111] Risini (n 55) 139, 157.

[112] Philip Leach, 'Ukraine, Russia and Crimea in the European Court of Human Rights' (EJIL: *Talk!*, 19 March 2014) <http://www.ejiltalk.org/ukraine-russia-and-crimea-in-the-european-court-of-human-rights/> accessed 14 April 2020.

[113] 'ECHR grants request for interim measures' (Press release 581, 12 August 2008) <http://hudoc.echr.coe.int/eng-press?i=003-2458412-2647173> accessed 14 April 2020.

[114] *ibid*.

[115] Country profile, Georgia, February 2020, 7 <https://www.echr.coe.int/Documents/CP_Georgia_ENG.pdf> accessed 14 April 2020.

According to Egbert Myjer, a former judge of the Court, interim measures requested by Georgia were unprecedented in light of all interim measures requested from the Court,[116] by granting of which the Court set the new precedent through intervening in ongoing international armed conflict for the first time to protect the whole population of a country.[117] However, as noted by Myjer, those interim measures did not have a slightest effect on heads of these states who were still in middle of active military operations.[118] Therefore, the possible deterrent effect of interim measures indicated by the Court in an ongoing international armed conflict is ambiguous. Moreover, it cannot be overlooked that the Court, acting cautiously and in a non-partisan manner, indicated interim measures to both parties.[119] The Court also shied away from granting specific measures requested by Georgia, such as assisting to the remaining injured civilian population and soldiers via humanitarian corridor.[120] Furthermore, due to a broad scope of this interim measure, it will be troublesome for the Court to assess which party complied with it and to what extent.

Interim measures were also requested by Ukraine against Russia. They can be grouped as declaratory interim measures, information requesting interim measures and interim measures in favour of specific individuals.[121] The interim measures indicated in the Ukrainian case largely mirrors Court's approach in *Georgia v Russia (II)*. On 13 March 2014, Ukraine lodged an interstate application against Russia concerning alleged violations in Crimea[122] and Eastern Ukraine.[123] At the same time, Ukraine submitted a request for an interim measure indicating to Russia, among other things, to refrain from measures, which could threaten 'the life and health of the civilian population on the territory of Ukraine.'[124] On the same day, the Court granted the request and called upon both states to refrain from taking any measures, in particular *military actions*, which might entail breaches of the Convention rights of the *civilian population*.[125] Differences can be spotted in reporting obligations: in Ukraine's cases both States were asked to inform the Court *as soon as possible* of the measures taken, whereas in Georgia's case this obligation was *contingent upon Court's request*. Moreover, interim measures in Ukraine's case tries to reflect normative and practical realities of armed conflict by focusing on military actions and civilian populations and are more specific as compared to interim measures granted in *Georgia v Russia (II)*.

In both situations, the ECtHR's interim measures gained new significance as one of its procedural instruments to react on international armed conflicts. Overview of conflict-related interim measures under the Convention system shows that on many occasions they ensure

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[116] Egbert Myjer, 'The European Court of Human Rights and Armed Conflicts between High Contracting Parties: Some General Remarks' in Jean Barthélemy and others, *Mélanges en l'honneur de Jean-Paul Costa La Conscience des Droits* (Dalloz 2011), 461-62.
[117] Haeck and Herrera (n 108) 97-98.
[118] Myjer (n 116).
[119] Myjer (n 116).
[120] Philip Leach (n 112).
[121] Risini (n 55) 156-157.
[122] *Ukraine v Russia (re Crimea)*, App no 20958/14.
[123] *Ukraine v Russia (re Eastern Ukraine)* App no 8019/16.
[124] 'Interim measure granted in inter-State case brought by Ukraine against Russia' (Press Release 073(2014), 13 March 2014) <http://hudoc.echr.coe.int/eng-press?i=003-4699472-5703982> accessed 14 April 2020.
[125] *ibid* (emphasis added).

effective provisional protection in critical situations. However, they 'do not act miraculously' as 'a legal instrument *per se* is not sufficient to transform (political) reality.'[126] In ongoing conflicts, provisional measures to protect population are usually requested by a state who is in militarily disadvantageous situation.[127] Therefore, it is understandable that provisional measures requested by Georgia against Russia were viewed as a political move for help rather than actual legal request for provisional measures.[128] Besides, questions are asked whether provisional measures, as the procedural mechanism utilized under incidental proceedings, are suitable to address political controversies resulting in armed conflict between states. However, on a more optimistic note, it is argued that, in the long-term perspective, provisional measures can eventually strengthen state compliance with IHRL and IHL standards.[129] Assessment of the ultimate efficiency of provisional measures in the context of interstate cases lodged by Georgia and Ukraine is a hard task at the time of writing this article, as they are still pending and the Court has not yet delivered any decision on the compliance with these interim measures. However, it may be predicted that the Court will give some legal weight to compliance with these measures while deciding on the merits.

5. PILOT JUDGMENTS: EFFECTIVE PROCEDURE TO ADMINISTER NUMEROUS INDIVIDUAL APPLICATIONS RELATED TO ARMED CONFLICTS?

Since armed conflicts give rise to hundreds and thousands of similar individual applications,[130] - making it practically impossible for the Court deal with all of them as it generally suffers from burgeoning caseload,[131] - it is critical to ask how can the Court deal with this phenomenon and whether a pilot judgment procedure can be the solution.

Pilot judgment procedure was designed to adopt 'a pilot judgment where the facts of an application reveal in the Contracting Party concerned the existence of a structural or systemic problem or other similar dysfunction which has given rise or may give rise to similar applications.'[132] It was developed as a technique in response to so-called 'repetitive cases' not only to find a violation of the Convention, but also to identify the structural problems under-

[126] Haeck and Herrera (n 108) 129.
[127] This is obviously illustrated by the provisional measures indicated in *Georgia v Russia (II)*.
[128] Myjer (n 116) 461, 472.
[129] Zyberi (n 105) 571–584.
[130] In addition to the *Georgia v Russia (II)* interstate case, persons allegedly affected by the hostilities in Tskhinvali Region in August 2008 had lodged more than 3,300 individual applications against Georgia. In the course of 2010, five communicated cases and 1,549 new applications belonging to that group were struck out of the Court's list. As of March 2020, there are almost 600 individual applications concerning the hostilities in 2008, against Georgia, against Russia or against both States. See Georgia, Country profile, February 2020, 7, <https://www.echr.coe.int/Documents/CP_Georgia_ENG.pdf > accessed 14 April 2020. Regarding the hostilities in eastern Ukraine and the events in Crimea, there are over 6,500 individual applications before the Court. See Ukraine, Country profile, January 2020, 11-12,
<https://www.echr.coe.int/Documents/CP_Ukraine_ENG.pdf> accessed 14 April 2020.
[131] There were 43,100 applications before the Court in 2018 and 63,350 in 2017. See Annual Report 2018, European Court of Human Rights, 2019, 167
<https://www.echr.coe.int/Documents/Annual_report_2018_ENG.pdf> accessed 14 April 2020.
[132] Rule 61(1), inserted by the Court on 21 February 2011, Rules of Court of the European Court of Human Rights. 9 September 2019.

lying them and impose an obligation on States to address those problems.[133] Under this procedure, the Court may adjourn or 'freeze' related cases for a period on the condition that the Government acts promptly to adopt the national measures.[134]

In 2004, the Grand Chamber delivered the first pilot judgment in *Broniowski*, which concerned the alleged failure to satisfy the applicant's entitlement to compensation for property.[135] According to the Polish Government, the anticipated total number of people in the similar situation was nearly 80,000 (Bug River cases). The Court found that there had been a violation of the applicant's right to property and that it was caused by a systemic problem connected to malfunctioning of Polish legislation and practice. Consequently, Poland was requested to solve this situation with effective legal and administrative means, while the Court adjourned the similar applications.[136] In 2008, the Court closed Bug River cases upon concluding that the new compensation scheme adopted by Poland was effective in practice.[137] In 2011, the pilot judgment procedure was codified in Rules of Court as a new rule 61.[138]

Drawing from the *Broniowski's* legacy, the Court applies pilot judgment procedure in the strict sense, i.e. pilot judgment are only those judgments which specify, in accordance with rule 61(3), in the operative provisions of the judgment the nature of the systemic problem and the type of remedial measures that the State concerned must adopt.[139] ECtHR may also rely on general principles of 'good administration of justice and procedural economy' to prevent needless proliferation of proceedings.[140] However, the question remains: is pilot judgment procedure suitable for repetitive applications related to armed conflict situations?

One of the *possible* exceptions when pilot judgment was applied in conflict-related situation is the case of *Xenides-Arestis*, which involved the deprivation of property rights because of the continuing occupation of Northern Cyprus by Turkey.[141] The judgment possesses characteristics of a pilot judgment, but lacks them in a strict sense. It is striking that it was retrospectively labelled as the pilot judgment by the Court itself in subsequent *Demopoulos* case.[142] Authors accentuate that *Xenides-Arestis* can be deemed to be a 'quasi-pilot' judgment, because the Court refrained from expressly applying pilot judgment procedure in this case,[143] despite the fact that the Court ruled that Turkey was under the obligation to intro-

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[133] 'Factsheet – Pilot judgments', Press Unit of the European Court of Human Rights (January 2020) 1 <https://www.echr.coe.int/Documents/FS_Pilot_judgments_ENG.pdf> accessed 14 April 2020.
[134] *ibid*.
[135] *Broniowski v Poland* [GC] ECHR 2004-V.
[136] 'Adjournment of "Bug River" cases' (Press release, 31 August 2004) <http://hudoc.echr.coe.int/eng-press?i=003-1062015-1099568> accessed 14 April 2020.
[137] 'First "pilot judgment" procedure brought to a successful conclusion Bug River cases closed (Press release, 06 October 2008) <http://hudoc.echr.coe.int/eng-press?i=003-2510971-2712345> accessed 14 April 2020.
[138] Rule 61, inserted by the Court on 21 February 2011, Rules of Court, 1 January 2020.
[139] 'Factsheet – Pilot judgments' (n 133) fn1.
[140] Antal Berkes, 'Concurrent Applications before the European Court of Human Rights: Coordinated Settlement of Massive Litigation from Separatist Areas' (2018) 34(1) Am.U.Int'l L.Rev 1, 19-24.
[141] *Xenides-Arestis v Turkey* App no 46347/99 (ECtHR, 22 December 2005).
[142] *Demopoulos and Others v Turkey* (dec.) [GC] App nos 46113/99 and 7 others (ECtHR, 1 March 2010) para 73.
[143] Philip Leach and Others, *Responding to Systemic Human Rights Violations: An Analysis of 'Pilot Judg-*

duce a remedy, which would secure genuinely effective redress for the Convention violations identified in that judgment in relation to all similar 1,400 property cases pending before it brought primarily by Greek Cypriots against Turkey.[144] Based on meticulous empirical research in the context of the Kurdish cases, it is correctly argued that 'while pilot judgments might be effective in handling repetitive cases arising from systemic legal problems […], they should not be applied to conflict or post-conflict cases where the underlying problems are deeply rooted ethno-political disputes'.[145]

According to *Broniowski* paradigm, the whole idea of a pilot judgment procedure is to identify and solve 'a structural or systemic problem or other similar dysfunction' within a state. This approach is at odds with reality of armed conflicts cases where the main cause of repetitive applications is connected to the scale of military operations and not faulty legislation or administrative practice. Pilot judgment procedure may be applied to certain aspects related to armed conflict, for example post-conflict compensation scheme, but it would necessarily fail to address numerous applications alleging specific violations from theatre of active military operations.

6. LEADING DECISIONS: ALTERNATIVE FOR PILOT JUDGMENTS IN ARMED CONFLICT CASES

Pilot judgment procedure is neither flexible nor suitable to be applied to armed conflict related applications. Alternatively, the Court has other tools in its procedural arsenal in the form of 'leading' and/or 'principal' judgments, considered as 'individual applications for which settlement serves as a model for hundreds of similar follow-up cases'.[146] Such decisions in conflict-related situations (but not necessarily in situations of active armed hostilities) are rendered in well-known cases,[147] when the Court examines specific aspects of a case 'on a level of generality that makes it possible to apply the decision to comparable pending applications',[148] resulting in strengthening the Court's effectiveness, as it does not have to rule on the same issues of admissibility and merits in similar cases.

Author submits that leading decisions can be optimized not only in conflict-related cases, but also in situations of active armed hostilities with respect to certain aspects of armed conflict litigations before the Court. One of the recent examples is the decision in *Lisnyy and Others v Ukraine and Russia*, which concerned the question of *prima facie* evidence 'about destruction of property *in the context of armed conflict*', namely by shelling of their property and

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ments' of the European Court of Human Rights and Their Impact at National Level (Intersentia 2010) 133–169.

[144] *Xenides-Arestis* (n 141) paras 37-40.

[145] Dilek Kurban, 'Forsaking Individual Justice: The Implications of the European Court of Human Rights' Pilot Judgment Procedure for Victims of Gross and Systematic Violations' (2016) 16(4) HRLR 731, 768.

[146] Berkes (n 140) 64.

[147] *ibid* 63-73 (author refers to *Loizidou, Varnava, Demopulous, Ilaşcu, Katan, Mozer, Sargsyan* and *Chiragov* cases).

[148] Lize R Glas, 'Changes in the Procedural Practice of the European Court of Human Rights: Consequences for the Convention System and Lessons to be Drawn' (2014) 14 HRLR 671, 676.

dwelling places in eastern Ukraine.[149] The Court dismissed the applications due to insufficient *prima facie* evidence. Curiously, referring to *Lisnyy*, the Court rejected 'a further 1,170 *similarly unsubstantiated* cases' in 2016.[150] More importantly, the Court relied on *Lisnyy* when it declared similar cases inadmissible against Georgia in the context of armed conflict of 2008 between Russia and Georgia in Tskhinvali Region, noting that applicants failed to produce appropriate *prima facie* evidence in support of their complaints on attribution alleged destruction of property to Georgian armed forces.[151] Thus, *Lisnyy* can be regarded as a leading or principal judgment on the issue of sufficient evidence to substantiate the allegations of destruction or damage of property in armed conflicts. This approach enabled the Court to effectively address similar allegations in similar context without time- and resource-consuming individual deliberations.

Methodological approach of leading decisions differs from the pilot judgment mechanism, which is not practically feasible to be applied to armed conflict cases due to its strictly defined formal and procedural elements. Leading decisions, on the other hand, can be viewed as an alternative to pilot judgments and a useful adjudication technique, which capacitates the Court to rule on numerous individual armed conflict related applications based on generalized findings made in previous decision from the same or similar situation.

7. ADJOURNMENT OF INDIVIDUAL APPLICATIONS BEFORE EXAMINATION OF INTESTATE CASES

The Convention does not envisage rules on interaction between individual and interstate applications when they overlap. However, they obviously do not exclude each other.[152] Since conflict-related interstate cases are accompanied by a great number individual cases,[153] it became essential for the Court to deal with them in a coordinated manner. The decision made by the Court in 2018 in relation to individual applications on Eastern Ukraine pending the Grand Chamber judgment in related *Ukraine v Russia (re Eastern Ukraine)* interstate case is a clear illustration of Court's solution to this challenge.

The Court 'adopted a plan for its future processing of thousands of applications from individuals who had raised complaints against Ukraine or Russia or both countries in relation to the conflict in Eastern Ukraine' and '[t]o save as much time as possible, the Court has decided [..] to record an adjournment for each case, pending a judgment in the inter-State case, with a view to having the files complete and ready for decision or judgment as soon as pos-

[149] *Lisnyy and Others v Ukraine and Russia* (dec.) App nos 5355/15 and 2 others (ECtHR, 05 July 2016) paras 21, 27 (emphasis added).
[150] 'ECHR to adjourn some individual applications on Eastern Ukraine pending Grand Chamber judgment in related inter-State case' (Press release 432(2018), 17 December 2018) (emphasis added).
[151] *Naniyeva and Bagayev v Georgia* (dec.) App nos 2256/09, 2260/09 (ECtHR, 20 November 2018); *Kudukhova and Kudukhova v Georgia* (dec.) App nos 8274/09, 8275/09 (ECtHR, 20 November 2018).
[152] Risini (n 55) 208.
[153] Russia, Country profile, February 2020, 28-29 <https://www.echr.coe.int/Documents/CP_Russia_ENG.pdf> accessed 14 April 2020.

sible thereafter.'[154] It should be noted that while most of those individual applications touch upon allegations of the detention and destruction of housing during armed conflict, the Court waits for judgment in interstate case to clarify 'a key issue' of jurisdiction in under Article 1 of the Convention.[155] No such decision has been made in the context of *Georgia v Russia (II)*. The Court is definitely guided by the Copenhagen Declaration of 2018, which recognized '[t]he challenges posed to the Convention system by situations of conflict and crisis in Europe' and recommended not to decide on individual applications 'before the overarching issues stemming from the inter-State proceedings have been determined in the inter-State case.'[156] It can be further argued that, in the situations like the present one, the Court considers the judgment in interstate case as a possible *leading decision* for 'individual applications raising the same issues or deriving from the same underlying circumstances'.[157]

The decision to adjourn individual applications related to *Ukraine v Russia (re Eastern Ukraine)* is a pragmatic action by the Court in terms of judicial economy in order to sustain efficacy of the Convention system in armed conflicts in a coordinated manner. It displays the Court's willingness and gives a practical exhibition of its flexibility to acknowledge and respond to those challenges which could not have been foreseen when the Convention was adopted, when it was thought that it would be applied only during peacetime.

8. THE EUROPEAN COURT OF HUMAN RIGHTS AND REPARATIONS IN ARMED CONFLICTS: REDRESS THROUGH 'JUST SATISFACTION'

The present chapter intends to show that the Court plays a noteworthy role in filling the gap of unavailability of the procedural grounds in IHL for victims of military operations to claim individual reparations before an international court. The ECtHR, 'on the implicit application of the standards of humanitarian law, albeit cloaked in the Convention-specific categories of legitimacy, necessity, and proportionality',[158] indirectly enforces IHL through finding violations of the Convention in armed conflict cases. Notwithstanding the objections by states,[159] ECtHR's judicial review of military operations 'is a major step towards a larger role for judicial processes in the context of war […] and towards greater protection for war victims, including provision for reparation which is almost entirely lacking in international humanitarian law.'[160]

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[154] 'ECHR to adjourn some individual applications on Eastern Ukraine' (n 150).
[155] *ibid.*
[156] Copenhagen Declaration on the Reform of the European Convention on Human Rights System, para 45.
[157] *ibid.*
[158] Alexander Orakhelashvili, 'The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?' (2008) 19(1) EJIL, 161, 174.
[159] See eg Toni Pfanner, 'Various Mechanisms and Approaches for Implementing International Humanitarian Law and Protecting and Assisting War Victims' (2009) 91 IRRC 279, 313. Pfanner identifies several features of this opposition, such as unwillingness of states to be subject to any form of judicial supervision during armed conflicts; claims of non-justiciable character of military operations; reducing of military capabilities by parallel application of IHL and human rights law; one-sided jurisdiction of human rights mechanism which excludes non-state groups from their purview and fragmentation of law of armed conflict on regional level.
[160] *ibid.*

States are under general obligation of reparation, which does not mean *per se* that such right is enforceable for an individual. The Convention was the first international legal instrument, which enabled individuals to enforce their right to reparation against state through binding judgments on just satisfaction under article 41 of the Convention.

Article 41 of the Convention on just satisfaction establishes at the *international* level that the Court 'shall, if necessary, afford just satisfaction to the injured party' if the internal law of a state party allows only *partial reparation*.[161] 'Just satisfaction' is the term used by the Convention with the meaning of reparation or compensation and addresses 'the entire spectrum of reparations available to an injured party', such as compensation for pecuniary or non-pecuniary damage and costs and expenses.[162] In *Khashiyev and Akayeva*, for example, which concerned the killing of applicants' relatives (civilians) in Chechen conflict, the Court held that the applicants' relatives were killed by Russian servicemen and that their deaths were attributed to Russia. Consequently, under article 41, Russia was ordered to pay 15,000 euros to the first applicant and 20,000 euros to the second applicant in respect of non-pecuniary damage, and 10,907 euros in respect of costs and expenses.[163] In *Isayeva* the Court fully applied article 41 and the applicant was awarded monetary compensation of 18,710 euros having regard to its conclusions that the death of the applicant's son, which violated article 2 of the Convention, deprived the applicant of the financial support provided by his son. Furthermore, the applicant was awarded 25,000 euros as non-pecuniary damage and 12,000 euros for costs and expenses.[164]

Another interesting caveat of article 41 is its application in interstate cases, which is one of the recent developments in the Court's case law. By the time of writing, the Court has applied article 41 in two interstate cases: *Cyprus v Turkey*[165] and *Georgia v Russia (I)*.[166] In both proceedings, the respondent states argued that article 41 was applicable only to individual cases. However, the Court observed that 'the overall logic of Article 41 is not substantially different from the logic of reparations in public international law', thus, 'Article 41 of the Convention does, as such, apply to inter-State cases',[167] and held that Turkey was to pay 90 million euros in total. The Court also noted that 'it is the individual, and not the State, who is directly or indirectly harmed and primarily "injured" by a violation of one or several Convention rights. Therefore, if just satisfaction is afforded in an inter-State case, it should always be done for the benefit of individual victims.'[168] Hence, it follows that if the applicant state submits just-satisfaction claims of 'sufficiently precise and objectively identifiable groups of people', individual victims can benefit from interstate cases.[169] The Court heavily relied on these findings in *Georgia v Russia (I)* and ruled that Russia is to pay Geor-

[161] Art 41 ECHR (emphasis added).
[162] Yulia Ioffe, 'Case of Georgia v. Russia (I) (Just Satisfaction)' (2019) 113 AJIL 581, 582.
[163] *Khashiyev and Akayeva v Russia*, App nos 57942/00 and 57945/00 (ECtHR, 24 February 2005).
[164] *Isayeva (I)* (n 74) paras 231-246.
[165] *Cyprus v Turkey* (just satisfaction) (n 48).
[166] *Georgia v Russia (I)* [GC] (Just satisfaction) (n 67).
[167] *Cyprus v Turkey* (just satisfaction) (n 48) paras 41-43.
[168] *ibid* para 46.
[169] *ibid* para 47. Cyprus submitted just-satisfaction claims for 1,456 missing persons and the enclaved Greek-Cypriot residents of the Karpas peninsula.

gia 10 million euros in respect of non-pecuniary damage suffered by 'a group of at least 1,500 Georgian nationals.'[170] In both cases the Court left it to applicant states, under the supervision of the Committee of Ministers, to set up an effective mechanism to distribute monetary just satisfactions to the individual victims. It is unfortunate that both just judgments are still pending for the execution 'since both interstate cases in which the ECtHR awarded compensation are politically sensitive and involve armed conflict', thus doubts are raised as to the effectiveness of protection victims via interstate cases.[171] Nevertheless, the Court's move is to be welcomed as application of article 41 in interstate cases increases the procedural avenues for providing redress to individual victims – whereas the only option for a long time had been individual applications, now it is procedurally possible in interstate cases as well.

In light of the Court's concentration on monetary compensations for violations in armed conflict cases, it is underlined that such compensations fail to implement 'full reparations'.[172] However, the Court's efforts should not be underappreciated for it established the solid case law on compensations for human rights violations in armed conflicts or emergency situations.[173] On this basis it is more than justified to conclude that for 'victims in search of a forum'[174] '[t]here is no equivalent to the European Courts of Human Rights to which those aggrieved by breaches of international humanitarian law can turn'.[175]

CONCLUSION

The European Court of Human Rights is equipped with sufficiently developed primary and secondary procedural infrastructure to ensure tangible redress for individual victims of armed conflicts. The primary procedures of individual and intestate applications transform the unenforceable IHL rights into enforceable rights under the Convention, while the secondary procedures guarantee the Court's practical efficiency to address realities of armed conflicts after the primary procedures are invoked by applicants. The Court has got acclimated itself to the new challenging reality by utilising secondary procedures, including the duty of the parties to cooperate with the Court; fact-finding and investigation (albeit limited); indication of interim measures in ongoing armed conflicts; operationalizing pilot judgment procedure and 'principal' judgments to deal with repetitive cases related to military operations; coordination of individual and interstate applications related to the same situation; and

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[170] *Georgia v Russia (I)* [GC] (Just satisfaction) (n 67) paras 71, 74, 76.
[171] Ioffe (n 162) 585.
[172] Koroteev (n 80) 302–303. Koroteev concludes that the Court failed to fight against impunity in Chechen situation as the Court refuses to indicate complex measure for Russia as a general measure, including fresh investigations, whereas only monetary compensation is not sufficient and enables Russia to atone human rights violations.
[173] Oberleitner (n 4) 336.
[174] Jean-Marie Henckaerts, 'Concurrent Application of International Human Rights Law and International Humanitarian Law: Victims in Search of a Forum' [2007] HR&ILD 95.
[175] Jean Paul Costa and Michael O'Boyle, 'The European Court of Human Rights and International Humanitarian Law' in Dean Spielmann and others, *The European Convention on Human Rights: A Living Instrument – Essays in Honour of Christos L. Rozakis* (Bruylant 2011) 112.

the firmly established case law to award reparations through ‘just satisfaction’ (which may not be full reparation). The Court demonstrates its procedural capacity to fill enforcement gaps of IHL by incorporating human rights compliance procedures into armed conflict related litigations. It should be borne in mind that the Court was established for peacetime human rights violations and cannot be subject to strict evaluation as if it was designed as a specialized judicial forum for enforcing obligations of parties in armed conflict. The Court remains the human rights mechanism, which is seized by individuals and states for indirect enforcement of IHL, often under the disguise of the European Convention on Human Rights.

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CONSTITUTIONAL ASPECTS OF ECONOMIC COMPETITION

"Competition is the most promising means to achieve and to secure prosperity."

Ludwig Erhard

ABSTRACT

Article 6 (2) of the Constitution of Georgia recognises free competition as the basis of the economic order in the country. Defining the content of the constitutional clauses regarding economic competition and determining positive and negative obligations of the state deriving from the constitution usually give rise to significant practical and theoretical challenges.

Preceding paper aims to establish proper theoretical grounds to overcome abovementioned legal obstacles. Based on the best western experience and scientific approaches, it defines the scope of the state's positive and negative obligations concerning free competition and competitive equality of undertakings. The paper also examines the teleological grounds of the constitutional provisions regarding free competition and its role in the process of assessment of the constitutionality of a legislative act related to economic competition. Moreover, the study discusses the functions of free competition with respect to freedom of enterprise and consumers' rights, and it identifies the relevant legal values as well.

INTRODUCTION

Competition generally means aspiration of two or more individuals towards a specific goal, where the success of one of them may proportionally reduce the chances of the competitor's success. This process takes place in almost all aspects of social life, for instance, sports, culture, education, science, etc. Economic competition is one of the essential expressions of competition.

The Constitution of Georgia upholds free competition as a basis of the economic order in the country and, under article 6 (2), it creates primary legal grounds for its protection and development. Article 6 of the constitution states that "the State shall take care of developing a free and open economy, free enterprise and competition". Following this provision, the state's economic policy should guarantee healthy competition within the whole country.

Regarding the issues related to economic competition, the case-law of the Constitutional Court of Georgia already encompasses several vital decisions and interpretations.[1] However, the need for further development and analysis of constitutional aspects of competition remains yet. Sound research of the issues related to the competition is of crucial importance primarily because, alongside the autonomy of will and private property, the free competition constitutes the basis for every efficient free market and public order.[2]

This paper aims to establish additional scholarly grounds to define the scope of the positive and negative obligations of the state concerning the development of competition and competitive equality of undertakings. It focuses on the relationship between constitutional provisions on the development of competition and the protection of the consumers' rights. Furthermore, the paper discusses teleological aspects of constitutional provisions regarding free competition and their importance for the assessment of conformity of the law to the constitution. Also, it tries to identify the functions and objectives of free competition and to specify protected legal values. The research is primarily based on the case-law of the Court of Justice of the European Union, as well as that of the EU member states and relevant juridical doctrines adopted in developed Western countries.

1. ESSENCE OF COMPETITION

Taking into consideration the title of the paper one may expect that it would determine the term of competition right away. However, the complexity of the concept in question makes it impossible to provide an ideal definition.[3] Therefore, legal literature and practice mostly prefer to focus not on the definition of competition, but its essential elements and functions. This approach makes the essence and the role of competition in the modern market economy clearer.

For the existence of competition following elements must be at hand: 1) relevant market; 2) at least two undertaking operating on the same market; 3) Antagonistic relationship of these undertakings and their aspiration towards strengthening their market position at each other's expense.[4] Determination of the concept of the undertaking and relevant market exceeds the scope of the preceding paper. Instead, its primary objective is the analysis of the third element regarding the confrontation of undertakings and their antagonistic relationship. It is precisely the rivalry,[5] and the process of gaining an advantage,[6] the very words that can be

[1] Judgment of the Constitutional Court of Georgia N1/2/411 dated 19 December 2008 in the case of "'Russenergoservice', LTD 'Patara Kakhi', JSC 'Gorgota', Givi Abalaki's Individual Company 'Farmer' and LTD 'Energia' v. the Parliament of Georgia and the Ministry of Energy of Georgia"; Judgment of the Constitutional Court of Georgia N2/11/74 dated 14 December 2018 in the case of "Ltd 'Giganti Security' and Ltd 'Security Company Tigonis' v. the Parliament of Georgia and the Minister of Internal Affairs of Georgia"; Judgment of the Constitutional Court of Georgia №1/1/655 dated 18 April 2019 in the case of "Ltd. SKS v. the Parliament of Georgia".

[2] *Emmerich Volker,* Kartellrecht, 13. Auflage. Rn. 11.

[3] *ibid*, Rn. 1.

[4] *Kling Michael, Thomas Stefan,* Kartellrecht, § 2. Rn. 6.

[5] *Clark J.M.* Toward a Concept of Workable Competition, see The American Economic Review, 1940, Vol. XXX, N2. 243.

used as one of the synonyms of competition, which is protected under article 6 of the Constitution of Georgia.

The Law of Georgia on Competition shares the same approach and defines the competition as a "rivalry between actual or potential undertakings on the relevant market to gain an advantage on the market." In contrast to the Georgian legislation, western states are practically reluctant to provide with any legal definition of the competition. An argument for the absence of the notion of competition in German legislation is that the legal definition based on the market structure, types of market actions and results, will limit the open and multifarious character of the concept of competition.[7]

Within the course of discussions regarding competition, the issue of potential competition is also of great significance. In particular, according to the definition of competition provided by Georgian legislation, competition might exist not only between undertakings operating on the same relevant market but also between undertakings that are already operating on the market and undertakings which have an intention to enter the market (potential competitor).

Scholarly works define competition the same way as "spontaneous order"[8] or the process of "search and discovery".[9] These definitions point to important and indispensable characteristics of the process of competition. Recognizing competition as a spontaneous order amounts to recognition of natural origins of the process of competition. This implies that competition is formed, developed and exists without any artificial intervention and it performs specific functions *ipso facto*, by virtue of its very nature. As for representing competition in form of the process of search and discovery – this underlines its dynamic character and the impossibility to predict results deriving from it.

In the light of the foregoing, it can be stated that the provision of article 6 implies the rivalry between undertakings, which are aiming to gain advantage on the market. This process is in constant development and improvement, and its dynamic nature is its primary characteristic. Under article 6, the state's obligation to take care of free competition implies promoting and ensuring the natural and dynamic process of rivalry among undertakings in relevant markets.

2. FUNCTIONS OF COMPETITION

As noted by Adam Smith, - also known as the founder of capitalism, - individuals become more productive and efficient when they act in accordance with their own interests and aspire toward their wellbeing.[10] During this time, the main objective of an individual does not concern increasing public good. However, the latter represents a side-effect of any action performed by the former. In other words, individual goals and ambitions of the market op-

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[6] *Whish/Bailey,* Competition Law, 7-th edition, 2011, p. 3.
[7] *Dreher Meinrad, Kulka Michael, Rittner Fritz,* Wettbewerbs- und Kartellrecht, 8. Auflage, Rn. 5.
[8] *Emmerich, supra* note 2, Rn. 29.
[9] *Kling/Thomas, supra* note 4, Rn. 6.
[10] *Smith Adam,* An inquiry into the nature and Causes of the Wealth of Nations. Edited by S. M. Soares. Metalibri Digital Library, 29-th May 2007, 349-350.

erator do, at the same time, serve the goal of increasing the public good. In addition, from the point of view of increasing public good, an undertaking in the relevant market is more efficient when the main purpose behind his/her actions is his/her own material gain. It is from this reasoning that we should draw the conclusion on the necessity to ensure healthy competition.

According to the concept developed by the government of Great Britain with respect to competition policy, dynamic and aggressive competition among undertakings represents the principal precondition for the formation of strong and efficient markets.[11] This results in increasing innovations and productivity and helps consumers receive high-quality goods and services at the most favourable terms.[12]

According to the reasoning of the European Commission's Directorate-General for Competition, competition is a main mechanism for market economy, which encourages companies to offer consumers goods and services at the most favourable terms.[13] It is precisely competition that encourages market efficiency and innovation and reduces prices.[14] It is a process of economic cohabitation, which is free from any artificial intervention and which naturally creates the optimal synthesis of goals stemming from the principles of freedom, equality and common good.[15]

Given the market competition, every undertaking has a constant expectation that it will lose its customers for the benefit of its competitors in case it does not offer a favourable price for the same or higher quality goods and services. The pressure generated as a result of such a competitive process ensures that a given undertaking will be oriented toward reducing the price, increasing the quality and developing its products. This, obviously, has a positive impact on the material wellbeing of customers, given that they can receive products of the highest quality for the lowest price, while having more options.

Formation of competitive markets also facilitates the process of increasing domestic undertakings' international competitiveness. This is because the pressure of competition stimulates undertakings and gives them an impulse for creating innovations, technological developments and implementation of new products. All of this increase competitiveness of undertakings and that of the products created in their country at the international level.

Based on the general discussion provided above, the following functions of the competition can be distinguished:

- *Governance function* – free competition should be considered a process independent from state interference and naturally ensuring a reasonable balance between demand and supply, thereby performing the function of governing the market;[16]

[11] A World Class Competition Regime Department of Trade and Industry, 30.07.2002. 13.
[12] *ibid.*
[13] Available here: https://ec.europa.eu/competition/antitrust/overview_en.html (as of 25.03.2020).
[14] *ibid.*
[15] *Emmerich, supra* note 2, Rn. 12.
[16] *Welfens Paul,* Grundlagen der Wirtschaftspolitik, 2. Auflage. 545.

- *Allocation function* – competition ensures optimal allocation of limited economic resources among participants of the market;[17]
- *Innovations/progress function* – the pressure of competition represents an important stimulant for undertakings to constantly care for improving goods and services and offer consumers new, innovative products;[18]
- *Limiting (neutralizing) market power* – competition neutralises market powers containing high risks and prevents concentration of such a scale of power in the hands of one operator or a group of operators, that threatens competitive environment or freedom of enterprise of other market operators;[19]
- *Social function* – competition ensures provision of goods and services to consumers at the most affordable price. Besides, competition creates important stimuli in terms of technological progress for reduction of expenditures related to production, which consequently results in reducing the prices.[20]

These functions are among those that should be performed by free competition, which is envisaged under article 6 (2) of the Constitution of Georgia and which forms a cornerstone of the country's economic order. By imposing a positive obligation for the state to take care of free competition, the Constitution is intending to protect the process of competition in itself, which forms an integral part of market stability. However, alongside ensuring the process of free competition, the said constitutional provision also ensures protection of interests of every participant of the market, consumers, and public and state interests while achieving the reasonable balance between these interests by exercising the aforesaid functions.

3. THE SCOPE OF A STATE OBLIGATION TO SUPPORT THE DEVELOPMENT OF ECONOMIC COMPETITION

3.1. GENERAL OVERVIEW

While considering the aforesaid functions as well as the values related to competition, article 6 of the Constitution of Georgia recognises free competition as the foundation of the economic order in the country. It prescribes the constitutional principle of free and open economy, free enterprise and the development of competition.[21] These principles imply the state obligation to promote the development of competition. Accordingly, the state is under obligation to ensure favourable conditions for the development of the dynamic process of rivalry among undertakings. However, the Constitution does not specify the degree or the scale of competition which is to be achieved in relevant markets of the country. Accordingly, it is difficult to determine the optimal degree of rivalry among undertakings, the existence of which can point to the fact that a state is duly performing its obligation to support to devel-

[17] *Emmerich*, *supra* note 2, Rn. 7.
[18] *Welfens*, *supra* note 16, p. 545.
[19] *Emmerich*, *supra* note 2, Rn. 9.
[20] Judgment of the Constitutional Court of Georgia №1/1/655 dated 18 April 2019 in the case of "Ltd. SKS v. the Parliament of Georgia", para. 3.
[21] *ibid*.

oping competition. Hence, in order to identify the optimal degree and scale of competition envisaged by the Constitution, it might be useful to analyse the history of competition law as well as theories and approaches of developed Western countries in this regard. In addition, for the purposes of determining the optimal degree of competition, it is also important to take into account the functions discussed above, given that within the scope of the obligation prescribed under article 6 of the Constitution, the competitive environment established in the country should ensure performance of these functions.

3.2. PERFECT COMPETITION

Economic theory distinguishes different types of market structure.[22] The beginning of the 20th century marks the formation of the theory of perfect competition ("Theorie des vollständigen Wettbewerbs"), which has been considered one of the leading theories in economic sciences.[23]

In the economic model of perfect competition, its positive effects are maximised from the point of view of benefits related to competition as well as social benefits.[24] The said model of competition is characterised by similar prices, homogeneity of goods and services and full transparency of the market.[25] Under these circumstances, undertakings offer consumers identical goods and services.[26] Buyers do not demand and suppliers do not provide any deviation from the existing standard quality of goods and services.[27] Besides, undertakings act as recipients towards the existing market price and the market share does not give them the possibility to influence the price of goods and services.[28] Furthermore, in perfect competition, the market is distinguished by maximal transparency and undertakings possess an exhaustive information with respect to market-related processes.[29] There are no practical barriers and neither entry nor exit from the market are associated with any costs.[30]

These elements which are characteristic to perfect competition ensure the existence of a large number of undertakings on the market, which deprives participants of the possibility to conduct economic policy based on the economy of scale.[31] Besides, the market provides homogeneous goods and services, which reduces the stimulus and motivation for the undertakings to be constantly oriented toward innovations and development. Under these circumstances, undertakings are deprived of the possibility to gain a large amount of profit, which consequently discourages them from engaging in research and technological development. Aspiration towards innovations and technological development is also reduced due

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[22] *Slot PJ, Johnston AC*, an introduction to EC Competition Law, 1-st ed. 4.
[23] *Kling/Thomas, supra* note 4, Rn. 7.
[24] *Whish/Bailey, supra* note 6 *p.* 4; *Lorenz Moris*, an introduction to EU Competition Law, 5.
[25] *Kling/Thomas, supra* note 4, Rn. 7.
[26] *Lorenz Moris*, an introduction to EU Competition Law, p. 5.
[27] *Slot, supra* note 22, p. 4.
[28] *Slot, supra* note 22, p. 4.
[29] *Japaridze Liana,* See Japaridze/Zukakishvili/Zhvania/Koadze/Gvelesiani/Akolashvili/Sergia/Momtsemlidze, Georgian Copetition Law, 2019, p. 29. quoting Whish, Richard and Bailey, David, Competition Law, 9th ed. Oxford University Press, 2018, p. 23.
[30] *Slot, supra* note 22, p. 4.
[31] *Kling/Thomas, supra* note 4, Rn. 7.

to having complete information about the market. These conditions reduce the level of rivalry among undertakings and they cohabitate "peacefully" with their competitors. In German literature, such a structure is known as "Schlafmützenkonkurrenz", which can be translated as a "dormant competition".

As noted above, competition is the process of "search and discovery" and its main characteristic is the dynamism of occurrences and actions. Accordingly, the static condition of the market in perfect competition contradicts the very essence of the competition. It is precisely because of the necessity to preserve the static condition and an unchanged position that the theory of perfect competition was not supported in practice.[32] On one hand, the perfect competition creates a market which is oriented on social wellbeing of consumers, but it factually implies the absence of elements and conditions necessary for the existence of competition. Based, among others, on this conclusion, achievement of the perfect competition can never be the objective of a rational competition policy.[33] Accordingly, the obligation to take care of the development of the competition as prescribed under article 6 of the Constitution should not be understood as the requirement to achieve the perfect competition in relevant markets.[34]

3.3. Effective Competition

Given that the creation of perfect competition cannot be justified under article 6 of the Constitution, it is necessary to determine an alternative model, which can be utilised when interpreting this constitutional provision. In this regard, it is also important to define rational maximisation, given that under jurisprudence of the Constitutional Court, in relation to certain norms, it is also possible to examine constitutionality of the disputed provision with respect to the constitutional principle of the development of competition.[35]

Due to flaws of the perfect competition model, it was necessary to create an alternative approach in the doctrine, which was further adopted in the legislation and jurisprudence of Western countries. In this regard, *"Toward a Concept of Workable Competition"* by the American economist John Maurice Clark is of significance. In this work, Clark was the first one[36] to criticise the model of perfect competition; he pointed out that the perfect competition has never existed and will never exist due to irreversibility of agreements distorting competition or other actions having the analogous effect.[37] The perfect competition is an unrealistic, ideal standard; it only bears the function of the initial point, with respect to which a practically existing competitive environment is assessed in a given case.[38] Based, among others, on these grounds, Clark rejects the theory of perfect competition and elaborates on a new concept of workable competition ("Konzept des funktionsfähigen Wettbewerbs"). With-

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[32] *Kling/Thomas, supra* note 4, Rn. 7; *Slot, supra* note 22, p. 4.
[33] *Emmerich, supra* note 2, Rn. 17.
[34] *Cf.* OECD Glossary of Industrial Organisation Economics and Competition Law, 03.01.2002. p. 66.
[35] *supra* note 21, para 4.
[36] OECD Glossary of Industrial Organisation Economics and Competition Law, 03.01.2002. p. 84; *Whish/Bailey, supra* note 6, 16.
[37] *Clark J.M. supra* note 5 p. 241.
[38] *ibid.*

ing the scope of this concept, he stresses that the full transparency required by the perfect competition and possession of exhaustive information on market processes by undertakings is harmful for the workable competition (stating that "effective competition requires some uncertainty").[39] Today, the uncertainty surrounding market processes is deemed to be one of the cornerstones on the dynamic competition theory.[40]

After two decades, Clark produced a more comprehensive work entitled *"Competition as a Dynamic Process"*,[41] where he specifies the term of workable competition and introduces a new term of "effective competition". At the same time, he develops his new theory with respect to the optimal degree of competition, which was further recognised in the scholarly work as well as legislation and jurisprudence of many countries. In this work, Clark elaborates not on static but dynamic nature of competition, and notes that the dynamic process of competition is everlasting.[42] The dynamic nature of the process of competition has been attributed a great significance in the further development of competition law, especially given the fact that the competition law attained the function of not only protecting the factually existing process of competition, but also potential competition.[43]

The dynamic nature of the process of competition has also been attributed a great importance in one of the decisions of the Competition Agency of Georgia, which underlined that competition, as a dynamic process, can only be beneficial for consumers if it is in the process of constant improvement, development and growth.[44] Based on the case-law of the ECJ, the Agency also noted that the restriction of free competition is also at hand, when a certain action is capable on influencing the market structure, and is aiming to obstruct preservation of the existing degree of competition or prevent its growth and development.[45] The Agency also shared the view of the ECJ and opined that preservation of the market in static condition results in problems related to the reduction of innovative products, limitation of choice of consumers as well as the price of products.[46]

Competition law of the EU is also based on the concept of effective competition.[47] This is demonstrated, for example, by the EC Regulation on the control of concentrations between undertakings, which prohibits such a concentration and this is incompatible with effective competition.[48] Furthermore, the concept of effective competition is also shared in the juris-

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[39] *Supra* note 37, p. 249.
[40] *Kling/Thomas, supra* note 4, Rn. 14.
[41] *Clark J.M.* Competition as a Dynamic Process, 1961.
[42] *Emmerich, supra* note 2, Rn. 18.
[43] *Kling/Thomas, supra* note 4, Rn. 14.
[44] Order N04/44 of the Chairman of the Competition Agency of Georgia in *„The case concerning Geverse Development, Ltd.".*
[45] *ibid*, cited ECLI:EU:C:1979:36, Case 85/76, "*Hoffmann-La Roche*," §§ 91; ECLI:EU:T:2003:250, Case T-203/01 *"Michelin II"* §§ 238-239.
[46] *ibid*, cited ECLI:EU:C:2010:603, C-280/08 P, "*Deutsche Telekom AG"*, § 182, ECLI:EU:C:2009:214 Case C-202/07 P, *"France Télécom"*, § 112.
[47] *Lorenz, supra* note 26, p. 22.
[48] See Council Regulation (EC) No 139/2004 of 20 January 2004 on the Control of Concentrations between Undertakings (the EC Merger Regulation, ELI: http://data.europa.eu/eli/reg/2004/139/oj (Accessed 28 March 2020).

prudence of the ECJ.[49] Nevertheless, there is no universal definition as to what should be regarded as effective competition.[50] Accordingly, the optimal degree of competition and, subsequently, effectiveness of competition, is to be defined for a given market in accordance with characteristics and parameters of this market in particular. Among such characteristics there can be the number of undertakings, accessibility of information, diversity of products etc.[51]

It is noteworthy that Georgian legislation regarding competition is also based on the theory of effective competition. This is demonstrated by several provisions in the Law "On Competition", as well as subordinate normative acts adopted based on this law.

Provisions of the Law of Georgia "On Competition" that relate to concentrations do prohibit such a concentration between undertakings, which distorts effective competition. Methodological Guidelines for Market Analysis adopted by virtue of Order N30/09-3 of the Chairman of the Competition Agency are fully based on the principle of effective competition. Moreover, Methodological Guidelines for Market Analysis contain the provision defining effective competition, according to which effective competition implies such an optimal combination of the market structure and market behaviour of undertakings, when the market productivity reaches the highest possible indicator. This provision creates solid grounds for discussing additional aspects of the effective competition. One of the most important aspects stemming from this definition is that effective competition cannot be regarded as a unified "formula" for all respective markets. Rather, effective competition means that the market should reach the highest possible indicator of productivity. This indicator, obviously, will vary in different markets, which hints on the relative nature of efficiency of the competition. Accordingly, efficiency of the competition shall be assessed differently with respect to each market. Competition of a specific degree might not be sufficient for achieving similar competition in a different market. Efficiency of competition shall be evaluated based on market conditions, market structure and its other characteristics. Thus, the existence of effective competition is to be examined on a case-by-case basis and independently, while considering parameters of a specific market.

Given the foregoing, it is clear that the concept of effective competition is more realistic; based on the Western practice and scientific achievements, it can be argued that article 6 (2) of the Constitution of Georgia implies the obligation to take care of developing effective competition.

3.4. INTERIM CONCLUSION

As demonstrated in the discussion provided above, the constitutional provision regarding the development of free competition does not intend to achieve the perfect competition in markets within the country. In this regard, state obligations are limited by creating favourable conditions for the formation of effective competition. Under article 6 of the Constitution, one

[49] ECLI:EU:C:1977:167, Case 26-76, *"Metro SB-Großmärkte"* § 21-22.
[50] *Lorenz*, *supra* note 26, p. 22.
[51] *ibid.*

of the constitutional aims of the country with respect to economic order is to achieve effective competition in the markets. This serves the goal of preserving the dynamic process of competition and is considerate of the market conditions, characteristics and other parameters thereof, while implementing the competition policy in a given market.

4. PROHIBITION OF MONOPOLISTIC ACTIVITIES

As mentioned above, article 6 of the Constitution denotes free competition as the basis of economic stability, however it does not represent the sole constitutional provision in relation to the economic competition. According to article 26 (4) the main constitutional aspect of economic competition should be the prohibition of monopolistic activities.

Considering the prohibition of monopolistic activities at the constitutional level already indicates the extent of potential damage that such practices may cause to the processes of establishing and developing free competition in the markets. The Constitution recognises monopolistic activity and free competition to be fundamentally incompatible, given that the existence of monopolistic practices renders it impossible to establish effective competition in relevant markets within the country. A constitutional provision of similar content indicates that, based on Article 6, in order to develop free competition, a country should pursue policies, which, through various mechanisms, prevent monopolies from occurring in the markets. The prohibition of monopolistic activity represents one of the specific instructions on the types of measures to be taken by the state in order to fulfil the obligation of developing free competition, as imposed by article 6. However, other than the prohibition of monopolistic activity, the Constitution does not specify the content of the said provision, which poses significant complications in practical interpretations of the norm. When interpreting article 26 (4) of the Constitution, it is of foremost importance to distinguish between the concepts of monopoly and monopolistic activity. The term "monopoly" describes a market in which only a single undertaking operates.[52] In such case, the only body/entity operating in the market is the exclusive supplier of specific goods or services.[53] "Monopolistic activity" refers to a specific action, or sets of actions, taken by undertakings. According to the verbatim interpretation of the norm, the prohibition only applies to the monopolistic activity, not to the monopoly itself. However, in order to determine the full content of the constitutional provision in question, it is imperative to analyse its teleological basis to establish the extent to which it applies to the monopoly itself.

Similar to the Georgian Constitution, primary treaties of the EU also establish the principles of open market economy ("offene Marktwirtschaft") and free competition ("freier Wettbewerb"). Specifically, paragraph 1 of article 199 of the TFEU obliges the Member States to adopt economic policies in accordance with the principle of an open market economy with free competition. The provision in the TFEU bears resemblance to the obligation to promote the development of free competition imposed on the country by the Article 6 of the Georgian

[52] *Shenefield John, Stelzer Irwin,* The Antitrust Laws, 4-th ed. p. 36.
[53] *Lorenz, supra* note 26, p. 10.

Constitution. Furthermore, unlike the Georgian Constitution, the TFEU establishes no guidelines in regard to the prohibition of monopoly or monopolistic activity. However, according to article 102 of TFEU, abuse by undertakings of a dominant position is prohibited. As defined by the ECJ, a dominant position refers to a state which would allow an undertaking to act independently from its competitors, clients and consumers, and limit free competition in the relevant market.[54] This definition makes it clear that the dominant position of an undertaking and a monopoly do not represent identical concepts, seeing as the existence of an undertaking with a dominant position, unlike a monopoly, does not preclude the existence of other undertaking in the relevant market. Nevertheless, it should be noted that according to the CJEU, article 102 does not prohibit the possession of a dominant position itself, rather - only its abuse.

A similar stance can be observed in the Law of Georgia "On Competition", which also prohibits not the possession of a dominant position, but the abuse of such a position. According to the law, an undertaking can be a dominant entity when it owns more than 40 percent of the market share. Furthermore, a monopolistic undertaking always owns more than 40 percent of the share in the market, and therefore automatically represents an entity with a dominant position. Thus, a dominant position is a broader concept than a monopolistic concept – a dominant entity is not always a monopolist; however, a monopolist is always a dominant entity. Accordingly, a dominant position and a monopolistic position do not represent identical concepts, and the notion expressed in scholarly works that "monopolistic position" and "dominant position" are synonymous, should be rejected.[55] Furthermore, it is clear that permitting a dominant position (which is a broader concept including a monopolistic position) implies the permissibility of a monopolistic position in itself.

As previously stated, similar to EU competition law, the Georgian legislation on competition also prohibits not the possession of a dominant position, but its abuse. An analogous notion can be found in the decision of the Competition Agency of Georgia, which stated that it is unlawful to abuse market power by limiting a free market though the "refusal to supply", not owning 100% of the market share (monopolistic position) itself.[56]

European and Georgian competition law approach is conditioned upon the concept of competition and its specific characteristics. Free competition makes it possible for an undertaking to gain significant advantage on a market, and as a result of the healthy competition remain as a sole active entity in the market. According to the dominant approach in the sciences of competition law, "competition exists for it to be won"[57] and the law "does not punish an honest winner".[58] Therefore, strengthening market position and increase in market share by a specific undertaking should be considered a concurrent event of a healthy compe-

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[54] ECLI:EU:C:1983:313, Case 322/81, *"Michelin"*, § 30; ECLI:EU:C:1979:36, Case 85/76, *"Hoffmann-La Roche,"* § 38; ECLI:EU:C:1978:22, Case 27/76, *"United Brands"*, § 65.
[55] Group of Authors, *Turava Paata*, ed, *Commentary to the Constitution of Georgia*, Chapter 2, Tbilisi, 2013. p. 374.
[56] *supra* note 44.
[57] *Japaridze*, *supra* note 29, p. 29. Quoting Whish, Richard and Bailey, David, Competition Law, 9 th ed. Oxford University Press, 2018, p. 9.
[58] *ibid.*

tition. Such a drive for "victory" from undertakings represents one of the determining factors for the growth of the quality of competition. Accordingly, monopoly itself cannot be prohibited, considering that such prevention will partially or fully eliminate the incentive for rivalry and subsequently inhibit the processes of establishing and developing healthy competition. For this exact reason, article 26 (4) of the Constitution does not instruct the prevention of a monopoly and the country's fundamental law does not prohibit the possibility of a monopoly in the relevant market *per se*.

Permitting a monopoly does not indicate that it represents a desirable condition for developing free competition and an open economy. As mentioned above, article 6 of the Constitution obliges the county to ensure the establishment of effective competition in the relevant markets. However, the existence of a monopolistic position in the market precludes the development of an effective competition, since a monopoly represents a complete theoretical opposite of perfect competition.[59] When only a single entity operates on the market, the undertaking is not subject to the competitive pressure from other undertakings, and market conditions are established not through the natural processes of competition, but by the undertaking in a monopolistic position. A monopolistic position grants an undertaking the power to independently determine the volume, quantity and scale of goods and services supplied to the market. In addition, the said undertaking sets prices that are self-tailored and not dictated by the market. Usually, in the absence of competition, an undertaking also neglects technological development and production of innovative goods. As a result, in contrast to the effective competition, a monopolistic market, as a rule, has detrimental effects on consumers' interest, establishment of a free and open market, and the common good of the society. Furthermore, one of the foremost negative effects of a monopoly is the prevention of participation in production and commercial relations by other entities.[60] Therefore, despite the status of legality with which a monopoly was established in the market, it is still considered to be an "economic evil" and is associated with artificially inflated prices, limited production and decreased innovation.[61]

Following this, despite the monopoly not being prohibited by the Constitution, given the nonexistence of competition in a monopolistic market, the responsibility to ensure free competition, as imposed by the article 6 of the Constitution, obliges the country - without a disproportionate and unjustified interference in natural processes of competition - to create an environment predisposed to prevent a specific undertaking from gaining a monopolistic position.[62] It can be said, that a monopolistic position is tolerated, but undesired.[63]

In contrast to a monopoly, article 26 (4) of the Constitution directly prohibits monopolistic activity, which is a more multifaceted and complex category. As mentioned before, prohibition of monopolistic activity is the constitutional aspect of an economic competition.

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[59] *Lorenz, supra* note 26, p. 9; p. 29. Quoting Whish, Richard and Bailey, David, Competition Law, 9 th ed. Oxford University Press, 2018, p. 22.
[60] Standard Oil Co. of New Jersey v. United States, 221 U.S. 1.
[61] *Shenefield, supra* note *52*, p. 37.
[62] Such a mechanism is *e.g.* control of concentrations. See *infra* Chapter 5.2.
[63] *Shenefield, supra* note 52, p. 40.

Accordingly, the said term must be defined in conjunction with article 6 of the Constitution, which envisages the principles of an open economy and free competition. The prohibition of monopolistic activity stems from the constitutional purpose of ensuring free competition.

In a broad sense, it can be said that an activity/set of activities categorised as monopolistic activity is restrictive for competition in nature. This is evidenced by the Law of Georgia "On Monopolistic Activities and Competition" (declared void since 2005), which, unlike the current Law of Georgia "On Competition" contains a legislative definition of a monopolistic activity. According to the mentioned law, monopolistic activity refers to the activity by an undertaking which has an influence on the price of goods and limits competition. Although this definition may not be comprehensive and fall short on painting a full picture of a monopolistic activity, the important part is that, according to this definition, the essential aspect of monopolistic activity is the limitation of competition. It is also important to note, that article 1 of the Law of Georgia "On Monopolistic Activities and Competition" prohibits monopolistic activities by an undertaking. According to this provision, a subject engaging in a monopolistic activity can be any undertaking, regardless of its power in the market. Therefore, the subject of monopolistic activity may not even be an undertaking in a monopolistic position.

Determining what constitutes a monopolistic activity regarding article 16 of the Constitution is incredibly complex. This complexity is, in part, caused by the fact that the concept of monopolistic activity is not recognised by modern Georgian competition law. The concept of monopolistic activity is also foreign to sources of EU legislation as well as that of its Member States.

With respect to the monopolistic activity, it is noteworthy that the notion promoted by scholarly works stating that "monopolistic activities are undertaken based on the position of monopoly"[64] is not to be shared. This approach significantly limits the scope to which article 26 (4) of the Constitution can be applied and lets various actions distorting competition remain permitted. Interpreting the norm in such a way and thereby limiting its scope comes in direct contradiction to article 6 (2) of the Constitution, which reinforces the principles of free competition. The mentioned norm should not be interpreted to be assuming that a monopolistic activity is predetermined by a monopolistic position. In this case, the norm will not apply to the actions by undertakings in dominant positions who do not represent monopolistic entities.

In conjunction with article 6 (2) of the Constitution and the interpretation of article 26 (4) (in the context of prohibition of monopolistic activities) of the Constitution in accordance with the discussion presented above as well as the views shared in the doctrine a monopolistic activity should be defined as a an action/actions by an undertaking (not necessarily a monopolist), which are prohibited by classical internationally recognised mechanisms of competition law and are predisposed toward monopolising a market. These mechanisms are similar in content across almost all developed Western nations and incorporate prohibitive norms for the actions by undertakings that are aimed at or result in, through the abuse of

[64] Group of Authors, *supra* note 55, p. 374.

power in the market, profit maximisation, limitation of production or technology, imposition of unfair prices, and so on. Prohibition of such actions represents one of the essential broad principles of an open economy and free competition.[65]

Furthermore, the Constitution also incorporates a provision according to which, monopolistic activity is permitted only in cases determined by the law. Although, this provision should not be interpreted as an implication, that the legislator has full discretion in determining the permissibility of a monopolistic activity. Allowing an activity that limits competition is permitted to a legislator only when it serves a legitimate public purpose and adheres to the principle of proportionality.[66] This might happen when free competition and natural processes in the market based on free competition are not as successful in achieving a healthy competitive environment and its derivative positive effects, as, in specific cases, would be possible by limiting competition; or when the competition is limited in an insignificant way, without harming effective competition in the relevant market.

5. CONSTITUTIONAL OBLIGATIONS OF THE STATE WITH RESPECT TO COMPETITION

5.1. GENERAL OVERVIEW

As stated before, article 6 of the Constitution of Georgia defines the main directions of the economic order in the country and recognises free competition as the fundamental institute for market economy, while ensuring its protection. At the same time, given its abstract nature, article 6 does not provide the possibility to see an all-encompassing picture of state obligations with respect to competition.

However, it has been pointed out in the previous Chapter, that prohibition of monopolistic activities is one specific direction among the types and forms of actions that are to be undertaken within the scope of the state obligation of developing free competition. Accordingly, positive and negative obligations regarding promotion of free competition can also be defined while considering the prohibition of monopolistic activities, as prescribed under article 26 of the Constitution.

5.2. POSITIVE OBLIGATIONS OF THE STATE

It is reasonable to begin the analysis of the state's positive obligations by discussing a specific judgment of the Constitutional Court, where it provided an overview of state obligations with respect to ensuring freedom of enterprise. In particular, the Court noted that the freedom of enterprise obliges the state to "create such a normative environment, which encoura-

[65] See the subsequent chapters for the discussion on specific ways of distorting competition.
[66] *Cf.* Judgment of the Constitutional Court of Georgia N2/11/747 dated 14 December 2018 in the case of "Ltd 'Giganti Security' and Ltd 'Security Company Tigonis' v. the Parliament of Georgia and the Minister of Internal Affairs of Georgia".

ges viable subjects and does not result in their expulsion from the market".[67] Similar to freedom of enterprise, the constitutional provision regarding free competition obliges the state to create such a legislative order, which ensures the formation of free competition, its development and the protection of the natural process of competition.[68] The legal order should create a reasonable balance between the interests of entrepreneurs, consumers, state and the public, and, based on this balance, it should ensure effective performance of functions listed in Chapter 2 of this article.

In addition, taking care of free competition implies protection of a healthy and natural process of competition from various restrictions. Within the scope of positive obligations under article 6 of the Constitution, the normative environment created by the state should prevent artificial obstacles to free competition and should ensure the constant development of the dynamic process of competition.

Restrictions of the natural process of competition can occur as a result of actions of the state as well as those of market operators. Accordingly, within the scope of its constitutional obligations, the state shall provide legislative mechanisms, protecting the process of competition both from state bodies and undertakings. Under the said constitutional provision, the state must create a normative environment ensuring competition free from interference from individuals and state bodies, and the restrictions deriving from them.[69]

In accordance with the elements of competition described in Chapter 1, the state is under the obligation to promote the formation of markets for goods and services, ensure the undertakings' free access to this market and achieve a high degree of competition, - i.e. antagonistic relationship between undertakings operating therein. Existence of the said elements of competition is impossible without the freedom of enterprise, which is guaranteed under articles 6 and 26 of the constitution. Under the definition provided by the Constitutional Court, freedom of enterprise ensures that an entrepreneurial subject freely selects a specific entrepreneurial activity and engages in it unobstructed.[70] To put it in other words, it is precisely the freedom of enterprise that provides the possibility of creating new undertakings, which select a specific area of activities independently and, subsequently, become participants of the relevant market. Their entry into market automatically guarantees that the said subjects will become participants of the market and, accordingly, of the competitive process existing within the market. These undertakings begin advancing their own position in the market at the expense of other market operators either for the purposes of achieving their own material wellbeing or maximising the profit gained from their activities. Thus, antagonistic relationship between these subjects creates a competition among them.

In this regard, one of the most essential factors is the autonomy of will of the undertakings, as well as is capacity to determine its own economic policy independently, which is guaran-

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[67] *supra* note 21, para. 5.
[68] Judgment of the Constitutional Court of Georgia N2/11/74 dated 14 December 2018 in the case of "Ltd 'Giganti Security' and Ltd 'Security Company Tigonis' v. the Parliament of Georgia and the Minister of Internal Affairs of Georgia", para. 2.
[69] *Opperman Thomas, Clasen Claus Dieter, Nettesheim Martin,* Europarecht, 6. Auflage, § 20, Rn. 3
[70] *supra* note 21, para. 2.

teed by the constitutional recognition of the freedom of enterprise. This is demonstrated by one of the decisions of the Constitutional Court, where it noted that the formation of free competition in the market is indispensably linked to the freedom of enterprise.[71] Only in the context of freedom of enterprise it becomes possible to create new markets and enable undertakings to operate freely on these markets. Without the freedom of enterprise, it is impossible to create competition, given that it forms the precondition for the creation of new markets as well as providing free market entry to undertakings. This is the reason why article 6 (2) of the Constitution refers both to freedom of enterprise and free competition, as two inseparable categories, which together create the legal grounds for the formation of open economy in the country.

The process of competition is being formed and developed when undertakings are fully exercising their constitutional freedom of enterprise.[72] However, unlimited exercise of freedom of enterprise would have created a threat of such rights being used by undertakings for the purposes of distorting free competition, which, of course, would have threatened the process of creation of free and competitive markets. In particular, competitive pressures of various scales might incite undertakings to avoid the process of healthy competition and think of artificial mechanisms for reducing or eliminating such a pressure.

According to the position widely accepted in German scholarly literature, the existence of competition is impossible without economic freedom. However, unlimited freedom of enterprise in itself contains high risks for entrepreneurial freedom.[73] The process of healthy competition naturally creates reasonable and proportionate frames for freedom of entrepreneurship, within which it is possible to exercise the said freedom in a form and to an extent which does not threaten the stability of market structure.[74] Precisely for this reason, the ECJ noted that defining market policy within the scope of freedom of enterprise is not only the right of undertakings, but also – their obligation. In particular, the Court observed that an economic policy to be implemented or which is being implemented by an undertaking should be defined solely by this undertaking,[75] *i.e.* without making prior agreements with other market participants. According to the Court, the grounds for norms protecting competition are stemming from the opinion suggesting that every participant of the market defines their economic policy independently.[76]

Making an agreement regarding undertaking's economic policy with other undertakings while intending to reduce the competitive pressure and thereby protect one's own material or other types of interests contains serious threats to a healthy competitive environment and a natural process of competition. In this case, the pressure of competition within the market is reduced and undertakings become in charge of governing market processes, contrary to the natural process of competition. This contradicts the principle of free competition, under

[71] *supra* note 21, para 5.
[72] *Kling/Thomas, supra* note 4, Rn. 2.
[73] *Füller*, in Kölner Kommentar zum Kartelrecht, Bd. 3. § 101. Rn. 4.
[74] *ibid.*
[75] ECLI:EU:C:2009:343, *"T-Mobile Netherlands BV"* Case C-8/08 § 32.
[76] ECLI:EU:C:2006:734, *"Asnef-Equifax"*, Case C-238/05 § 52.

which the market should be governed by competition rather than a specific subject or a group of subjects. Anticompetitive Agreements are not only in breach of the principle of free competition, but they are also against the interests of entrepreneurial subjects and consumers.[77] Accordingly, the normative environment created by the state within the scope of its positive obligation to take care of competition should ensure prevention of actions aiming to restrict competition among undertakings, as well as imposing sanctions on undertakings in case of engaging in such actions.

It should also be noted that anticompetitive agreements represent one manner of limiting the realisation of autonomy of will of undertakings, which is protected under the freedom of enterprise. However, according to the definition of the Constitutional Court, "the interference within the formation of this will should not be excluded, when there is a real risk that a subject will abuse the entrusted entitlements and will act in contradiction to the traditions established in civil turnover. It is inadmissible the free will should become the ground for the formation of non-equivalent, disproportionate and unfair relations which would cause the distancing of the participants from the traditions of turnover and would at the same time come in conflict with the acknowledged moral imperatives".[78] Given that anticompetitive agreements represent an action against common good and interests, which threatens a healthy competitive environment and the country's economic order, it can be said that prohibiting actions distorting competition with the determination to take care of competition constitutes a justified restriction of the undertaking's freedom of enterprise.

Freedom of enterprise is the principal foundation of the competition, however, protection of competition borders with freedom of enterprise insofar that it is unacceptable for the freedom of enterprise of one or several undertakings to limit this right for other undertakings or inflict disproportionate and unjustified harm to the wellbeing of consumers. Under article 6 (2) of the Constitution, guaranteeing the freedom of enterprise is not a value higher than the development of competition, formation of the competitive market or free and open economy. This provision of the Constitution points to the obligation of undertakings not to use their constitutionally guaranteed freedom of enterprise for the purposes of distorting competition and, in this way, obstruct the process of formation or development of the free and open economy.

Actions such as abuse of dominant position, unfair competition and such concentrations of undertakings that are threatening the competition can be regarded as the exercise of the freedom of enterprise. However, alongside the anticompetitive agreements, all the aforesaid actions are prohibited by the Georgian legislation, as well as that of leading Western countries. In Georgian reality, this prohibition stems directly from the obligation to take care of competition under article 6 (2) of the Constitution.

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[77] See *infra* Chapter 6.

[78] Judgment of the Constitutional Court of Georgia №1/2/411 dated 19 December 2008 in the case of "LTD 'Russenergoservice', LTD 'Patara Kakhi', JSC 'Gorgota', Givi Abalaki's Individual Company 'Farmer' and LTD 'Energia' v. the Parliament of Georgia and the Ministry of Energy of Georgia".

The prohibition of abuse of dominant position protects the market from such actions of subjects having market power, which are harmful for a healthy competitive environment. Subjects having such a market position might use their power to obstruct activities of competitor undertakings, foreclose them from the market, create market barriers for potential competitors, set unfair prices for consumers, etc. This is the reason why a state should, within the scope of its obligation to care about competition, create such a normative environment, which can prevent the occurrences of the abuse of dominant position by subjects having significant market power and protect undertakings, consumers and the process of healthy competition as such.

In addition, as noted above, the obligation under article 6 (2) to take care of free competition prescribes that a state must create such an environment, without disproportionate and unjust interferences within the natural process of competition, that will be aiming to prevent specific undertakings from gaining monopoly over the market. Taking this into account, Georgian and European competition law, as well as that of different Western states envisage the possibility to control concentrations which are harmful for competition. Concentration is at hand when undertakings are linked/united by merger or other means.[79] Accordingly, concentrations result in combining the market power of undertakings operating in the market, which, obviously, decreases the degree of competition. Hence, in order to preserve free and healthy competition, it is important for the state to adopt special norms regulating such transactions, which will be aiming to prevent concentrations harmful for the process of competition.

For the purposes of protecting interests of consumers and entrepreneurs, the process of competition should follow fair rules of the game and there should be no place for undertakings' actions against good faith, which are contrary to work ethics and harms interests of competitors. Thus, it is necessary for one of the main directions of taking care of free competition under article 6 to be the prohibition of bad faith actions, which are harmful for the competition.

Accordingly, it can be stated that prohibitions regarding anticompetitive agreements, abuse of dominant position, unfair competition and concentrations that are incompatible with healthy competitive environment represent the principal mechanism for preventing threats stemming from undertakings, within the scope of the state obligation to take care of competition. However, as noted above, a healthy competitive environment can be threatened not only by private individuals, but particularly by executive bodies of the government as well. Thus, under the positive state obligation stemming from article 6 of the Constitution, the legislature shall provide such a legislative order, which will be able to prevent distortion of competition by various administrative bodies.

Distortion of competition by administrative bodies might be at hand when a preferential treatment is guaranteed for a specific undertaking, or, on the contrary, - when obstacles are created for an undertaking, thereby obstructing the natural competitive equilibrium within the market. Providing advantages to specific undertaking or a group of undertakings at the

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[79] *Zukakishvili Keti*, See Japaride/Zukakishvili/Zhvania/Kobadze/Gvelesiani/Akolashvili/Sergia/Momtsemlidze, Constitutional Law of Georgia, p. 496.

expense of government resources distorts the natural state of the market and provides artificial benefits to one part of undertakings, the achievement of which would have been impossible for this undertaking within the course of natural development. Such an approach is known in competition law as state aid, which implies "giving selective economic advantage by a state to a specific undertaking to a specific kind of activity".[80] The normative environment created by the state within the scope of its positive obligations under article 6 (2) should ensure reasonable regulations regarding provision of state aid and the existence of respective procedural norms.

Besides, a threat posed by administrative bodies can also be created when undertakings are granted certain rights exclusively with respect to public procurement, in breach of competition, equality, etc. For this reason, the Georgian Law on Competition prescribes certain norms which impose limitation on different government agencies. In this regard, it important to take a look at the definition provided by the Competition Agency: article 10 of the Law "On Competition" intends to perform such constitutional obligations, by barring the government as well as the bodies of autonomous republics and local self-government from carrying out activities which obstruct the development of free entrepreneurship and competition.[81]

Another important direction for ensuring competitive environment in the country is the area of public procurement, which, as stated by the Supreme Court of Georgia, "represents one of the most important functions related to public governance, and its legal consequences have an impact on creating a healthy competitive environment for entrepreneurial subjects, development of market economy, and ensuring lawful and fair civil circulation".[82] Precisely for this reason, article 6 of the Constitution also requires ensuring the principle of free competition in the context of public procurement.

In the light of the foregoing, it can be stated that the normative environment created by the state within the scope of its positive obligations regarding free competition should, on one hand, ensure the compatibility of executive bodies' actions with the free market order and, on the other hand, should eliminate different actions aiming to distort competition undertaken particularly by undertakings with the intent to distort competition. Accordingly, special legislation created with the intention to protect free competition shall not serve the purpose of state or undertakings' hegemony, but rather that of the pressure stemming from the natural process of competition. A normative environment created by the state within the scope of its positive constitutional obligations with respect to free competition should ensure that, on the hand, undertakings possess different scales of market power and; on the other hand, administrative/financial resources concentrated in hands of state organs shall be balanced in such a way that would prevent the hegemony of a state or undertaking(s) over the market, and that

[80] *Adamia Givi*, "Qualifying State Action as a State Aid according to the Georgian and European Competition Law" See "Georgian-German Journal of Comparative Law", 4/2019, p. 47.
[81] Order N04/216 of the Chairman of the Competition Agency of Georgia dated 17 August 2018 in "The case N3 regarding advance guarantees, p. 28.
[82] Judgment of the Supreme Council of Georgia, 21/07/2014, BS-667-642(k-13).

would ensure that the market is entirely governed by a healthy and natural process of competition.

Considering these elements of the positive state obligation to take care of free competition, creating a relevant normative environment is possible through enacting special legislation on competition. Competition laws create the principal grounds for the formation and development of market economy. They should ensure free competition and should limit already existing market powers in cases where the latter obstruct or might possibly obstruct the process of healthy competition and inflict harm upon efficiency of the market related to this process. This is the reason why Georgian legislation has adopted the Law "On Competition", which is aiming to prevent threats stemming, on one hand, from the government and bodies of local self-governments or autonomous republics, and, on the other hand, - from undertakings. It prescribes the norms prohibiting agreements distorting competition, abuse of the dominant position, unfair competition and concentrations that are incompatible with the healthy competitive environment. Provisions barring bodies of government, local self-government and autonomous republics from engaging into activities distorting competition take care of the prevention of obstructing competition by government bodies. In addition, the positive obligation to take care of competition also implies the necessity of a specialised administrative body, equipped with effective mechanisms in order to execute the said norms. It is also noteworthy that creating a normative environment within the scope of the positive state obligation to take care of free competition might not be limited only to the existence of competition legislation, and additional legal acts might be adopted in order to stimulate and encourage the development of healthy competition in the country.

5.3. NEGATIVE OBLIGATIONS OF THE STATE

Negative obligations stemming from the constitutional guarantee for the protection of free competition imply abstaining from legislative actions or measures, which would amount to artificial interference within the natural process of competition and would obstruct the process of its natural development. Such an interference can have different forms and nature, the effects of which are to be determined on a case-by-case basis as a result of analysing circumstances of a given case. This paper will touch upon two of the most important violations of the state's negative obligations – the breach of competitive equality and imposing barriers for entering the market.

One of the most important aspects of taking care of competition is the protection of competitive equality. Under the case-law of the Supreme Court of Georgia, ensuring equality among undertakings is regarded as the measure for the promotion of free entrepreneurial activities and the guarantee of the constitutional provision regarding free competition.[83] The Constitutional Court noted that the *"state is obliged to abstain from creating unequal conditions for undertakings"*.[84] However, competitive equality is characterised by certain specificities. In particular, it implies equal treatment of not only undertakings operating on the market, but

[83] Judgment of the Supreme Council of Georgia 21/07/2014, BS-667-642(k-13).
[84] *supra* note 68, para. 3.

potential undertakings as well. To put it otherwise, for the purposes of ensuring effective competition on the market, it is essential that undertakings be considered as equal; while performing its negative obligations under article 6 of the Constitution, the state should not create a legislative basis that can breach competitive equality of similar subjects.

Violation of competitive equality might occur when the state gives a certain advantage to one undertaking, thereby creating such favourable market conditions that the latter would not have been able to achieve within the course of natural development of the market. Such an example is one of the cases of the Constitutional Court, where the state created legislation equipping the State Security Service with administrative resources, which resulted in competitive advantages as compared to its competitor undertakings.[85]

State interference might be at hand not only in cases where undertakings are given an advantage, but also where market position of a given undertaking is worsened. State actions might disproportionately limit rights of an undertaking operating within the relevant market, or they might obstruct its entrepreneurial activities, which subsequently results in worsening the market position of a particular undertaking, thereby giving other undertakings a competitive advantage.

Accordingly, the breach of competitive equality might occur in two cases: 1) when a state gives an undertaking or a group of undertakings certain advantages, thereby creating more favourable conditions for them as compared to their competitors;[86] 2) when a state creates disadvantageous conditions for one undertaking or a group of undertakings as compared to their competitors.

When examining state actions with respect to competitive equality, it is important to identify undertakings that are substantially equal. These would be subjects operating within the same market as well as potential subjects (subjects that have a reasoned intention to enter the relevant market). Afterwards, it should be examined whether a given legislative regulation provides a selective advantage to one of them, or whether it limits market positions of these undertakings. In both cases, state interference within the natural market process will be at hand, which is in breach of competitive equality of undertakings and harms the healthy competitive environment by destroying the equilibrium.

Accordingly, for the purposes of performing negative obligations with respect to the development of competition, it is also important to abstain from creating barriers for market entry. According to the Constitutional Court of Georgia, free competition ensures the protection against unjustified obstacles.[87] In this regard, scholarly works distinguish two types of barriers – financial/technical and institutional.[88]

In the context of negative state obligations related to competition, setting forth the requirement to have a certain amount of capital for market entry or specific technical preconditions

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[85] *supra* note 68.
[86] *supra* note 68, para. 4.
[87] *supra* note 68, para 6.
[88] Akolashvili/Sergia, See Japaride/Zukakishvili/Zhvania/Kobadze/Gvelesiani/Akolashvili/Sergia/Momtsemlidze, Constitutional Law of Georgia, p. 410.

might be regarded as technical/financial obstacles. As for institutional obstacles, - they might be at hand where some difficulties arise with respect to registration of an undertaking, or where permission or license is required for carrying out certain activities, etc.

With regards to the negative obligation of the State derived from the constitutional guarantee of safeguarding free competition, it is essential to point out a judgment of the Constitutional Court of Georgia, which dealt with the provision in the Law "On State Procurement" stating, that the State Procurement legislation was not applicable to the public procurement by a contracting authority of postal and courier services of the LLC Georgian Post (Law of Georgia "On State Procurements", article 3, paragraph "r").[89] With this Judgment the Constitutional Court of Georgia correctly declared the existing provision unconstitutional and invalidated it. However, the argumentation and the grounds which the Constitutional Court used to reach the conclusion are problematic. The Court points out the state aid multiple times and elaborates on the elements, characteristics and other aspects thereof. It is primarily noteworthy, that State Aid / Staatliche Beihilfe is a legal institute within the competition law, and it is not constitutional-law category. Therefore, assessing the constitutionality of legal provisions based on state aid cannot be appropriate. As mentioned above, constitutional obligation of the State with regards to the state aid is bound by proportional regulation of issuing state aid, which is positive obligation of the State to create relevant normative environment.

The instance discussed by the mentioned case is classic example of violating state negative duty. The State, on the one hand, infringes the competitive equality of the existing and potential undertakings on the market by granting unjustified and indirect privileges to the Ltd Georgian Post, which was expressed in the ability of providing postal services without tender procedures to contracting authorities. This provision also imposed barriers to postal service-providers from entering relevant market and excluded from such market the competitors and potential competing undertakings of the Ltd Georgian Post. Therefore, the State violated its negative constitutional obligation and did not abstain on a legislative level from the act or event, which would manifest into artificial interference and hindrance or encroachment of the natural development of this process.

As stated before, the principal characteristic of the competition process is its dynamic nature. Accordingly, in order to ensure constant development of this process and to preserve its dynamic nature, it is important for undertakings to have the ability to freely enter and operate in the relevant market within the country. This ability might be restricted by any obstacle set forth by the state, which results in difficulty or impossibility for new undertakings to enter the relevant market.

[89] *supra* note 21.

6. GROUNDS FOR EXAMINING CONSTITUTIONALITY OF NORMS WITH RESPECT TO FREE COMPETITION

Breach of the aforesaid positive and negative obligations undoubtedly creates the necessity to examine constitutionality of a specific action. Accordingly, it is important to identify constitutional provisions, with respect to which it will be possible to examine constitutionality of a specific norm in cases where there is an alleged breach of obligations related to free competition.

Based on one of the most important definitions provided by the Constitutional Court, assessing the constitutionality of the norm with respect to the constitutional principle of free competition is admissible.[90] In this definition, the Constitutional Court rightly pointed out that assessing constitutionality of the norm only with respect to article 6 of the constitution was impossible. As mentioned, in this case, free competition is one of the foundations of the economic order in the country as well as the general constitutional principle. Accordingly, examining constitutionality of the norm in the context of competition requires linking it with other constitutional provisions.

The said link should be established while considering those functions that are performed by free competition within the scope of the country's economic life. Functions of competition have already been discussed in Chapter 2 of this paper and, as a result of the analysis of these functions, it is evident that positive effects stemming from free competition are benefiting not only entrepreneurs, but also consumers. Constitutional provisions regarding the protection of freedom of entrepreneurship and consumers' rights are enshrined in article 26 (4) of the Constitution.

The said connection from the point of view of the context points to the fact that certain aspects of spheres protected under freedom of substantially equal and consumers rights shall be defined in accordance with functions of competition, that is the foundation of the country's economic order.

One of the aspects of freedom of enterprise is the possibility to engage into entrepreneurial activities in a healthy competitive environment. This freedom, in conjunction with article 6 of the Constitution, gives every entrepreneur the right to carry out its activities in a healthy competitive environment. This is also demonstrated by the definition provided by the Constitutional Court. Namely, the Court noted that the rights protected under article 26 (4) also implies the state obligation to abstain from distorting competition.[91] In this regard, consumer's rights consist of the possibility of receiving products of high quality for the minimal price set as a result of effective competition, as well as their ability to benefit from other goods produced as a result of free competition.

Accordingly, in the context of competition, constitutionality of a given norm can also be assessed with respect to freedom of entrepreneurship as well as provisions ensuring the protection of the consumers' rights. Article 6 of the Constitution encompasses part of the

[90] *supra* note 21, para 4.
[91] *supra* note 21, para. 19.

freedom of enterprise and consumers' rights guaranteed under article 26 of the Constitution. This means that the freedom of enterprise and consumers' rights imply carrying out entrepreneurial activities in a healthy competitive environment as well as providing customers with benefits stemming from effective competition (low price, high quality, more choice, etc.). Thus, depending on factual circumstances of specific cases, free competition can also fall within the scope of constitutional provisions ensuring the protection freedom of enterprise or consumers' rights. Hence, the breach of negative and positive state obligations with respect to free competition should also be deemed as an interference within the sphere protected under article 26 (4). In addition, legislation regarding economic governance alters competitive conditions of the market,[92] and, in this regard, it can also be deemed as an interference within the rights protected under article 26 (4) of the Constitution.

Besides, in accordance with exceptions from article 26 (4), enabling monopolistic activities at the legislative level also constitutes interference within the rights protected under this article (freedom of enterprise, consumers' rights). Hence, monopolistic activities shall also undergo the same test as other types of interference within free competition.

In addition, not every change in competition and interference within article 26 (4) point to its unconstitutionality.[93] Carrying out entrepreneurial activities in a healthy competitive environment and the possibility for the consumers to enjoy benefits stemming from effective competition are not absolute rights, and they can be subjected to proportionate limitations aiming to achieve a legitimate aim.[94] In such cases, legitimate aims might vary, and their analysis is a topic for another research, exceeding the scope of the present paper. However, it can be pointed out that one of the legitimate aims for limiting free competition might be the achievement of the functions, enumerated in Chapter 2 of the paper. In other words, restriction of free competition might be justified in cases where a special norm or a unity of norms integrate the aforesaid functions of the competition and ensure their more effective performance, as compared to how they would have been performed in the context of free competition independent from state interference.

CONCLUSION

Based on the discussion presented in this article, it is possible to conclude that article 6 of the current edition of the Constitution of Georgia recognises free competition as the foundation of the economic order in the country. One of the main directions created based on this constitutional provision, as well as the economic policy of the country stemming from it, is ensuring healthy competitive environment in relevant markets. At the same time, this principle is of particular significance for the purposes of interpretation of article 26 (4) of the Constitution, as well as for defining the scale and types of specific obligations of the state.

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[92] BVerfGE 4, 7 – "*Investitionshilfe"* § 57.
[93] BVerfGE 4, 7 – "*Investitionshilfe"* § 57.
[94] *Cf. supra* note 68, para. 47.

This paper defined main elements and main characteristics of competition as prescribed under article 6 of the Constitution. In addition, the second part of the paper was dedicated to the analysis regarding principal functions of competition, which are highly valuable for the purposes of interpretation of specific provisions of the Constitution and Georgian legislation.

After elaborating on functions of competition, the paper also defined the scope and scale of the state obligation to take care of competition under article 6 of the Constitution. Based on leading scholarly work and practice of Western developed countries, it has been pointed out that the state obligation under this norm does not imply the achievement of perfect competition, but rather, - the effective competition.

Further, due regard has been paid to the constitutional provision in article 26 (4) of the Constitution regarding the prohibition of monopolistic activities. With respect to this provision, it has been noted that the Constitution does not prohibit monopoly as such, but rather – it prohibits monopolistic activities, which might not necessarily be carried out by a subject holding monopoly.

In addition, this paper defined the scope of positive and negative obligations of the state in the context of taking care of the development of competition; interrelation between constitutional provisions regarding the development of competition, freedom of entrepreneurship and protection of the consumers' rights has been analysed as well.

This paper also discussed the importance of the constitutional provision in the context of assessing constitutionality of the norm as well as its teleological grounds. As a result, it has been noted that free competition falls within the scope of article 26 (4) of the Constitution, which concerns the freedom of enterprise and the rights of consumers. Accordingly, examining constitutionality of the norm can also be possible with respect to article 6, in conjunction with article 26 (4) of the Constitution.

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THE ART OF APPLYING IHL: *JUS IN BELLO* IN THE JURISPRUDENCE OF INTER-AMERICAN HUMAN RIGHTS BODIES

ABSTRACT

Due to the ECHR's decision regarding the request for interim measures lodged by Armenia against Azerbaijan with respect to an armed conflict, the issue of giving international humanitarian law (IHL) relevance through the jurisprudence of regional human rights bodies has recently become relevant once again. Some European scholars have criticized the Court's attempt to get involved in the case concerning the international armed conflict, deeming the related interim measures vague, ineffective and incompatible with the role of the Court. However, while focusing on the jurisprudence of Inter-American human rights bodies, this paper will try to remind the readers that the ECHR is not the only human rights body which had to deal with IHL. It will be demonstrated that the experience of these bodies is far more creative and diverse as compared to that of the ECHR.

It is not the aim of this paper to argue that decisions attempting to incorporate IHL will necessarily be complied with; nor does it intend to engage into theoretical mandate-related discussion on whether or not human rights bodies should dare dealing with IHL at all or not. Rather, it will review the jurisprudence of bodies of the Inter-American system of human rights, and suggest that, should other judicial or quasi-judicial bodies be willing to manifest the bravery of giving IHL relevance through their case-law, the IACHR and the IACtHR could be the bodies the example of which might be the one to follow.

INTRODUCTION

The non-enforceable nature of international humanitarian law (hereinafter, the "IHL") has long troubled proponents of this field of law. While the Geneva Conventions (hereinafter, "GC(s)"), their Additional Protocols (hereinafter, "AP"), customary rules of IHL and the Hague Conventions altogether demonstrate a very important attempt aiming to protect individuals during armed conflicts, sadly, - and despite the latest attempts led by the International Committee of Red Cross (hereinafter, the "ICRC"), - no supervisory body has been established under *jus in bello* that would assess the state's compliance with this body of law. Accordingly, it remains largely unexecuted.

Although the discussion on whether or not international judicial and quasi-judicial human rights bodies should attempt to incorporate IHL into their jurisprudence is not a new topic, it has gained more relevance once again due to interim measures recently granted by the European Court of Human Rights (hereinafter, the "ECHR") with respect to an international armed conflict (hereinafter, "IAC") between Armenia and Azerbaijan. Similar to its previous interim measures granted in the context of armed conflicts, this decision of the Court has also attracted some criticism.

In particular, some authors argue that utilization of IHL by human rights bodies would fall beyond their mandate and that human rights bodies have no authority to interpret or apply IHL. Hence, these bodies should abstain from interpreting, and even more so – from applying *jus in bello*, given the absence of mandate and expertise in IHL. *Au contraire*, others suggest that it is precisely international human rights bodies that have the capacity to give IHL at least some relevance. Due to the Europocentric character of legal scholarship though, these discussions have mostly been centered around IHL specifically in the jurisprudence of the European Court of Human Rights (hereinafter, the "ECHR"). Many European scholars have voiced their opinions with respect to the ECHR's involvement in IHL cases, but what sometimes is forgotten is that, since their creation, the Inter-American Commission (hereinafter, the "IACHR" or the "Commission") and Court of Human Rights (hereinafter, the "IACtHR" or the "Court") have dealt with a number of cases involving an armed conflict of non-international character (hereinafter, the "NIAC").

This article does not intend to deep dive into the conversation regarding the human rights bodies' authority to interpret and apply IHL as such. Rather, it is aiming to contribute to the literature regarding application or interpretation of IHL by international human rights bodies and demonstrate, that the ECHR is not a unique human rights body "daring" to utilize IHL: its counterparts in the Americas region, - which, oftentimes, are not given enough credit, - have had a far more creative and extensive experience in interpreting and applying *jus in bello.* The paper will also attempt to demonstrate that, by references to IHL during interpretation of the Inter-American Convention (hereinafter, the "ACHR"), the bodies of Inter-American human rights system – also regarded as "pioneer[s] among regional and international counterparts to take IHL effectively into account",[1] - provide a more comprehensive solution for greater protection of human rights in the cases involving armed conflicts, while the ECHR is oftentimes more hesitant.

1. MANDATE AND FUNCTIONS OF THE IACRH AND THE IACTHR

In situations of armed conflict, even though IHL might generally be considered to be *lex specialis*[2] (see *infra* Chapter 2), international human rights law does not cease to apply. Nev-

[1] Larissa van den Herik and Helen Duffy, *Human Rights Bodies and International Humanitarian Law: Common but Differentiated Approaches*, Grotius Centre Working Paper 2014/020-IHL, p. 13; See also Cordula Droege, *Elective affinities? Human Rights and Humanitarian Law*, International Review of the Red Cross, Vol. 90, No. 871, September 2008, pp. 501-548, at. 546.

[2] See ICJ, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1. C.J. Reports 1996, p. 240,

ertheless, neither the Inter-American Court nor the Commission were established for the purposes of examining alleged breaches of *jus in bello*. Rather, both the Commission and the Court are human rights bodies, responsible for assessing human rights violations in the region. Before analyzing their involvement in IHL cases, it will be useful to take a look at the mandate and the nature of these bodies of the Inter-American human rights system.

The Commission preceded the Court. It was established under the OAS resolution[3] and started operating in 1960 through exercising its functions via on-site visits; later, it was authorized to process individual complaints of alleged human rights violations.[4] The IACHR has been recognized as the "region's principal human rights body"[5] through the OAS Charter. The latter provides, that "[the] principal function [of the IACHR] shall be to promote the observance and protection of human rights and to serve as a consultative organ of the Organization in these matters".[6] In addition to being a consultative human rights body under the OAS Charter, the Commission exercises a wide variety of functions, some of the most important of which are analyzing and investigating individual petitions regarding alleged human rights violations by OAS Member States, regardless of whether they have ratified the American Convention of Human Rights or not.[7]

Besides these functions, the Commission is equipped with tools for human rights monitoring in these countries and issues a variety of reports with respect to human rights situation in OAS Member States. It is noteworthy that the IACHR has been regarded as a "very effective fact-finding body [which has] the greatest experience among international bodies in conducting on-site visits during states of emergency".[8] The Commission can also refer a case to the Inter-American Court and take part in judicial proceedings before the Court. Composition and competencies of the Commission are further clarified in the Convention.[9]

As for the Court, it was established under the American Convention of Human Rights, and its functions and mandate are specified in the Convention itself,[10] as well as the Statute of

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para. 25; See also ICRC, *IHL and human rights: Introductory Text*, available at: https://casebook.icrc.org/law/ihl-and-human-rights [accessed 22 November 2020], - pointing out that humanitarian law is "increasingly influenced by human rights-like thinking".

[3] First Meeting of Consultation of Ministers of Foreign Affairs, Santiago, Chile, 12-18 August 1959, available at: http://www.oas.org/council/MEETINGS%20OF%20CONSULTATION/Actas/Acta%205.pdf [accessed 20 October 2020].

[4] See International Justice Resource Center, Inter-American Human Rights System, available at: https://ijrcenter.org/regional/inter-american-system/ [accessed 21 October 2020].

[5] *ibid*.

[6] Organization of American States (OAS), Charter of the Organization of American States, 30 April 1948, Article 106.

[7] OAS, Mandate and Functions of the Commission, available at: https://www.oas.org/en/iachr/mandate/functions.asp#:~:text=Calendar-,Mandate%20and%20Functions%20of%20the%20Commission,human%20rights%20in%20the%20Americas. [accessed 20 October 2020].

[8] Subrata Roy Chowdhury, *Rule of Law in a State of Emergency: Paris Minimum Standards of Human Rights Norms in a State of Emergency*, (London: Pinter Publishers, 1989) pp. 71-72; See also Jaime Oraá, *Human Rights in State of Emergency in International Law* (Oxford: Clarendon Press), p. 57.

[9] Organization of American States (OAS), American Convention on Human Rights, "Pact of San Jose", Costa Rica, 22 November 1969, Articles 34-51.

[10] *ibid*, Articles 52-69.

the Court.[11] The Court is the judicial body, whose mandate is narrower that of the Commission (e.g. accepting the Court's contentious jurisdiction is a prerequisite for considering a case against one of the OAS Member States, and these cases shall be considered by the Commission first).[12] The principal function of the Court is to apply and interpret the ACHR, thus it is responsible for assessing the Member States' compliance with the Convention. In addition, it can issue advisory opinions on issues related to the protection of human rights within the Inter-American system of human rights, as well as order provisional measures. The function to issue advisory opinions gives the Court an opportunity to respond to questions posed by OAS Member States or its organs regarding: "a) the compatibility of internal norms with the Convention, and b) the interpretation of the Convention or other treaties concerning the protection of human rights in the American States".[13]

Both the Court and the Commission have an extensive experience with respect to cases involving armed conflicts, in particular of a non-international character. In addition, the Court has delivered its advisory opinions with respect to the standards of human rights protection applicable during a state of emergency. [14] However, before going reviewing the jurisprudence in this regard, it is important to analyze the interplay between the IHL and IHRL. The next Chapter will address the relationship between these disciplines based on the jurisprudence of the International Court of Justice and some relevant scholarly work produced in this regard.

2. FOLLOWING STEPS OF THE ICJ AND BEYOND: IACHR'S EARLY JURISPRUDENCE REGARDING APPLICATION OF IHL

When describing the relationship between international human rights law (IHRL) and humanitarian law, most of scholarly articles refer to the jurisprudence of the International Court of Justice (hereinafter, "ICJ"). Unlike the IACtHR, the ICJ is not a human rights body as such, and it deals primarily with inter-state disputes regarding breaches of international obligations in accordance with Article 36 of its Statue.[15] Although the authority to adjudicate disputes arising from Geneva Conventions and disputes primarily related to human rights violations as such is not conferred upon this Court, the ICJ has expressed its views on applicability of human rights during armed conflicts on several occasions. [16]

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[11] OAS, Statute of the Inter-American Court of Human Rights, available at: https://www.oas.org/en/iachr/mandate/Basics/statutecourt.asp [accessed 20 October 2020].
[12] International Justice Resource Center, Inter-American Human Rights System *supra* note 4.
[13] Inter-American Court of Human Rights, ABC of the Inter-American Court of Human Rights: What, How, When and Why of the Inter-American Court of Human Rights, San José, IACHR, 2019, p. 10, available at: https://www.corteidh.or.cr/sitios/libros/todos/docs/ABCCorteIDH_2019_eng.pdf [accessed 20 October 2020].
[14] See *e.g. Habeas Corpus in Emergency Situations* (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights), OC-8/87, Inter-American Court of Human Rights (IACrtHR), 30 January 1987; Judicial guarantees in states of emergency (Arts. 27(2), 25 and 8 American Convention on Human Rights), Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9.
[15] United Nations, *Statute of the International Court of Justice*, 18 April 1946, Article 16.
[16] See *ibid*, Article 36. The ICJ can, however, adjudicate on human rights violations in cases involving diplomatic protection. See *e.g. Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*,

The first important piece of jurisprudence on this matter was the ICJ's Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*[17] (hereinafter, "the *Nuclear Weapons* Advisory Opinion"), where it established that the human rights law does not cease to apply during armed conflicts, however, the rules of IHL are to be treated as *lex specialis* during such a parallel application.[18] Such an interpretation "excludes the rigid use of the *lex specialis derogati generalis* rule" [19] and, instead of giving priority to one discipline thereby excluding the other, it reinforces a parallel application whereby IHL and IHRL complement each other.[20]

The ICJ further reiterated this approach in the Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.[21] For the third time, the ICJ addressed the relation of IHL and IHRL in the case concerning *Armed Activities on the Territory of the Congo (DRC v. Uganda)*,[22] where, referring to the aforesaid Advisory Opinions, it stressed that "both branches of international law […] would have to be taken into consideration".[23] Here, however, as opposed its advisory opinions, the ICJ omitted a reference to *lex specialis derogat legi generali* principle, the reasons for which are ambiguous.[24] The ICRC is of the opinion that "the *lex specialis* determines for each individual situation which rule prevails over another",[25] rather than considering IHL *lex specialis* in all cases regarding armed conflict.

Merits, Judgment, I.C.J. Reports 2010, p. 639. In addition, "[o]ther human rights treaties, such as the International Convention on the Elimination of All Forms of Racial Discrimination 1965, have a provision permitting referral to the Court after the exhaustion of the pre-condition to resort to the treaty-specific dispute settlement procedure", - Sandy Ghandhi, *Human Rights and the International Court of Justice: The Ahmadou Sadio Diallo Case*, Human Rights Law Review, Vol. 11, No. 3, 2011, p. 528; See UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195, Article 22; See also Case concerning *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, I.C.J. Reports 2011, p. 70

[17] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1. C.J. Reports 1996, p. 226, (*Nuclear Weapons* advisory Opinion).

[18] *ibid*, para. 25.

[19] Nancie Prud'homme, *Lex Specialis: Oversimplifying a More Complex and Multifaceted Relationship?,* Research Paper No. 15-07, December 2007, p. 375.

[20] *ibid*.

[21] Advisory Opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ, 9 July 2004, para. 106; Here, the Court explained: "the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law". See also Christina M. Cerna, *The History of the Inter-American System's Jurisprudence as Regards Situations of Armed Conflict*, Koninklijke Brill NV, Leiden, International Humanitarian Legal Studies 2 (2011) 3–52, p. 27.

[22] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, ICJ Reports 2005, p. 168.

[23] *ibid*, para. 216.

[24] See Cerna, *supra* note 21, p. 29; Droege, *supra* note 1, p. 522; See also Nancie N. Prud'homme, *supra* note 19, p. 385.

[25] ICRC, IHL and Human Rights, available at: https://casebook.icrc.org/law/ihl-and-human-rights [accessed 20

Even though it is very common to mention *lex specialis* in discussions regarding IHL and IHRL, some authors stress that "despite all that has been written on *lex specialis* and the relationship between IHL and IHRL, the meaning of the maxim remains entirely unclear".[26] The *lex specialis* approach has been criticized because of its flaws on other occasions as well,[27] however, assessing theoretical validity of the *lex specialis* approach in relation to the interplay between IHRL and IHL falls beyond the scope of this article. Rather, we should agree on the fact that "[despite much controversy surrounding it] the maxim of *lex specialis* is still generally solicited to solve the problem".[28]

The ICJ's initial *lex specialis* approach was followed by the Inter-American Commission in *Arturo Ribón Avila v. Colombia.*[29] This case was concerning extrajudicial killings of 11 persons as the result of the armed confrontation between members of the Army, the Departamento Administrativo de Seguridad (DAS), the Police, and the Sijin (Police Intelligence, F-2) of the Republic of Colombia and members of the armed dissident group the M-19.[30] The Commission relied on Article 29 of the Convention, together with the IACHR's Advisory Opinion on *Other Treaties Subject To The Consultative Jurisdiction Of The Court,*[31] and concluded that it was competent to directly apply IHL and to interpret the ACHR by referring to IHL norms.[32] Thus, even though the Commission did not provide details with respect to the scope of its competence to apply IHL, this case opened the door for direct application of IHL.[33]

The next case of a particular significance was *Juan Carlos Abella v. Argentina* (*La Tablada* case),[34] decided shortly after the ICJ's *Nuclear Weapons* Advisory Opinion, where the IACHR "examined in great detail"[35] its own competence to apply the rules governing armed conflicts. The case was concerning alleged human rights violations committed by State agents following the attack on barracks of the General Belgrano Mechanized Infantry Regiment in La Tablada, which was carried out by armed persons. Although ultimately no violation of the norms of humanitarian law was found in this case, some commentators have

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[26] Marko Milanovic, A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law, Journal of Conflict & Security Law, Oxford University Press 2010, p.473.

[27] See *e.g.* Prud'homme, *supra* note 24, p. 378.

[28] ICRC IHL Database, IHL and human rights, available at: https://casebook.icrc.org/law/ihl-and-human-rights [accessed 14 October 2020].

[29] Arturo Ribón Avila v. Colombia, Case 11.142, Report Nº 26/97, Inter-Am. C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 444 (1997); available at: http://hrlibrary.umn.edu/cases/1997/colombia26-97a.html [accessed 22 November 2020].

[30] *ibid*, paras. 1-2.

[31] Inter-American Court of Human Rights, Advisory Opinion Oc-1/82 Of September 24, 1982, *"Other Treaties" Subject to The Consultative Jurisdiction of the Court* (Art. 64 American Convention on Human Rights) Requested by Peru, paras. 21-22.

[32] Arturo Ribón Avila v. Colombia *supra* note 29, para. 132.

[33] Cerna, *supra* note 21, p. 31.

[34] IACHR, Report No. 55/97, Case No. 11.137: *Juan Carlos Abella et al. (Argentina),* OEA/ Ser/L/V/II.98, Doc. 38, December 6 rev., 1997, [the "Tablada case"]; available at: https://www.cidh.oas.org/annualrep/97eng/argentina11137.htm [accessed 22 November 2020].

[35] Liesbeth Zegveld, *The Inter-American Commission on Human Rights and international humanitarian law: A comment on the Tablada Case,* 30-09-1998 Article, International Review of the Red Cross, No. 324, available at: https://www.icrc.org/eng/resources/documents/article/other/57jpgb.htm [accessed 10 May 2018];

stressed the importance of *Tablada*, in particular, because it had an encouraging effect on other human rights bodies, such as the Human Rights Committee or the European Court and the Commission.[36] In this case, the Commission started applying IHL on the following grounds outlined in the decision:

First, international human rights law lacks provisions regarding the prohibited means and methods of warfare, as well as references to the principle of distinction, collateral damage, loss of civilian status *etc*. Further, the Commission stressed that "in any event, rules applicable to NIAC (CA 3) overlap with the duties under the American Convention (ACHR)".[37] At the same time, the IACHR attempted to draw its competence to directly apply IHL from the Convention itself, - namely, from Article 25 of the ACHR.[38] It established that if the States Parties to the ACHR fail their duty to provide remedies "to persons for violations by state agents of their fundamental rights recognized by *the constitution or laws* of the state concerned or by this Convention (emphasis in original)",[39] then " a complaint asserting such a violation, can be lodged with and decided by the Commission under Article 44 of the American Convention".[40]

In addition, the Commission relied on the ICJ's advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, and considered that IHL and human rights apply simultaneously.[41] It went on referring to Article 29(b)[42] of the ACHR, - known as the "most-favorable-to-the-individual-clause",[43] or the *pro homine* principle, - which provides that the provision of the Convention shall not be read as to restricting the rights and freedom guaranteed by "the laws of any State Party of another convention which one of the said states is a party".[44] The Commission concluded that

> […] where there are differences between legal standards governing the same or comparable rights in the American Convention and a humanitarian

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[36] See Cerna, *supra* note 21, p. 41, citing Liesbeth Zegveld, *The Inter-American Commission on Human Rights and international humanitarian law: A comment on the Tablada Case*, 30-09-1998 Article, International Review of the Red Cross, No. 324; See also Alexander Orakhelashvili, *The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?*, The European Journal of International Law, Vol. 19, No. 1, pp. 161-182, at p. 167. For a more detailed overview of the *Tablada* case, see Michele D'Avolio, *Regional Human Rights Courts and Internal Armed Conflicts*, Intercultural Human Rights Law Review, Vol. 2 (2017), 249-328, pp. 288-298.

[37] *Tablada* case *supra* note 34, paras. 157-162.

[38] Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose"*, Costa Rica, 22 November 1969, Article 25 (1) [hereinafter, the "ACHR"]: "Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties."

[39] *Tablada* case, *supra* note 17, para. 163.

[40] *ibid*. Hence, the Commission concluded that "the American Convention itself authorizes the Commission to address questions of humanitarian law in cases involving alleged violations of Article 25", - see *ibid*.

[41] *Tablada* case, *supra* note 34, para. 160.

[42] ACHR, *supra* note 38, Article 29 (b): "No provision of this Convention shall be interpreted as restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party".

[43] *Tablada* case, *supra* note 34, para. 164.

[44] *ibid.*

> law instrument, the Commission is duty bound to give legal effort to the provision(s) of that treaty with the higher standard(s) applicable to the right(s) or freedom(s) in question. If that higher standard is a rule of humanitarian law, the Commission should apply it.[45]

In *Hugo Bustios Saavedra*,[46] the Commission confirmed its approach and expressly applied relevant humanitarian law, - namely, Common Article 3 (hereinafter, the "CA 3") of the Geneva Conventions.[47] For a short period of time, the Commission continued applying the norms of humanitarian law to cases brought before it, where human rights violations had occurred in the context of a non-international armed conflict.[48] However, this practice was interrupted by the Inter-American Court's 2000 decision on *Las Palmeras v. Colombia*,[49] where it declared both – the Court and the Commission – incompetent to apply IHL.[50] The next section will proceed by analyzing the said decision and will demonstrate that, even though *Las Palmeras* rejected the competence of the IACHR and IACtHR to apply IHL directly, it still left room for using this field of law as an interpretative tool.

3. LIMITATION OF THE COMPETENCE TO APPLY IHL: *TABLADA V. LAS PALMERAS*

The case of *Las Palmeras v. Colombia* concerned extrajudicial killings of civilians throughout the course of an armed operation carried out by the Colombian National Police Force and members of armed forces. The Commission submitted an application, requesting from the Court to find, *inter alia*, the breach of Article 3 Common to 1949 Geneva Conventions. In response, Colombia raised preliminary objections thereby contesting the Court's and the Commission's competence to apply IHL.[51]

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[45] *Tablada* case, *supra* note 34, para. 165; See also Orakhelashvili, *supra* note 36, pp. 167-168; Hans-Joachim Heintze, *On the Relationship between Human Rights Law Protection and International Humanitarian Law*, International Review of the Red Cross, December 2004, Vol. 86, No. 856, pp. 789-814, at 803.

[46] Hugo Bustios Saavedra v. Peru, Case 10.548, Report N° 38/97, Inter-Am. C. H. R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 753 (1997), available at: http://hrlibrary.umn.edu/cases/1997/peru38-97.html [accessed 22 November 2020].

[47] *ibid*, para. 61; See also Cerna, *supra* note 21, p. 34.

[48] For the list of cases where the commission invoked the norms of humanitarian law and/or established violations of Common Article 3 or AP II, See Cerna, *supra* note 21, pp. 45-46. See Van den Herik and Duffy, *supra* note 1, p. 14, footnote 78: *"*Case 11.142, *Arturo RibónAvilán v Colombia*, Report No 26/97(1997), paras 134 and 135; Case 10.548, *Hugo Bustíos Saavedra v Peru*, Report No 38/97 (1997). Case 10.488, *Ignacio Ellacuria, S.J. et al. v El Salvador*, Report No 136/99 (1999), para 169. Case 11.481, *Monsignor Oscar Amulfo Romero y Galdámez v El Salvador*, Report No 37/00 (2000), para 66 and 72; Case 11.519, *José Alexis Fuentes Guerrero v Colombia*, Report No 61/99 (1999), para 43."

[49] *Las Palmeras* Case, Preliminary Objections. Judgment of February 4, 2000. Series C. No. 67, [the "*Las Palmeras"* case], available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_67_ing.pdf [accessed 22 November 2020].

[50] *ibid*, paras. 43(2) and 43(3). See Cerna, *supra* note 21, p. 3 and p. 47; See also D'Avolio, *supra* note 36, p. 296 and pp. 298-302.

[51] *Las Palmeras* Case, *supra* note 49, para. 16.

The Respondent State referred to the IACtHR Advisory Opinion OC-1 of September 24, 1982,[52] and argued that "the Court 'should only make pronouncements on the competencies that have been specifically attributed to it in the Convention'".[53] In particular, due to the lack of consent of the States Parties to the ACHR, the Court or the Commission do not have competence to apply the norms of IHL, and such a competence cannot be derived neither from Article 25 nor from Article 27(1) of the ACHR.[54] As to the Commission's competence to apply the CA 3 of GCs, - the Respondent State argued that "the American Convention limits the competence *ratione materiae* to the rights embodied in the Convention and does not extend it to those embodied in any other convention".[55] Even though Colombia did not dispute that the provisions of the ACHR are to be "interpreted in harmony with other treaties",[56] it did not agree that the Commission had the competence to infer state responsibility based on CA 3.

In response to these preliminary objections, the Commission referred *inter alia* to the ICJ's Advisory Opinion on *Nuclear Weapons* and stated that "[the case] should be decided in the light of 'the norms embodied in both the American Convention and in customary international humanitarian law applicable to internal armed conflicts and enshrined in [Common] Article 3'".[57] In addition, as established in *Tablada*, the Commission reiterated that Article 25 of the Convention allowed it to apply "international humanitarian law and other international treaties".[58]

Without giving an elaborate explanation with respect to the interplay between the IHL and human rights, the Court stated that the American Convention "has only given the Court competence to determine whether the acts or the norms of the States are compatible with the Convention itself, and not with the 1949 Geneva Conventions".[59] Hence, it decided to admit Colombia's preliminary objection regarding the Court's competence to apply international humanitarian law and other international treaties.[60] With respect to the Commission's competence to apply CA 3, - the Court reasoned that, even though the Commission had "broad faculties",[61] it could only address rights protected by the Convention. Thus, without providing much explanation, the Court interrupted the Commission's direct application of IHL which followed the *Tablada* case, and it also established that the Court itself was not compe-

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[52] *Las Palmeras* Case, *supra* note 49, para. 28; See IACHR, Advisory Opinion on *"Other Treaties "*, *supra* note 11, paras. 21-22.
[53] *ibid*, note 49, para. 28.
[54] *ibid*, para. 30. The Government of Colombia distinguished the "application" and "interpretation" of the Geneva Conventions and argued that "the Court may interpret the Geneva Conventions and other international treaties, but it may only apply the American Convention", - see *ibid*.
[55] *ibid*, para. 34.
[56] *ibid*.
[57] *ibid*, para. 29.
[58] *ibid*.
[59] *ibid*, para. 33.
[60] *Las Palmeras* case, *supra* note 49, para. 33.
[61] *ibid*. In some cases, other Conventions themselves might confer competence upon the Commission, - *e.g.* so does the Inter-American Convention on Forced Disappearance of Persons. However, such was not the case with respect to the Geneva Conventions. Hence, the Court was of the opinion that the Commission was not competent to apply the rules of IHL.

tent to apply IHL. This, however, did not fully eliminate IHL considerations from judgments of the Court.

In this regard, it is noteworthy that Judge A.A. Cançado Trindade wrote a separate opinion, where he explained the difference between *interpretation* and *application* of rules[62] and stressed that "the interpretative interaction between distinct international instruments of protection of the rights of the human person is warranted by Article 29(b) of the American Convention (pertaining to norms of interpretation)".[63] Accordingly, even though the Court did reject the idea of direct application of IHL, "the possibility of using IHL to interpret human rights law obligations in situations of armed conflict […] was still left open".[64] Such an approach was also reaffirmed in *Bámaca-Velásquez v. Guatemala*,[65] which, alongside other subsequent cases, will be reviewed in the following Chapter to demonstrate the scope of the Court's involvement in interpretation of IHL.

4. THE "RENVOI" APPROACH OR DIRECT APPLICATION OF CUSTOMARY IHL BY THE IACTHR?

The case of *Bámaca-Velásquez* was concerning the detention and mistreatment inflicted on Efraín Bámaca Velásquez and other combatants of the Guatemalan National Revolutionary Unit by the armed forces. Significance of this case lies in the fact that, without overruling its position in *Las Palmeras*, the IACHR "did take the time to demonstrate that the failure to apply international humanitarian law did not entail its exclusion as a tool for interpretation",[66] thereby "[r]eflecting its generally open approach to IHL".[67] Here, the Court

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[62] *Las Palmeras*, Separate Opinion of Judge A.A. Cançado Trindade, para. 5: "a distance between the exercise of interpretation referred to, - including here the interpretative interaction, - and the application of the international norms of protection of the rights of the human person, the Court remaining entitled to interpret and apply the American Convention on Human Rights (Statute of the Court, Article 19). In characterizing the second and third objections interposed by the respondent State in the present case as preliminary objections properly (as to competence and not as to admissibility), rather than as defenses as to the merits, the Court proceeded to decide them, in my understanding correctly, in *limine litis*, - by an imperative of juridical stability as well as of "prudence and economy of the judicial function".

[63] *ibid*, para. 4. Judge Cançado Trindade also added that "[i]n fact, such exercise of interpretation is perfectly viable, and conducive to the assertion of the right not to be deprived of the life arbitrarily (a non-derogable right, under Article 4(1) of the American Convention) in any circumstances, in times of peace as well as of non-international armed conflict (in the terms of Article 3 common to the Geneva Conventions of 1949)".

[64] Noam Lubell, Challenges in Applying Human Rights Law to Armed Conflict, International Review of Red Cross, Vol. 87, No. 860, December 2005, pp. 737-754, at 742; See also Heintze, *supra* note 45, p. 804; See also Marten Coenraad Zwanenburg, *Accountability under International Humanitarian Law for United Nations and North Atlantic Treaty Organization Peace Support Operations*, (Lieden, 2004), p. 291.

[65] *Bámaca Velásquez v. Guatemala*, 2002 Inter-Am. Ct. H.R. (ser. C) No. 70 (Nov. 25, 2000).

[66] Laurence Burgorgue-Larsen and Amaya Úbeda de Torres, *"War" in the Jurisprudence of the Inter-American Court of Human Rights*, Human Rights Quarterly 33 (2011), pp. 148–174, at 165.

[67] Van den Herik and Duffy, *supra* note 1, p. 15. Although the Court's position in *Las Palmeras*, has not been changed (when explicitly invoking a "renvoi" technique in *Bámaca-Velásquez*, the Court itself referred to *Las Parmeras supra* note 31, paras. 32-34, - see *Bámaca-Velásquez supra* note 2, para. 209 and *ibid*, footnote 124), it can be said that *Bámaca-Velásquez* indeed reflects a more "open approach to IHL". Namely, besides clarifying the scope of its engagement in interpretation of IHL, the Court seems to expand the restrictive language used in *Las Palmeras*, which might be attributed to the Respondent States' positions in these two cases. One of the differences between *Bámaca-Velásquez* and *Las Palmeras* was that, as opposed to Colombia, Guatemala

expressly stated that "relevant provisions of the Geneva Conventions *may be taken into consideration as elements for the interpretation of* the American Convention".[68] This technique is also referred to as a "renvoi" approach,[69] which, as pointed out by one author, helps the Court avoid the "complexion of a *lex specialis*".[70]

Both, in *Las Palmeras* and *Bámaca-Velásquez* the Court "while not explicitly doing so, at least arguably relied"[71] on Articles 27 (derogation clause) and 29 (b) (more-favorable-protection clause, or *pro homine* principle) [72] of the ACHR. The Commission accepted and shared this approach,[73] and the Court has also reaffirmed it in subsequent jurisprudence. For instance, in cases of *Mapiripán Massacre*[74] and *Ituango Massacres*,[75] both of which concerned civilians' human rights violations, - including executions, - in the context of an internal armed conflict in Colombia. The IACtHR pointed out that it "cannot set aside"[76] state obligations to protect the civilian population under IHL, and that it "[considered] it necessary useful and appropriate […] to use international treaties […] such as Protocol II of the Geneva Conventions of August 12, 1949 […] to interpret provisions [of the ACHR] in accordance with the evolution of the inter-American system, taking into account the corresponding developments in international humanitarian law".[77] Thus, in both of these cases, the Court examined alleged human rights violations in the light of CA 3 and AP II applicable to NIACs.[78]

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did not raise any objections with respect to the Court's competence to "*apply* any other provision that it deemed appropriate" (emphasis added), - See *Bámaca-Velásquez*, *supra* note 65, para. 204. In addition, "relevance of IHL as a tool of interpretation, [was not] a central [issue] to the state's or the applicant's case, - See Van den Herik and Duffy, *supra* note 1, p. 16. Michelle D'Avolio has pointed out that Guatemala's consent "[to apply Common Article 3 may explain] the dichotomy in language" and due to such consent, in this case, "the Court felt less constrained and was, therefore, clearer in its competency determination", - See D'Avolio, *supra* note 36, p. 310 and pp. 308-309.

[68] Case of *Bamaca Velasquez v. Guatemala*, *supra* note 65, para. 209.; See also *ibid*, paras. 207-208.

[69] Robert Kolb, *Human Rights and Humanitarian Law*, Max Planck Institute for Comparative Public Law and International Law, Heidelberg and Oxford University Press, 2012, p. 7, para. 36.

[70] *ibid.*

[71] D'Avolio, *supra note* 36, p. 314. The author argues that this can be demonstrated by the Court's emphasis on "protecting the fundamental rights of the human person, is certainly consistent with the provisions in these articles", - see *ibid* (referring, *inter alia*, to *Bámaca-Velásquez supra* note 65, para. 209).

[72] No provision of this Convention shall be interpreted as restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party.

[73] See Carlos Enrique Arévalo Narváez and Paola Andrea Patarroyo Ramirez, *Treaties over Time and Human Rights: A Case Law Analysis of the Inter-American Court of Human Rights*, ACDI, Bogota, ISSN: 2027-1131/ISSNe: 2145-4493, Vol. 10, pp. 295-331, 2017, at 317, referring to *Cruz Sánchez et. al v. Peru*, Preliminary Exceptions, Merits, Reparations and Costs, Judgment of 17 April 2015, Series C No. 292, para. 267, where the Commission stressed that "the Court shall interpret the norms of the American Convention in the present case in light of the pertinent dispositions in international humanitarian law, considering that the facts occurred in the context of an armed conflict of a non-international character".

[74] *Mapiripán Massacre v Colombia*, Series C No 134, 15 September 2005 [the "*Mapiripán Massacre* case"]

[75] *Ituango Massacres v Colombia*, Series C No 148, 1 July 2006 [the "*Ituango Massacres* case"].

[76] *Mapiripán Massacre v Colombia supra* note 74, para. 114.

[77] *Ituango Massacres v Colombia supra* note 75, para. 179.

[78] See *Mapiripán Massacre supra* note 74, paras. 171-172; *Ituango Massacres* case, para. 179; See also Adamantia Rachovitsa, *Treaty Clauses and Fragmentation of International Law: Applying the More Favourable protection Clause in Human Rights Treaties*, University of Groningen/UMCG research database (Pure), p. 16). In particular, these cases concerning forced displacement in the context of NIAC were examined with reference

Some authors claim that doing so constitutes "misapplication" of Article 29,[79] arguing that through *pro homine* principle, the "IACtHR seems to *indirectly* apply other treaties and not respect the restrictions of its jurisdiction"[80] and that "[t]he IACtHR does not have the authority to […] *effectively supervise* provisions of other international treaties *under the guise* of the IACHR"[81] (emphasis in original). It has also been pointed out that "[as opposed to Article 31 (3) (c) of the VCLT,[82]] Article 29 (b) dictate[s] that the IACtHR has the *negative duty* not to endanger the more favourable protection provided for an individual under another international treaty"[83] (emphasis added). However, it is not clear how can this negative duty under the *pro homine* principle be fulfilled by the Court without taking into account applicable norms of humanitarian law, which, in some cases, might indeed provide not only more specific, but also a more favorable protection to those affected by an armed conflict.

Nevertheless, "probably aim[ing] to prevent the States from claiming that the Court is applying treaties that it has no competency for",[84] the Court seems to have revisited its approach of relying on specific provisions of AP II. In particular, in *Santo Domingo Massacre,* [85] - a case concerning an alleged bombardment perpetrated by the Colombian Air Force on the village of Santo Domingo, - the Court deemed it necessary to interpret the ACHR "in light of the pertinent norms and principles of international humanitarian law, namely: (a) the principle of distinction between civilians and combatants; (b) the principle of proportionality, and (c) the principle of precaution in attack".[86] The Court reiterated that it lacks competence to apply IHL,[87] however, it also reasoned that

> [i]n this case, by using IHL as a supplementary norm of interpretation to the treaty-based provisions, the Court is not making a ranking between

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to Article 17 of Additional Protocol II, which was "instrumental to the Court's analysis".

[79] Rachovitsa, *supra* note 63, p. 20; See also Carlos Enrique Arévalo Narváez and Paola Andrea Patarroyo Ramirez, *supra* note X, p. 317 (stating that "[in *Mapiripán* case], the Court applied the *pro personae* principle […] to incorporate IHL into the interpretation of ACHR clauses and attribute responsibility to the State [and thus] may have departed from the original intention of the parties, due to the lack of jurisdiction *ratione materiae* to declare responsibility on the grounds of IHL").

[80] Rachovista, *supra* note 78, p. 22.

[81] *ibid.*

[82] United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, Article 31 (3) (c), - stipulating that while interpreting international treaties, "any relevant rules of international law applicable in the relations between the parties [shall be taken into account, together with the context].

[83] Rachovista, *supra* note 78, p. 18.

[84] Elizabeth Salmon, *Institutional Approach between IHL and IHRL Current Trends in the Jurisprudence of the Inter-American Court of Human Rights*, Journal of International Humanitarian Legal Studies 5 (2014) pp. 152-185, at 163.

[85] *Santo Domingo Massacre v. Colombia*, Judgment of November 30, 2012 (Preliminary objections, merits and reparations), available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_259_ing.pdf [accessed 22 November 2020]. The author distinguishes three phases of the IACtHR's approach towards IHL: 1) Phase of Indifference (referring to cases *Cayara* and *Caballero Delgado and Santana*, where the Court did not give a particular significance to the existence of an armed conflict); 2) Phase of Recognition of IHL as an Interpretive Tool (referring to *Las Palmeras* (Preliminary Objections), *Bámaca-Velásquez* (Preliminary Objections), Serrano Cruz Sisters, and *Mapiripán Massacre*); and 3) Phase of the "Gray Area" (referring to *Santo Domingo Massacre* and *Operation Genesis* cases).

[86] *Santo Domingo Massacre* case, *supra* note 85, para 211.

[87] *ibid*, para. 23.

> normative systems, because the applicability and relevance of IHL in situations of armed conflict is evident. This only means that the Court can observe the regulations of IHL, as the specific law in this area, in order to make a more specific application of the provisions of the Convention when defining the scope of the State's obligations.[88]

Interestingly, every section of the Court's analysis with respect to each of these principles starts by stressing that all three of them constitute a norm of customary IHL, applicable to IACs and well as NIACS.[89] It therefore seems that the focus has shifted on the customary nature of relevant IHL norms. In this regard, it should be pointed out that, in *Santo Domingo Massacre* case, while the Court still stressed the lack of its competence to apply IHL, it still seems to be applying customary humanitarian law directly.[90] The Court has examined the facts in great detail and practically assessed their compliance with these principles of customary IHL. While the Court's attempt to give IHL relevance are to be appreciated, it might be argued that it should abstain from direct application of IHL, even if this application is limited to the norms of customary IHL.

One of the arguments against direct application of customary humanitarian law might be that human rights judges are not experts in IHL and, therefore, might err in dealing with issues governed by the laws applicable to armed conflicts; however, international and regional human rights (quasi-judicial) bodies are authorized and even *required* to consider the issues of humanitarian law in their judgments. For instance, emergency provisions of major human rights treaties[91] demand that every derogation be consistent with States' obligations under international law. Given that war is a "paradigmatic example [of an] emergenc[y]",[92] these provisions refer, first and foremost, to international humanitarian law. Accordingly, "[derogation clauses] require[e] the human rights systems to consider international humanitarian law and examine *proprio motu* whether derogation is consistent with [IHL]". [93]

While applying the rules of customary IHL, regional human rights courts can refer to subsidiary means for interpreting the rules of international law.[94] ICRC's study on customary IHL[95]

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[88] *Santo Domingo Massacre* case, *supra* note 85, para 187.
[89] See *ibid*, paras. 212, 214, 216.
[90] Elizabeth Salmon, *Institutional Approach between IHL and IHRL Current Trends in the Jurisprudence of the Inter-American Court of Human Rights*, Journal of International Humanitarian Legal Studies 5 (2014), p. 163.
[91] See ACHR, *supra* note 38, Article 27; UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Article 4; Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, Article 15. The African Charter does not have an emergency clause.
[92] Marko Milanovic, *Extraterritorial Derogations from Human Rights Treaties in Armed Conflict*, in *The Frontiers of Human Rights*, ed. Nehal Bhuta (Oxford: Oxford University Press, 2016, pp. 55-88), p. 63.
[93] Nancie N. Prud'homme, *supra* note 19, p. 365.
[94] For instance, in *Tablada* case, the Commission directly and explicitly referred to the Commentary to the 1949 Geneva Conventions and 1973 Draft Commentary on the Draft Additional Protocols to these Conventions, - *Tablada* case, *supra* note 34, para. 149; In this case, in determining the scope of application of Common Article 3, the Commission also made a reference to the Commission of Experts convened by the ICRC. See *ibid*, footnote 16. Experts can at the same time be, "highly qualified publicists", - scholars, whose teachings are considered to be subsidiary means for determining the rules of international law, - See *e.g.* ICJ Statute, *supra* note 15, Article 38.
[95] See ICRC, Customary IHL Database, available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/home

might also be particularly useful in this regard. Moreover, if judges are trained in humanitarian law, application of such rules as a principle of distinction, proportionality, military necessity *etc.* does not seem to be an impossible task. After all, human rights judges are, at least, used to protecting the same core values that are protected by IHL, - as the ICTY put it: "general principle of respect for human dignity is the basic underpinning and indeed the very *raison d'être* of international humanitarian law and human rights law".[96]

CONCLUSION

The paper provided an overview of the jurisprudence of the Inter-American human rights bodies with respect to application of IHL in the context of NIACs. While the IACHR tried to apply IHL directly, the Court has limited its jurisdiction for doing so, choosing instead the "renvoi" approach. The latter provides more hope for IHL, and the Court's efforts to contribute to is enforcement should be appreciated. However, under the existing jurisprudence, IHL serves only as a tool for interpreting the ACHR – this approach does not go as "far" as applying IHL directly, while at the same time nor does it stay reluctant to relevant norms of IHL. On the other hand, *Santo Domingo Massacre* has shown the Court's direct engagement in assessing the State's compliance with customary IHL, while, interestingly enough, the Court still insists on lacking competence to apply IHL.

This paper demonstrated that significant steps have been made by the human rights bodies of the Inter-American system of human rights to give IHL some relevance. The Commission's initial bravery with respect to direct application of IHL might be explained by several factors, such as a quasi-judicial nature of its decisions. As for the Court's application of some norms of customary IHL, - this might have been facilitated by such specificities of the Inter-American human rights system as the conventionality control. Another factor might be that IHL cases before the Court and the Commission concerned conflicts of non-international character, rather than inter-state applications as is the case with respect to the ECHR.

Taking all of the foregoing above, it cannot be concluded that other regional and international judicial and quasi-judicial human rights bodies will necessarily succeed in trying to follow the steps of the Inter-American human rights bodies; nor can it be argued that engagement into direct application of IHL will not result in non-compliance with judgments. However, what is clear is that the Inter-American human rights bodies have made a significant progress in terms of giving IHL some relevance, - at least in the context of non-international armed conflicts – which showed their counterparts that sometimes, taking a risk might be worth it.

[accessed 22 November 2020].

[96] Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment (10 December 1998), para. 183; See also Robert Kolb, *supra* note 69, p. 5, para. 22; See also D'Avolio, *supra* note 36, p. 308, - referring to *Bámaca-Velásquez*, paras. 209 and 143; See also Orakhelashvili, *supra* note 36, p. 182.

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THE BOUNDS OF "MARGIN OF APPRECIATION" OF THE STATE IN RESTRAINING FREEDOM OF EXPRESSION DURING THE PANDEMIC

ABSTRACT

2020 will certainly become a part of history of the mankind not just due as a healthcare crisis related to COVID-19 (novel Coronavirus), but also as vivid example of a more "coordinated action" of the "civilised nations",[1] the situation, the management and improvement of which became the reason for unity of the "international society". However, despite such unity, even in the era of technological development like this one, the only relevant measure of combating the virus is the one from the century before.[2]

Thus, the foregoing paper discusses the public-law aspects of the emergency caused by the pandemic on the basis of legal analysis of state policies. The goal of the paper is to vividly distinguish the power of information in the process of managing the pandemic and to demonstrate that censorship is used by the states for silencing the political opponents. Apart from demonstrating the problems, the paper aims at showing the ways, which the international society can use to face disinformation and unjustifiable involvement in media activity shackled by authoritarianism.

The main postulate of the paper is that in the era of technological development, gossip and conspiracy have no place and that the states shaping the current political agenda should treat the power of information and its impact on the wellbeing of the society with higher preservation.

INTRODUCTION

Notwithstanding the negative effects of COVID-19 on public health, it should be acknowledged that the pandemic, in itself, does not violate our rights. It does have an impact on our

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* *This paper was prepared by the author as a rework of Master Thesis defended on August 1, 2020, at the Tbilisi State University Faculty of Law, Master of Public Law Programme.*

[1] WHO, Coronavirus Disease (COVID-19) Dashboard, 2020, available at: https://covid19.who.int/ [last accessed: 30 September, 2020].

[2] WHO, Coronavirus disease (COVID-19) advice for the public, 2020, available at: https://www.who.int/-emergencies/diseases/novel-coronavirus-2019/advice-for-public [last accessed: 30 September, 2020].

exercise of rights, however, regardless of our desire, we can neither judge the virus based on legal credos, nor impose any liability.

States are not responsible for COVID-19. However, they are responsible for methods which they invoke to respond to the current challenge the world is facing. If they are responding to the challenge by implementing policies and enacting regulations that unjustifiably restrict human rights, then this will be deemed as a human rights violation. If they do not ensure relevant measures aiming to prevent the spread of the virus, then this too, shall be regarded as a violation of human rights.

The author is of the opinion, that a post-crisis reality can develop in two directions: the first **approach to the future** is that, when the crisis has once again demonstrated the role of coordinated international action for the purposes of progress in this regard,[3] the pandemic has once again shown every government, politician, relevant actors of the digital era, that any kind of censorship targeting accessibility of information, effective governance of issues related to health, life and autonomy, shall satisfy the criteria of lawfulness, necessity and proportionality. This is the desired way of recovering from the pandemic, which should be followed by states all over the world in order to strengthen the framework for respecting human rights.

Under the **second approach**, we might have a different reality, whereby the policy of disproportionate restriction of human rights will result in the reign of autocratic regimes, inequality and disrespect for human rights. In this reality, the COVID-19 is not only an invisible enemy, but also a pathogen of repression. It is likely that many states will follow the second way, taking into account that the virus has started to spread in a censored environment, which caused the politisation and degeneration of science and expertise.[4]

The following areas protected by freedom of expression regarding state policy administration will be reviewed during the discussion:

1. Freedom to have one's own opinion;[5]
2. Freedom to spread information;[6]
3. Freedom to receive information.[7]

All three dimensions are closely interconnected, given that formation and possession of an opinion becomes practically impossible, if one has no access to information.[8]

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[3] UN General Assembly, Global solidarity to fight the coronavirus disease 2019 (COVID-19), 2020, available at: https://undocs.org/en/A/RES/74/270 [accessed 30 September 2020].
[4] International Press Institute (IPI) Tracker on Press Freedom Violations Linked to COVID-19 Coverage – "COVID-19: Number of Media Freedom Violations by Region," available at: https://ipi.media/covid19-media-freedom-monitoring/ [accessed 30 September 2020].
[5] The Constitutional Court of Georgia case No.1/5/675,681 "Ltd TV Rustavi 2 and Ltd TV Sakartvelo v. the Parliament of Georgia", 30 September 2016, § 71.
[6] The Constitutional Court of Georgia case No.1/1/468, "Public Defender (Ombudsman) of Georgia v. the Parliament of Georgia", 11 April 2012, § 27.
[7] The Constitutional Court of Georgia case No.2/3/364, "Georgian Young Lawyers' Association (GYLA) and Rusudan Tabatadze v. the Parliament of Georgia", 14 July 2006, page 7.
[8] European Court of Human Rights, *Handyside v. the United Kingdom*, December 7, 1976, § 49, Series A no.

The European Court of Human Rights considers that the freedom of expression protects not only "information" and "ideas" that the society likes, or that are inoffensive and harmless, but also those that are unacceptable, offensive and shocking.[9]

> The press plays an essential role in a democratic society, its duty is to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest […]. Not only does it have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog".[10]

The aim of the article is to analyse legal and political processes caused by COVID-19 and to demonstrate problems that might arise after an emergency with respect to the freedom of expression and governing information related to the pandemic. In addition, the research is intending to address "a state of emergency – a hallway to authoritarianism".

1. FREEDOM OF EXPRESSION, GOVERNING INFORMATION RELATED TO THE PANDEMIC AND THE STATE

"Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties," [11]

John Milton, 1644
English civil servant and intellectual

Throughout the centuries, freedom of expression has been an inspiration for a number of legal and political processes. History keeps the records of civic activism, which would have been deprived of its substantial essence without the freedom of expression, as well as revolutions, which would have not been accomplished without the freedom of thought and expression.[12] The humanity also remembers, from the point of view of improving the protection of human rights, a famous speech by Martin Luther King, Jr., which would not have been kept in the history without the freedom of expression.[13] History has provided answers with respect to social importance of the freedom of expression on many occasions, emphasising the role that this freedom has on the development of the worldview of the society.

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24 and nos 21279/02 and 36448/02, *Lindon, Otchakovsky-Laurens and July v. France* [GC], 2007, § 45, also no. 32772/02, *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* [GC], 2009, § 96, also, no. 39954/08, *Axel Springer AG v. Germany* [GC], February 7, 2012, § 78.

[9] European Court of Human Rights *Mouvement raëlien suisse v. Switzerland* [GC], no. 16354/06, 2012, § 48.

[10] European Court of Human Rights *Thoma v. Luxembourg*, no. 38432/97, 2001, § 45.

[11] Malik K. "From Milton to Pullman, the quest for truth is riddled with ambiguity". The Guardian, 29 December 2019, pp. 1-2, available at: https://www.theguardian.com/commentisfree/2019/dec/29/from-milton-to-pullman-the-quest-for-truth-is-riddled-with-ambiguity [accessed 30 September 2020].

[12] Shearlaw Maeve, "Egypt five years on: was it ever a 'social media revolution'?" The Guardian, 25 January 2016, https://www.theguardian.com/world/2016/jan/25/egypt-5-years-on-was-it-ever-a-social-media-revolution [accessed 30 September 2020].

[17] Younge Gary, "Martin Luther King: the story behind his 'I have a dream' speech," The Guardian, 9 August 2013, pages 2-4, https://www.theguardian.com/world/2013/aug/09/martin-luther-king-dream-speech-history [accessed 30 September 2020].

This is also demonstrated by the fact that the freedom of expression was enshrined in a number of international conventions, including the Universal Declaration of Human Rights, European Convention on Human Rights and the International Covenant on Civil and Political Rights (ICCPR).[14]

The Constitution of Georgia gives a special attention to the freedom of information it the context of formation of the democratic society.[15]

Under the definition provided by the Constitutional Court of Georgia:

> "For the formation of a thought, it is important to access information, while the freedom to disseminate information ensures that the thought be delivered from the author to the addressee. Besides the social importance, freedom of information also bears a significant importance for the purposes of intellectual development of individuals".[16]

The European Court of Human Rights reiterates that enacting certain measures against information based on prejudices or ungrounded allegations falls within the "margin of appreciation" of a state.[17] Moreover, when disseminating information, an individual shall demonstrate great caution in analysing exactness and reliability of information, as well as the interest of making it publicly available.[18] For instance: An act imbued with personal hatred, personal antagonism, or for the sake of personal exclusion cannot justify high-level protection. It is significant to establish that the applicant acts in good faith, aiming only to make the public aware of a specific injustice.

When the requested information is of high public interest, the state's denial to provide access to such information shall be subjected from strict supervision on behalf of the public and shall be adequately reasoned.[19]

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[14] Article 19, UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III);
Articles 9, 10 and 11, Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, ;
Articles 18 and 19, UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171;
Article 32, 1921 Constitution of Georgia, Adopted by The Constituent Assembly, 21 February 1921.
Article 17, Constitution of Georgia (ed. 2018), Parliament of Georgia, 24 August 1995, available at: https://matsne.gov.ge/en/document/view/30346?publication=36 [accessed 30 September 2020].
The Constitutional Court of Georgia case No.1/7/1275, "Aleksandre Mdzinarashvili v. Georgian National Communications Commission", 2 August 2019, Motivational part of the judgement, § 7.
[15] The Constitutional Court of Georgia Ruling No.2/6/1311 "LTD Stereo +, Luka Severini, Lasha Zilpimiani, Robert Khakhalevi and Davit Zilpimiani v. the Parliament of Georgia and the Ministry of Justice of Georgia", 17 December 2019, § 54; The Constitutional Court of Georgia case No. 1/6/561,568, "Iuri Vazagashvili v. the Parliament of Georgia", 30 September 2016, § 39.
[16] The Constitutional Court of Georgia case No.2/3/406,408 "Public Defender's Office of Georgia and Georgian Young Lawyers' Association (GYLA) v. the Parliament of Georgia", 30 October 2008, § 10.
[17] *ibid.* See also, European Court of Human Rights case no. 39293/98, *Fuentes Bobo v. Spain*, February 29, 2000, § 38; nos 28955/06, 28957/06, 28959/06 and 28964/06, *Palomo Sánchez and Others v. Spain* [GC], 2011, § 59 and also, no. 44306/98 *Appleby and Others v. the United Kingdom*, 2003, §§ 39–40.
[18] European Commission case no. 252, *Hadjianastassiou v. Greece*, Series A, 16 December 1992, § 45.
[19] European Court of Human Rights Judgement on Admissibility *Sdruzeni Jiboceske v Czech Republic*, 10 July 2006.

In addition, the Constitutional Court of Georgia noted in another decision that:

> "[a] free society consists of free individuals, which live in a free informative space, think freely, have independent opinions and participate in a democratic process, which implies exchange of ideas and competition among these ideas".[20]

It is worth pointing out the approach of the World Health Organisation towards the socio-legal importance of freedom of expression before the world was strangled by the pandemic. Governing the epidemic requires "active communication regarding the risks",[21] a bilateral dynamic and progressive information strategy since the moment of the eruption of the virus, which consists of the following aspects:

1. Provision of information by a state with respect to the nature of risks and preventive measures;
2. Analysis of collective and individual fears;
3. Gossip-management, which, in the first place, implies "listening" to disinformation, analysing it and correcting immediately.[22]

Taking this into account, it is preferable to disseminate information in a way that is targeted on the needs of different audiences and is aiming to improve rather than punish. In addition, it should be pointed out that states shall implement the healthcare policy in accordance with fundamental human rights.[23]

Resolution 21/12 of the Human Rights Council and Resolution 68/163 of the UN General Assembly vividly enshrine the role of free media in building democracy and good governance. Both bodies clearly recognise the crucial role of journalism and set the standard that, both in physical and in the virtual dimension (the Internet), freedom of expression must be guaranteed. The Council has established that freedom of thought and expression is an integral part of both personal and social development. This concept remains firm even in the times of global pandemic.[24]

Accordingly, the principles of legality, necessity and proportionality apply to any circumstances, including the attempts to combat threats posed by the COVID-19 to public health. The International Covenant on Civil and Political Rights recognises freedom of expression a special importance, which is also one of the most important instruments for developing public healthcare policies.[25] We might also discuss that the restriction of freedom of expression

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[20] The Constitutional Court of Georgia case No.2/2-389, "Maia Natadze and others v. Parliament of Georgia and the President of Georgia", Chapter II, 26 October 2007, § 13.
[21] WHO, Managing Epidemics: Key Facts about Major Deadly Diseases (Geneva), 2018, p. 34.
[22] *ibid*.
[23] International Health Regulations, WHO, 2005, Article 3 (1).
[24] Human Rights Committee, General Comment No. 34, 2011, § 2.
[25] The Inter-American Legal Framework regarding the Right to Freedom of Expression, Inter-American Commission on Human Rights, 2009, p. 11, available at:
http://www.oas.org/en/iachr/expression/docs/publications/inter-american legal framework of the right to freedom of expression final portada.pdf [accessed 30 September 2020].

can never be necessary, even during the pandemic. Accordingly, states shall do all in their powers to protect the freedom of expression.[26]

A healthcare crisis such as the pandemic shall not be understood as a factor limiting accessibility of information, or as if the government is no longer required to act in the best interests of the nation. On the contrary, - a public health threat strengthens an argument in favour of free access to information related to the epidemic, given that the public can only take measures for the protection of their health as a result of being informed on threats caused by the disease. A method enabling states to restrict certain rights when facing an epidemic or another large-scale challenge should also be pointed out.

2. PANDEMIC AS A CHALLENGE FOR FREEDOM OF EXPRESSION: STATE PRACTICE

The discussion above has on several occasions demonstrated that media is a main instrument at the hands of the society for getting acquainted with topical issues and finding ways to approach problems. Restricting access to information bars an important element of sharing information.[27] Prior restrictions regarding certain topics, closing media outlets and blocking an access to internet communication platforms call for careful examination and can only be justified under exceptional circumstances.[28]

As noted above, journalism plays an important role from the point of view of providing information to the public, thereby allowing it to find and have access to such information, that would enable them to protect themselves. This is what constitutes a fundamental accomplishment of media for the contemporary public.[29]

Several Member States of the EU have adopted measures (criminalisation) in order to avoid the spread of disinformation, however, in most cases, these measures have been assessed as incompatible with democratic principles.[30]

According to a joint statement of the United Nations, Organisation for Security and Cooperation in Europe and the Inter-American Commission on Human Rights,

> "Any attempts to criminalise information relating to the pandemic may create distrust in institutional information, delay access to reliable information and have a chilling effect on freedom of expression".[31]

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[26] Human Rights Committee, General Comment No. 29, on derogations from provisions of the Covenant during a state of emergency, 2001, paras. 5 and 8.
[27] WHO, Managing Epidemics, 2018, pp. 34 and 47, available at: https://www.who.int/emergencies/diseases-/managing-epidemics-interactive.pdf?ua=1 [accessed 30 September 2020].
[28] European Court of Human Rights, *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, 2004, § 118.
[29] Human Rights Committee, General Comment No. 34, 2011, para. 13, available at: https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf [accessed 30 September 2020].
[30] Council of Europe, Public Statement, "Press freedom must not be undermined by measures to counter disinformation about COVID-19", 3 April 2020, available at: https://www.coe.int/en/web/commissioner/-/press-freedom-must-not-be-undermined-by-measures-to-counter-disinformation-about-covid-19 [accessed 2 November 2020].

To put it in other words, criminalisation of disinformation is disproportionate, it cannot justify the aims of restricting information, deprives persons of the right to share information, which can be crucial for life. Nevertheless, during the crisis, Hungary, for example, began fighting against disinformation through criminal law provisions. These provisions are too broad as compared to the standard for the freedom of expression and impose disproportionate sanctions.[32]

Alongside ensuring the freedom and impartiality of the media, it is also important that the public has a guaranteed access to reliable information. Moreover, the UN and regional experts on freedom of expression stated in a joint declaration, that public agencies, even without the request for such an information, shall proactively publish information of public interest, as well as the date they were obtained and the source.[33]

According to the Human Rights Watch, access to information shall be guaranteed. This, for specific groups, means that information shall be provided while taking into account their needs and accommodating the format and relevant procedures.[34]

To deep dive into practical reflection of the aforesaid threats, it would be interesting to analyse the examples of Russia and China with respect to governing information in the context of the pandemic. We should also bear in mind that worldwide, more than 250 journalists are in detention because of performing their duties and that persons whose liberty is restricted are among the most vulnerable groups during the pandemic.[35]

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[31] International experts - "COVID-19: Governments must promote and protect access to and free flow of information during pandemic – international experts", 19 March 2020, available at: https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25729&LangID=E [accessed 30 September 2020].

[32] Amendment to Section 337 of the Hungarian Criminal Code, See Walker Shaun, "Hungarian journalists fear coronavirus law may be used to jail them", The Guardian, 3 April 2020, available at: https://www.theguardian.com/world/2020/apr/03/hungarian-journalists-fear-coronavirus-law-may-be-used-to-jail-them [accessed 30 September 2020].
The European Commission, "Democracy cannot work without free and independent media and that respect for freedom of expression and legal certainty are essential during such times", 31 March 2020, available at: https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_20_567 [accessed 30 September 2020].

[33] UN Commission on Human Rights, Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, submitted in accordance with Commission resolution 1999/36, 18 January 2000, E/CN.4/2000/63, para. 44, available at: https://www.refworld.org/docid/3b00f3e10.html [accessed 30 September 2020].
UN General Assembly, Promotion and protection of the right to freedom of opinion and expression, 2013, A/68/362 para. 76, available at: https://undocs.org/A/68/362 [accessed 30 September 2020].

[34] Human Rights Watch, "Human Rights Dimensions of COVID-19 Response", 19 March 2020, available at: https://www.hrw.org/news/2020/03/19/human-rights-dimensions-covid-19-response [accessed 2 November 2020].

[35] Committee to Protect Journalists, "Release all jailed journalists now", 30 March 2020, available at: https://cpj.org/2020/03/release-all-jailed-journalists-now/ [accessed 30 September 2020].
WHO, "Preventing COVID-19 outbreak in prisons: a challenging but essential task for authorities", 23 March 2020, available at: https://www.euro.who.int/en/health-topics/health-emergencies/coronavirus-covid-19/technical-guidance/2020/preparedness,-prevention-and-control-of-covid-19-in-prisons-and-other-places-of-detention,-15-march-2020 [accessed 30 September 2020].

2.1. THE GOVERNMENT KNOWS BEST – ANALYSIS OF THE COMMUNIST POLITICS

In order to understand a general background with respect to the relationship between China and the freedom of expression, it should be noted that according to the report by Reporters Without Borders (RSF), China was recognised as the largest prison for reporters. This report emphasises deadly conditions in the prison.[36] According to the 2020 Report of the same organisation, China ranks 177th out of 180 countries in the index of media freedom.[37]

Although the origins of the virus are disputed, the history of a medic Li Wenliang from the Central Hospital of Wuhan grabs the attention. By the end of December 2019, he warned his colleagues about the patient with a Severe Acute Respiratory Syndrome (SARS). The local government immediately "silenced" him and punished for "spreading rumours". Events unfolded in such a way, that the medic himself was a victim of COVID-19.[38]

Foreign media such as New York Times (NYT), Wall Street Journal (WSJ) and Washington Post were involved in political processes. They were banned from operating on the territory of China. The state tasked these three media outlets, - alongside the Voice of America and the Times, - with providing information with respect to their operations in China.[39] In addition, there are conspiracy theories of the members of the Chinese Government with respect to the virus and the US army, [40] and that the virus had already been spread within Italy before the medical personnel in China noticed it.[41]

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[36] Radio Free Asia, "China is 'world's biggest prison' for journalists, bloggers: Report, 20 December 2017, available at: https://www.refworld.org/docid/5a942812a.html [accessed 30 September 2020].

[37] Reporters Without Boarders - 2020 World Press Freedom Index, 15 May 2020, available at: https://rsf.org/en/ranking [accessed 30 September 2020]. Internet platform WeChat is constantly used by the Government for the surveillance purposes. Wang, Yaqiu, "How China's censorship machine crosses borders — and into Western politics," Human Rights Watch, p. 2-4, 20 February 2019, available at: https://www.hrw.org/news/2019/02/20/how-chinas-censorship-machine-crosses-borders-and-western-politics [accessed 30 September 2020].

[38] Amnesty International, "China: Doctor's death highlights human rights failings in coronavirus outbreak", 7 February 2020, available at: https://www.amnesty.org/en/latest/news/2020/02/china-doctor-death-highlights-human-rights-failings-in-coronavirus-outbreak/ [accessed 30 September 2020]; Wang. Ivian, "They Documented the Coronavirus Crisis in Wuhan. Then They Vanished." The New York Times, 21 February 2020, available at: https://www.nytimes.com/2020/02/14/business/wuhan-coronavirus-journalists.html, See also "Lawyer Chen Qiushi documenting coronavirus epicentre disappears", 10 February 2020, available at: https://www.youtube.com/watch?v=Iwpr55PZEJ8 [accessed 30 September 2020]; Reporters Without Borders (RSF) (28 February 2020) – "RSF urges China to stop censoring information about coronavirus epidemic", 25 February 2020, available at: https://rsf.org/en/news/rsf-urges-china-stop-censoring-information-about-coronavirus-epidemic [accessed 30 September 2020].

[39] Reporters Without Borders (RSF), "Coronavirus : mass expulsion of foreign correspondents further cripples freedom of information in China", 27 March 2020, available at: https://rsf.org/en/news/coronavirus-mass-expulsion-foreign-correspondents-further-cripples-freedom-information-china [accessed 29 March 2020]; See also, Bill Birtles, "In the midst of the coronavirus pandemic, China forces out foreign reporters", ABC Australia, 9 May 2020, available here: https://www.abc.net.au/news/2020-05-09/china-kicks-out-foreign-journalists-during-coronavirus-crisis/12227782 [accessed 30 September 2020].

[40] Myers, Steven Lee, "China Spins Tale That the U.S. Army Started the Coronavirus Epidemic," The New York Times, 13 March 2020, available at: https://www.nytimes.com/2020/03/13/world/asia/coronavirus-china-conspiracy-theory.html [accessed 30 September 2020].

[41] Reporters Without Borders (RSF), "Beware of China's coronavirus disinformation, RSF says", 18 April 2020, available at: https://rsf.org/en/news/beware-chinas-coronavirus-disinformation-rsf-says [accessed 28 November 2020]; Tang Didi, "Beijing twisted my words on coronavirus's Italian origin, says scientist Giuseppe Remuzzi", The Times, 26 March 2020, available at: https://www.thetimes.co.uk/article/beijing-twisted-my-

Accordingly, China is well-known for restricting the freedom of expression, and yet it maintains and strengthens the communist regime, regardless of appeals from international organisations.[42]

The essence of this article is to provide an overview of standards that shall be met by a state in terms of informative management of the pandemic, rather than discussing issues of international state responsibility. Thus, the author does not address this issue, however, political sanctions invoked by the US against China throughout the years are to be appreciated.[43]

When tools of criminal law are used to restrict the freedom of expression at the national level, together with the "threat of silence," the suppression of critical opinion beyond criminal proceedings, the manipulation via immigration policy, the "expulsion threat" of foreign media outlets, and the incitement of conspiracy theories, the authoritative regime and usurpation of power in China is more vivid.

When speaking about communist and authoritarian regimes, we should not forget about our occupant neighbouring state. In order to provide background information with respect to interrelation between Russia and disinformation campaign, we can refer to the EU policy with respect to hybrid warfare, that was initiated upon occupation of the territory of Eastern Ukraine by Russia. In 2015, a special programme - East StratCom Task Force - „EUvsDisinfo" was created under the European External Action Service.[44] As of 18 May 2020, within the scope of this programme, 500 facts of spreading disinformation by outlets favouring Russia were recorded.[45]

Concerning numbers of COVID-19 cases were recorded in Russia from the end of February 2020, from the emergence of first case, till the end of April, which was distinct from that of Brazil and the US, with roughly the same amounts of population.[46] Given that media has fo-

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words-on-coronaviruss-italian-origin-says-scientist-giuseppe-remuzzi-6twwhkrvn [accessed 28 November 2020].

[42] Rankin Jennifer, "EU says China behind 'huge wave' of Covid-19 disinformation" The Guardian, 10 June 2020, available at: https://www.theguardian.com/world/2020/jun/10/eu-says-china-behind-huge-wave-covid-19-disinformation-campaign; Amnesty International, "Global: Crackdown on journalists weakens efforts to tackle COVID-19", 1 May 2020, available at: https://www.amnesty.org/en/latest/news/2020/05/global-crackdown-on-journalists-weakens-efforts-to-tackle-covid19/; Reporters without Boarders, "CORONAVIRUS: We need reliable news more than ever – act now!" (public statement), 7 May 2020, available at: https://rsf.org/en/campaigns/coronavirus-we-need-reliable-news-more-ever-act-now; IFJ Launches Global Platform for Quality Journalism, 29 April 2020, available at: https://www.ifj.org/media-centre/news/detail/category/world-press-freedom-day-2020/article/ifj-launches-global-platform-for-quality-journalism.html [links accessed 30 September 2020].

[43] Swanson Ana and Mozur Paul, "U.S. Blacklists 28 Chinese Entities Over Abuses in Xinjiang", 7 October 2019, New York Times, available at: https://www.nytimes.com/2019/10/07/us/politics/us-to-blacklist-28-chinese-entities-over-abuses-in-xinjiang.html [accessed 25 November 2020]; Guardian staff and agencies, "US House approves Uighur Act calling for sanctions on China's senior officials", The Guardian, 4 December 2019, https://www.theguardian.com/world/2019/dec/04/us-house-approves-uighur-act-calling-for-sanctions-on-chinas-politburo-xinjiang-muslim [accessed 30 September 2020].

[44] For details, see EUvsDisinfo website, available at: https://euvsdisinfo.eu/about/ [accessed 30 October 2020].

[45] EEAS Special Report Update: Short Assessment of Narratives and Disinformation around The Covid-19 Pandemic (Update 23 April – 18 May), 18 May 2020, p. 2, available at: https://euvsdisinfo.eu/uploads/2020/05/EEAS-Special-Report-May-1.pdf [accessed 30 September 2020].

[46] Chief freelance infectious diseases specialist of the Ministry of Health Elena Malinnikova explained the low mortality from coronavirus in Russia, 4 May 2020, available at: https://iz.ru/1007510/2020-05-04/spetcialist-

cused attention on these issues and much has been written on Russia's handling of the pandemic, a person might be sentenced to 5 years of imprisonment because of dissemination of harmful information regarding the pandemic, according to restrictions of the Kremlin.[47] In addition, administrative fines have increased up to 127 thousand dollars.[48] Besides the censorship, it should be noted that Russia does not welcome foreign media which speak about the governmental disinformation campaign. One example of this is the article by Voice of America, which discussed real number of Coronavirus fatal cases and the inconsistency thereof with the governmental statistics.[49] According to Russian media regulators, such articles incite riots and extremism.[50] If we elaborate on the content of the Article, it was dealing with the analysis of statistical data, referring to research conducted by other media outlets, and did not contain any incitements regarding the *coup d'état*. Moreover, a journalist and an advisor, with opposition political views, from "Novaya Gazeta" was arrested.[51] This is not the first, nor the last act of implementing censorship policies against this outlet.[52]

In addition to the foregoing, we are dealing with an intentional discreditation when speaking about the Russian propaganda against the Lugar laboratory. Criticism and conspiracy theories against this laboratory are not unique in this kind.[53] Similarly, disinformation was spread with respect to activities of laboratories in Moldova, Armenia and Ukraine.[54]

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obiasnila-nizkuiu-smertnost-ot-koronavirusa-v-rossii [accessed 30 September 2020]; Sepkowitz, Kent, "Why is Russia's Covid-19 mortality rate so low?", CNN, 13 May 2020, available at: https://edition.cnn.com/2020/05/13/opinions/russia-low-covid-19-mortality-rate-sepkowitz/index.html [accessed 30 September 2020].

[47] Rainsford, Sarah, "Coronavirus: Russia includes jail terms to enforce crackdown", BBC, 31 March 2020, available at: https://www.bbc.com/news/world-europe-52109892 [accessed 30 September 2020].

[48] Committee to Protect Journalists, "Russian media regulator orders 2 outlets to take down COVID-19 reports", 24 March 2020, available at: https://cpj.org/2020/03/russian-media-regulator-orders-2-outlets-to-taked.php [accessed 30 September 2020].

[49] Roskomnadzor, Russian Media Regulator, "Roskomnadzor demanded that the media and social networks remove false information about the coronavirus", 24 March 2020, available at: https://www.rkn.gov.ru/news/-rsoc/news72366.htm; Associated Press, "Fake News or the Truth? Russia Cracks Down on Virus Postings", 1 April 2020, available at: https://www.voanews.com/europe/fake-news-or-truth-russia-cracks-down-virus-postings [links accessed 30 September 2020].

[50] "Russia's Media Regulator Asks Google To Block Article Questioning Coronavirus Death Toll", 15 May 2020, available at: https://www.rferl.org/a/russia-s-media-regulator-requests-google-block-article-questioning-coronavirus-death-toll/30613809.html?fbclid=IwAR3-TgkQGU8PSqUyelksZLH85IxavQbIKPmO9c-ZZ9uuRWwPCc038l2GESo [accessed 30 September 2020].

[51] EUvsDesinfo, DISINFO: COVID-19 without Independent Journalism, 6 May 2020, available at: https://euvsdisinfo.eu/covid-19-without-independent-journalism/ [accessed 30 September 2020].

[52] See, *e.g.*, European Court of Human Rights, *Novaya Gazeta and Milashina v. Russia*, no. 45083/06, 3 October 2017.

[53] Factcheck, "Lugar laboratory in Georgia – Russia's traditional rigmarole", 16 January 2019, available at: https://factcheck.ge/en/story/37919-lugar-laboratory-in-georgia-russia-s-traditional-rigmarole; Statement of the Minister of External Affairs of Russia regarding operation of the Lugar Centre in Georgia, 26 May 2020, available at: https://www.mid.ru/ru/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/4138777 [links accessed 30 September 2020].

[54] Comment of the Press and Information Department of the Ministry of Foreign Affairs with respect to the statement of the Russian Federation, 16 May 2020, available at: https://mfa.gov.ge/News/sagareo-saqmeta-saministros-presisa-da-informa-(6).aspx?CatID=5 [accessed 30 September 2020].

EUvsDesinfo, DISINFO: Suspicious American Military Activity in Lugar Lab, 1 July 2020, available at: https://euvsdisinfo.eu/report/suspicious-american-military-activity-in-lugar-lab/ [accessed 30 September 2020].

Statement by Amiran Gamkrelidze, 28 May 2020, available at:

Given that Russia is a State Party to the European Convention on Human Rights since 1998, it is likely that within the next 3-4 years, we will witness cases against Russia regarding its disinformation policy and oppression of free media,[55] while also taking into account that judgments on several cases regarding freedom of expression were delivered against the Russia throughout the Case Law of the European Human Rights Court.[56]

By imposing legal penalties on critical thought, banning foreign media and implementing measures that are disproportionate to the fight against disinformation, the state expresses not only its desire to oppress the dissent, but is actually implementing measures to accomplish this desire. Under the principle of plurality, the means of restricting media sources shall not be used for the purposes of governing opposition forces and establishing authoritarianism. However, the reality suggests otherwise based not only on the case of Russia, but other examples as well.[57]

2.2. Interrelation between a State of Emergency and Authoritarianism

Based on the practice of aforesaid countries and considering historical examples, it can be concluded that during the crisis, states are oftentimes tempted to preserve stability and public safety at the expense of individual rights. As stated by the Council of Europe Commissioner for Human Rights Dunja Mijatović,

> "In this extraordinary time of the COVID-19 pandemic, politicians and decision-makers must resist the temptation to push through measures that are incompatible with human rights".[58]

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https://www.radiotavisupleba.ge/a/30640007.html?fbclid=IwAR14BiwPpyOjW5CEvnBP7J3gYHdWszcfD_iRPqceAr7K38fznNcJuQpOzts [accessed 30 September 2020]; EUvsDesinfo, DISINFO: American Biolaboratory In Armenia Is The Epicentre Of The Spread Of New Coronavirus In The Region, 9 April 2020, available at: https://euvsdisinfo.eu/report/american-biolaboratory-in-armenia-is-the-epicenter-of-the-spread-of-new-coronavirus-in-the-region/ [accessed 30 September 2020].
EUvsDesinfo, DISINFO: Coronavirus Could Have Been Created In A Ukrainian Laboratory, 25 April 2020, available at: https://euvsdisinfo.eu/report/coronavirus-could-be-created-in-a-ukrainian-laboratory/ [accessed 30 September 2020].

[55] Moreover, the document adopted by the European Union recognises the immense role of the media in combating false information. The document also calls on China and Russia to refrain from a global disinformation campaign. European Commission, Joint Communication, "Tackling COVID-19 disinformation - Getting the facts right", JOIN(2020) 8, Brussels, 10 June 2020, p. 9, available at: https://ec.europa.eu/info/sites/info/files/communication-tackling-covid-19-disinformation-getting-facts-right_en.pdf; Radio Free Europe/Radio Liberty, "EU: Russia, China Undermine Democracy with Coronavirus Disinformation, public statement", 10 June 2020, available here: https://www.rferl.org/a/eu-russia-china-undermine-democracy-with-coronavirus-disinformation-campaigns/30663872.html [links accessed 30 September 2020].

[56] European Court of Human Rights, Report on Russian Federation, page 1, last updated September 2020, available here: https://www.echr.coe.int/Documents/CP_Russia_ENG.pdf [accessed 30 September 2020].
European Court of Human Rights, *Margulev v. Russia*, case no. 15449/09, 08.10.2019. European Court of Human Rights, *Stomakhin v. Russia*, case no. 52273/07, 09.05.2018.

[57] BBC, "Coronavirus: Is pandemic being used for power grab in Europe?", 18 April 2020, available at: https://www.bbc.com/news/world-europe-52308002 [accessed 30 September 2020].

[58] Commissioner for Human Rights, public statement, "Commissioner urges Poland's Parliament to reject bills that restrict women's sexual and reproductive health and rights and children's right to sexuality education" 14 April 2020, available at: https://www.coe.int/en/web/commissioner/-/commissioner-urges-poland-s-parliament-

As a response to the challenge, many states have adopted measures that objectively serve the aim of preventing the spread of COVID-19. Among these measures, restrictions on "freedom of movement, freedom of expression and manifestation" are frequent.[59]

In *Lawless v. Ireland*, the European Court of Human Rights defined a state of emergency as a condition threatening the life of the nation. According to this definition, this implies such situations of crisis, which impacts organised life of the society from which a state is composed.[60]

As discussed above, restrictions to rights shall be derived from the principle of lawfulness. Accordingly, if certain rights are restricted in a state of emergency, it is based on an ordinance of the government, which is consistent with the decree referring to the constitutional provision. Hence, the restriction is adopted based on the law and, thus, is valid.[61]

Considering current examples as well as those from history, it might be relevant to take a look at the relationship of a state of emergency with authoritarianism and usurpation of power. As a result of a state of emergency declared in Hungary due to COVID-19, the executive branch was granted an exclusive authority to enact special measures, - including suspension of certain norms without the consent of the parliament. Accordingly, it is the Prime-Minister rather than the Parliament who decides when a state of emergency and special measures cease to exist.[62] A similar situation can be observed in Georgia, where it is up to the Constitutional Court to decide upon the validity of certain measures and their compliance with democratic standards.[63]

Such an increase of powers of the government and deviation from the principle of separation of powers can potentially create the risk of usurpation of power. The principal risk has to do with effective management of the crisis through imposing less human rights restrictions, so that we avoid the creation of authoritarian restrictions like the ones enacted in China.[64] A classic example can be Great Britain's broad definitions with respect to anti-terrorism legislation and their application to any suspect and accused in Northern Ireland.[65]

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to-reject-bills-that-restrict-women-s-sexual-and-reproductive-health-and-rights-and-children-s-right-to-sexuali?fbclid=IwAR173ivMkNi-eEXxCTueu9cSacgp39MOn2fG2JSupCLBZxGLTjG-saOpAHQ [accessed 27 November 2020].

[59] Human Rights Watch, "COVID-19 Offers Chance to Address Human Rights Concerns", 14 April 2020, available at: https://www.hrw.org/news/2020/04/14/covid-19-offers-chance-address-human-rights-concerns [accessed 30 September 2020].

[60] European Court of Human Rights, *Lawless v. Ireland* (no. 3), 1 July 1961, p. 27, § 28, Series A no. 3.

[61] Greene Alan, "Permanent States of Emergency and the Rule of Law: Constitutions in an Age of Crisis", Hart Publishing, 2018, p. 69, Chapter 3, https://media.bloomsburyprofessional.com/rep/files/9781509906154sample.pdf [accessed 30 September 2020].

[62] Thorpe Nick, "Coronavirus: Hungary government gets sweeping powers," BBC, 30 March 2020, https://www.bbc.com/news/world-europe-52095500 [accessed 30 September 2020].

[63] GYLA Appeals Amendments to Health Care Law to Constitutional Court, Radio Free Europe / Radio Liberty 23 May 2020. Public Statement available from: https://www.radiotavisupleba.ge/.

[64] Gerson Michael, "Coronavirus might make authoritarianism look like the answer. It's not", The Washington Post, 19 March 2020, available at: https://www.washingtonpost.com/opinions/coronavirus-might-make-authoritarianism-look-like-the-answer-its-not/2020/03/19/ebfc72c0-6a06-11ea-abef-020f086a3fab_story.html [accessed 30 September 2020].

[65] Jabauri Ana, "Preserving Criminal Justice during a State of Emergency: Derogations from Fair Trial and Due

The next risk would be the post-emergency period: a reality where the government is still operating within the scope of the authority enhanced during a state of emergency. A practical example of such a reality is a socio-legal state in Turkey, given the impact of a state of emergency on the democratic process.[66] Events begun to occur in 2016, after the government declared a state of emergency aiming to stabilise the situation caused by an attempted *coup d'état*. Attempts of the government to silence the dissent can also be observed during this time,[67] which keeps on occurring even today, through controlling various media outlets during the pandemic.[68] In addition, in a post-emergency period, legal system of Turkey kept the norms enacted during a state of emergency.[69] Moreover, exercise of the municipalities' authorities is monitored and democratic processes such as local elections are being controlled.[70]

If we agree that human rights shall be protected during a military state of emergency, we shall *a priori* argue that, during the healthcare crisis, governments are to observe basic principles, such as: separation of powers, democratic governance and pluralistic society.[71] Otherwise, history reveals the risks of establishing such a socio-legal environment, where it is entirely up to an authoritarian government to protect human rights. Concentration of power within one branch of the government, without proper checks and balances, is against the aspiration of a democratic society, according to which decisions regarding state policies are to be taken based on consensus and through civic engagement. Accordingly, the discretion of introducing a different regime after the state of emergency is inconsistent with the "genuine constitution".[72]

Process Rights under the ICCPR, ECHR and the ACHR," Thesis Submitted to the Department of Legal Studies of the Central European University, 2018, p. 19.

[66] Human Rights Watch, "Turkey: Normalizing the State of Emergency: Draft Law Permits Purging Judges; Prolonged Detention; Curbing Movement, Assembly", 20 July 2018, available at: https://www.hrw.org/news/2018/07/20/turkey-normalizing-state-emergency, [accessed 30 September 2020].

[67] Human Rights Watch, Joint NGO Letter, "Turkey: State of emergency provisions violate human rights and should be revoked", 20 October 2016, available at: https://www.hrw.org/news/2016/10/20/turkey-state-emergency-provisions-violate-human-rights-and-should-be-revoked [accessed 30 September 2020].

[68] Sinclair-Webb Emma, "Turkey Seeks Power to Control Social Media," Human Rights Watch, 13 April 2020, available at: https://www.hrw.org/news/2020/04/13/turkey-seeks-power-control-social-media [accessed 30 September 2020].

[69] Amnesty International, "Turkey's State of Emergency Ended But The Crackdown on Human Rights Continues", 1 February 2019, p. 1, available at: https://www.amnesty.org/en/documents/eur44/9747/2019/en/ [accessed 30 September 2020].

[70] European Commission for Democracy through Law, Opinion No. 888/ 2017 "On the Provisions of the Emergency Decree Law N°674 Of 1 September 2016", 9 October 2017, para. 97, available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)021-e [accessed 30 September 2020].
Ülgen Sinan, "How Istanbul's mayoral elections are shaping the future of Erdoğan's Turkey", The Guardian, 15 May 2019, available at: https://www.theguardian.com/commentisfree/2019/may/15/istanbul-elections-erdogan-mayor [accessed 30 September 2020].

[71] Cole David, "The Poverty of Posner's Pragmatism: Balancing Away Liberty After 9/11", Stanford Law Review, Vol. 59:1735 April 2007, pp. 1735-1751.

[72] Jabauri Ana, "State of Emergency: A Shortcut to Authoritarianism", Journal of Constitutional Law, Vol 1 (2020), Special Issue, pp. 121-143, at 143, 15 June 2020, available at: https://www.constcourt.ge/en/journal/journal_editions/journal-2020-1-special [accessed 30 September 2020].
Greene Alan, *supra* note 61, p. 70. Chapter 3, available at: https://media.bloomsburyprofessional.com/rep/files/9781509906154sample.pdf [accessed 30 September 2020].

CONCLUSION

The events of 2020 have indeed shown the international community its weaknesses in terms of its immediate response to the fight against the epidemic, and a century-old lesson that it has overlooked. State leaders and leading virologists argue that the world will never be the same again and that COVID-19 has given rise to scientific challenges that are directly related to human health and life.

The pandemic processes were no less interesting in terms of human rights challenges. We were given the opportunity to conduct a legal analysis of the policies that various countries implemented. For its part, COVID-19 has reaffirmed the great role of the freedom of expression in dealing with pandemic processes.

The author undoubtedly shares the view that the post-pandemic period and our existence will never be the same as before, by both social and legal contexts. The crisis has once again shown the World the role of unified, internationally coordinated action. In this step of progress, the pandemic has made it clear to all governments, politicians and all relevant players in the digital age that any kind of censorship aimed at restricting access to information, health, life, autonomy and good governance, even legitimate ones, must be within the standards of legality, necessity and proportionality. This is the preferred path of rehabilitation from the pandemic that states should follow to establish a stronger framework for respect for human rights.

The treatment of freedom of expression in times of crisis is definitely in line with the country's democracy index. Disinformation and hybrid attacks, which weaken the state's ability to deal effectively with a crisis, should not be overlooked. This requires strategic communication between the internal structures of the country, detection of disinformation and its deterrence from the Internet, as well as international support from both technology giants and international organisations.

State policy, which considers arbitrary and unjustified restriction of freedom of expression, yearns towards establishing an authoritarian regime, and on the part of society, towards seizing the primacy of inequality. The international community should apprehend that COVID-19 poses not only a virologic war but also an information challenge. It is transparency and freedom of speech that build the bridges of international relations and ensure effective coordination.

CASE NOTES OF THE CONSTITUTIONAL COURT OF GEORGIA

ABSTRACT

In the Volume 2, 2020 the Journal of Constitutional Law continues to publish short summaries of the notable recent Judgments adopted by the Constitutional Court of Georgia. Two cases discussed below have been adopted in the second half of 2020 and both deal with complex issues, such as the constitutionality of the appointment of the Supreme Court Members in Georgia and the Gender Quota for the Parliament of Georgia. The controversiality is probably best demonstrated by the dissenting opinions, which are also summarised in the Case Notes. The Journal hopes both the majority and the dissenting opinions will be interesting for our readers worldwide and will support academic discussions regarding the case-law of the Constitutional Court of Georgia.*

30 JULY 2020 JUDGMENT №3/1/1459,1491 JUDGMENT "THE PUBLIC DEFENDER OF GEORGIA V. THE PARLIAMENT OF GEORGIA"

MAJORITY OPINION

On 30 July 2020 the Plenum of the Constitutional Court of Georgia adopted the judgment in the case of "The Public Defender of Georgia v. the Parliament of Georgia" (constitutional complaints №1459 and №1491). The subject of dispute, in this case, was the constitutionality of norms of Article 34^1 of Organic Law of Georgia on General Courts, which defined the procedure for selecting candidates to be nominated by the High Council of Georgia to the Parliament of Georgia for election to the position of a judge of the Supreme Court.

The Public Defender argued that the legislation did not provide for the requirements of the reasoned judgment of the High Council of Justice on the nomination of candidates to the Parliament for the Supreme Court of Georgia. At the same time, due to secret voting at different stages of candidate selection, the High Council of Justice was not bound by criteria - such as the candidate's conscientiousness and competence. According to the complainant, only a court established and staffed in accordance with the procedural requirements of the Constitution has constitutional legitimacy. The disputed norms, which did not exclude the arbitrary and unreasonable conduct for the selection procedure, put in question the constitutional legitimacy of the staffing of the court. Accordingly, the complainant argued that the disputed provisions failed to ensure the selection of the best candidates, which was incompatible with the right to hold public office and the right to a fair trial.

* This abstract was drafted by the Editor of the Journal of Constitutional Law.

The respondent explained that the selection of candidates by the High Council of Justice of Georgia was not a competition and differed from the appointments of judges to the district (city) court and court of appeals. The role of the High Council of Justice of Georgia in this process was limited to nominating candidates to the Parliament, which did not imply rejection of other persons (candidates), and the final decision on the election of a person as a judge was made by the Parliament of Georgia. Based on the provided arguments, the respondent considered that the election of a candidate for the position of a judge of the Supreme Court did not fall within the ambit of the right to hold public office.

The respondent emphasized that, at any stage of candidate selection, the High Council of Justice of Georgia was bound by criteria - such as the candidate's conscientiousness and competence. Moreover, regardless of the secrecy of the vote, it was possible to identify the factual preconditions underlying the High Council decision, and secrecy, in itself, safeguarded each member of the Council from the external influences. In the light of the foregoing, the disputed norm should have been considered constitutional.

The Constitutional Court assessed the issue of applying the standards established by the first paragraph of Article 25 of the Constitution of Georgia to the position of a judge of the Supreme Court of Georgia. According to the Court, the standards set for the appointments of district (city) court and court of appeals judges could not be fully relevant and identical for the judges of the Supreme Court, because the essence of the position to be held was different, as well as the constitutional bodies authorized to appoint judges at a different level of the judiciary and the role of these bodies.

According to the judgment of the Constitutional Court, the power to select and appoint members of the Supreme Court was distributed between the High Council of Justice (the judiciary) and the representative political power (the Parliament), and the final decision was made by the political authorities. In exercising this power, the discretion of the High Council of Justice of Georgia was limited to nominating the appropriate candidates for the election by the legislature and Parliament had the final decision-making power. According to the Court, the process of selection of judges of the Supreme Court of Georgia, despite the existence of the submission stage by the High Council of Justice of Georgia, was characterized by the elements of elective positions.

The Constitutional Court held that, when making the decision, the Parliament, as well as the members of the High Council of Justice, were bound by the constitutional requirement – judges shall be selected based on their conscientiousness and competence. At the same time, the Constitutional Court of Georgia shared the position of the Parliament of Georgia and indicated that the participation of the two constitutional bodies in the process of the nomination and appointment of judges of the Supreme Court of Georgia and the functions, purpose and status of those bodies, ensured the staffing of the Supreme Court in accordance with the requirements of the Constitution of Georgia – with competent, conscientious judges.

The Constitutional Court emphasized that according to the Constitution of Georgia, only the High Council of Justice of Georgia was competent enough to select the appropriate candidates for the position of a judge. Thus, due to the existing legal guarantees in the procedure of staffing and operating of this body the decision made by the High Council of Justice was

legitimate in itself. Therefore, a model where a decision made by the Council was determined by a vote of its members and did not require additional written justification did not call into question the quality and credibility of the decision. Accordingly, making the decision by the High Council of Justice on the selection of candidates for the Supreme Court without written justification was not incompatible with regard to Article 25(1) of the Constitution.

In addition, the Court clarified that the right to hold public office was not violated by the rule of secrecy of decision-making, as the secrecy of the ballot served to enable an objective and fair decision making, ensuring the safeguarding of the decision-maker.

In assessing the constitutionality of giving preference to a candidate with more work experience in the selection process of the Supreme Court judges by the High Council of Justice of Georgia, the Court held that long experience of working in a specialty was an objective criterion for determining a person's qualification. Thus, in the case of equally divided votes in the High Council of Justice, giving preference to a candidate with longer working experience was not an inappropriate criterion and/or a criterion that contradicted the requirement of competence and conscientiousness.

In the light of the foregoing, the Constitutional Court considered that the disputed norms ensured the staffing of the Supreme Court in accordance with the standards established by the Constitution of Georgia and, therefore, there was no violation of the right to a fair hearing of all other persons. Thus, the Constitutional Court deemed that these norms were in accordance with the Constitution.

DISSENTING OPINION

The Members of the Constitutional Court of Georgia Teimuraz Tughushi, Irine Imerlishvili, Giorgi Kverenchkhiladze and Tamaz Tsabutashvili pronounced dissenting opinion regarding the July 30, 2020 Judgment of the Plenum №3/1/1459,1491.

Firstly, the authors of the dissenting opinion clarified that the model for appointment of the Supreme Court Justices established by the Constitution of Georgia includes evaluating and supporting a person by the non-political judicial branch, as well as the political body where the Parliament completes the professional decision made by the High Council of Justice and grants it a democratic legitimation. Besides, the Constitution determined qualification requirements for the judges, including conscientiousness and competence. Therefore, the will of the Constitution is clear that in the process of selecting judges, decisions based on desirability, that is characteristic of the political process, should be minimized. According to the position of the authors of the dissenting opinion decision-making process without providing the reasoning meant deciding based on expediency, desirability (in this case, the will of the members of the High Council of the Justice). Similar power had only been granted to the political authority by the Constitution with the condition of the direct control exercised by the people.

Dissenting opinion goes on discussing, that because of the lack of constitutional mechanisms of popular control over the High Council of Justice the principle of democracy requires from the Council to make important public decisions based on the law and not on the desirability. It is the requirement of article 25 of the Constitution that the system for selecting the Supreme Court judges should not only allow the Council to adequately assess the consciousness and competency of the candidates but to also preclude the self-intentional decision-making by the Council.

Based on the analysis of the relevant provisions of the Organic Law of Georgia "On General Courts" the authors of the dissenting opinion considered that the stage of the first vote of the selection process did not allow the members of the Council to adequately and objectively assess the candidates. Furthermore, the following steps of the selection process established by the disputed provisions were not prone to make a reasoned decision; could not preclude the artificial advantage or privilege to the candidate; could not provide equal opportunities for them; and undermined the constitutionally established guarantees for any person to be informed about the reasoning for not being appointed to a certain public office. Moreover, according to the authors of the dissenting opinion the secrecy of the voting rendered the decisions made by the members of the Council even less transparent and further diminished the level of their accountability. As for the disputed rule, according to which among the candidates with equal results the advantage was granted to those having longer working experience, without considering the qualitative component of such an experience, it was deemed as inappropriate criterion in the process of selecting judicial candidates.

Finally, according to the dissenting opinion the system established by the disputed provisions completely undermined the principle of accountability of the persons exercising the state authority in a democratic state and violated the right of a person to hold an office of a supreme court judge.

In addition to the above-mentioned, the authors of the dissenting opinion stated that the judgment of the Constitutional Court of Georgia N3/1/1459, 1491 dated July 30, 2020 substantially contradicted the standards firmly established by the Constitutional Court and did not share the spirit thereof.

When discussing the compatibility of the disputed provisions with respect to the right to a fair trial the authors of the dissenting opinion stated that the personal and professional characteristics of the judges directly exercising the judicial functions is of crucial importance for the practical realization of the right itself. Therefore, the process of selecting the Supreme Court judges had to ensure the appointment of constitutionally required qualified and conscientious judges for the office. According to the authors of the dissenting opinion the stages for selecting judges did not meet the above-mentioned constitutional requirements, namely, they did not enshrine the possibility for thorough assessment of judicial candidates and therefore, the Council was deprived of an ability to make an informed decision based on the criteria established by the Constitution. At the same time, the procedure did not envisage the obligation to provide reasoning of the decision made by the Council at each stage, which, in conjunction with the absence of a link between the results of the secret voting and their assessment grades, made the logic behind the decision unknown.

25 SEPTEMBER 2020 JUDGMENT №3/3/1526 "N(N)LE POLITICAL UNION OF CITIZENS 'NEW POLITICAL CENTER', HERMAN SABO, ZURAB GIRCHI JAPARIDZE AND ANA CHIKOVANI V. THE PARLIAMENT OF GEORGIA"

MAJORITY OPINION

On September 25, 2020, the Plenary Session of the Constitutional Court of Georgia adopted the judgment in the case of "N(N)LE Political Union of the Citizens – 'New Political Center', Herman Sabo, Zurab Girchi Japaridze and Ana Chikovani v. the Parliament of Georgia". The disputed norm established the obligation for electoral subjects to draw up a party list in order to participate in the parliamentary elections to be held before the October 26, 2024 parliamentary elections in such a way that at least one person in every four members of the list should have been of the opposite sex. Otherwise the registration of the party list would be rejected.

According to the constitutional complaint, the applicant political union developed a system on the basis of which the formation of a party list for participation in the elections depends entirely on the will expressed by the party partners. The disputed norm obliged the applicant party, with the motive of maintaining a balance between the sexes, to make changes in the party list determined by the party partners. According to the applicants, imposing such an obligation unjustifiably restricted their electoral right. At the same time, the political party was forced to ignore the decision made by its own partners, which would negatively affect the issue of party financing by the partners and, consequently, posed a significant threat to the full functioning of the political union.

The respondent explained that the restriction of the electoral right was conditioned by the fundamental right established by Article 11 (3) of the Constitution of Georgia, on the basis of which the state had a positive obligation to take special measures to ensure the essential equality of men and women. In the present case, the legitimate aim of the disputed norm was to improve the balance between the sexes in the supreme legislative body.

The Constitutional Court determined that the imposition of mandatory regulations on the possibility of freely determining the party list for participation in elections restricts applicants' electoral right. In assessing the constitutionality of the restriction, the Court first assessed the compatibility of the restriction imposed by the disputed norm with the principle of democratic governance and clarified that gender quotas are not linked to the promotion of any particular idea or policy. In addition, quotas are imposed between women and men, who are almost equally represented in the electorate and, thus, do not cause a disproportionate increase in the representation of any group in the Parliament of Georgia. Thus, as a result of the disputed norm, the influence of the state on the choice of citizens is minimal, therefore, it cannot be automatically considered as a restriction incompatible with the principle of democracy.

The Constitutional Court also assessed the compliance of the disputed norm directly with the requirements of the principle of proportionality. The Court noted that even under conditions of equal opportunity for individuals and equal legal regulation, it is possible that certain

groups, due to artificial barriers created by the social environment, could not realize the opportunities equally with others. The positive obligation of the state under Article 11, Paragraph 3 of the Constitution of Georgia is directed against this kind of socio-political inequality, which is beyond the law, and promotes equal realization of opportunities. This provision equips the state only with the authority to adopt special measures based on real needs. It requires the state to use special measures for creating mechanisms to balance artificial public barriers for success due to gender. According to the Constitutional Court, the purpose of this provision is to create conditions promoting not artificial, but factual equality.

The Constitutional Court, based on its analysis of the rate of women's representation in the legislature since the restoration of independence in Georgia, held that their small representation could not be linked solely to natural factors, but rather to circumstances existing in the community that prevents women from participating in politics. In particular, stereotypes in Georgia reinforce the argument for unhealthy, artificial barriers to women's participation in politics and ultimately create an unequal environment for women, including in terms of political participation. Based on the above, the Constitutional Court considered the increase of women's representation in the Parliament as a legitimate aim deriving from Article 11 (3) of the Constitution of Georgia, which can be achieved by limiting the electoral right.

In considering the suitability of the constraint, the Court separately considered the obligation to nominate at least one male candidate in every four members on the party list, noting that there is no logical explanation as to why a female electoral list is restricted when women represented in parliament are significantly less than men and, at the same time, there is no rational expectation of creating the need for quotas in favor of men in the Parliament in the near future. Consequently, such regulation prevents the increase of women's representation in the Parliament of Georgia. Thus, the requirement established by the disputed norm, according to which there should be at least one man in every four members of the party lists, was declared unconstitutional with regards to the first sentence of the first paragraph of Article 24 of the Constitution of Georgia.

Regarding the normative content of the disputed norm, which obliges electoral subjects to have at least one female candidate for every four members on the party list, the Court pointed out that the disputed measure is one of the most effective mechanisms for achieving results in a short period of time and guarantees, at least by a small percentage, the representation of women. In this regard, the Constitutional Court drew attention to the fact that it is fundamentally incorrect to compare members of the Georgian Parliament to persons of different professions. According to the Court, unlike professional positions, where better management and successful results are directly related to the selection of people with the best knowledge and experience for this position, the Parliament of Georgia is staffed entirely by the will of the people as a sovereign, and proper performance of a parliamentarian activity is not related to the special skills that typically characterize men. Thus, according to the Court, the mandatory quotas established by the disputed regulation will not prevent the successful implementation of the activities of the Parliament, in contrast to the areas of professional activity. In addition, the Court took into account the temporary nature of the disputed norm, as well as the fact that the freedom of electoral subjects is restricted to a minimum not only by

imposing less quantitative demands on members of the opposite sex, but also by the very nature of regulation. In particular, the restriction is aimed not at selecting candidates on the basis of any particular characteristics, but by the requirement (sex), which by its nature is one of the easiest barriers to overcome. Based on the above, the Court considered that the disputed norm rightly establishes a balance between private and public interests and the obligation to include at least one woman in every four members of party list does not contradict the first sentence of the first paragraph of Article 24 of the Constitution of Georgia.

DISSENTING OPINION (1)

Justice Eva Gotsiridze expressed the dissenting opinion on the judgment of the Plenum of the Constitutional Court of Georgia №3/3/1526 of 25 September 2020 and pointed out that the judgment failed to establish a fair value balance. Moreover, there was no factual, legal, or logical basis for declaring the disputed norm and any of its "normative content" unconstitutional.

According to the author of the dissenting opinion, the disputed provision indeed served the legitimate interest of achieving equality between the sexes in the respective legal relationship. At the same time, the purpose of the provision is to support the oppressed sex in legal relations and not specifically a woman or a man, which is directly in line with the principles established by Article 11(3) of the Constitution. It is noteworthy that in this provision the Constitutional Court rightly saw the special positive obligations of the state of ensuring equality between women and men.

According to the author of the dissenting opinion, the disputed provision requires that at least one person in every four members on the party list is of an opposite sex, therefore, it achieves the legitimate aim with minimal interference in electoral right. Accordingly, beyond this restriction, the parties have a broader margin of appreciation with regard to drawing up their party lists.

According to the author of the dissenting opinion, the Constitutional Court wrongly decided the constitutionality of the gender quota benefitting men. Namely, the main purpose of the disputed regulation was to have a more or less equal representation of both - women and men in the Parliament. Therefore, creating equal quotas for both genders does not contradict the idea of equality, but expresses it in the most clear and direct way. At the same time, Article 11(3) of the Constitution of Georgia refers to substantial equality of both women and men in the Parliament, not to the increased representation of women only. Consequently, if the legitimate aim of the Constitution is not only to increase the number of women in the Parliament but to eliminate gender inequality, then it is difficult to say that male quotas do not serve such legitimate purpose and that there is no reasonable and rational connection between them. According to the dissenting opinion, the Constitutional Court considered the legitimate aims of ensuring the substantial equality of women and men, on the one hand, and increasing the representation of women in the Parliament, on the other hand, to be incompatible with each other, which led to the wrong decision on the disputed case. Increasing the representation of women helps to ensure gender balance in the Parliament.

According to the author of the dissenting opinion, normative reality created by the decision of the Constitutional Court contains considerable risks. More precisely, by declaring gender quotas for men unconstitutional, the Court made the disputed, content-neutral regulation discriminatory in its nature and thus interfered with the right to equality itself. Moreover, the Court, in fact, allowed the existence of women only political parties, while denying the same right to men. Giving such priority to women poses a threat for gender equality and for increasing the quality of democracy in general; and such a decision cannot be easily justified by the legitimate purpose of increasing women's representation in the Parliament.

The author of the dissenting opinion points out that by resolving the dispute in this way the Constitutional Court of Georgia, in fact, acted as a positive legislator.

The author of the dissenting opinion also considers that normative content of the disputed norm declared unconstitutional by the Constitutional Court could not be considered a true normative content of the impugned provision. Thus, in her opinion, the disputed regulation possesses only one normative content which implies mandatory quotas for candidates of both in the political party lists. Consequently, it is the "quota of both sexes" that creates one normative reality which is why the Plenum of the Constitutional Court should either recognize the disputed norm entirely constitutional or declare it entirely unconstitutional.

According to the author of the dissenting opinion, the Constitutional Court has created a new dilemma by resolving the dispute this way. In particular, the Court ruled out the possibility for men to argue on the constitutionality of differential treatment on the grounds of sex with regard to electoral right.

DISSENTING OPINION (2)

Justices Irine Imerlishvili and Teimuraz Tughushi expressed a dissenting opinion regarding the second paragraph of the Ruling part of the Judgment №3/3/1526 of the Plenum of the Constitutional Court of September 25, 2020, according to which the Court should have fully upheld the constitutional complaint and declared the mandatory quota rule unconstitutional.

The authors of the dissenting opinion point out that the disputed rule, which obliges the citizens of Georgia to elect a certain number of women deputies in the Parliament of Georgia, is aimed at restricting the freedom of choice of the citizens of Georgia and not at promoting it. The disputed norm establishes an order that is alien to the electoral process based on freedom of choice, and thus the disputed norm imposes severe restriction on this right.

The authors of the dissenting opinion do not deny that there is a significantly lower level of women representation in the Parliament of Georgia compared to their number in the society. However, this, by itself, does not prove that such factual reality is mostly caused by unhealthy or stereotypical attitudes towards women in society. According to the authors of the dissenting opinion, even if the above-mentioned situation is present, Article 11 (3) of the Constitution of Georgia does not create a basis for the application of a special measure provided by the disputed norm, as the latter is not aimed at equalizing the starting conditions of persons, but is directly focused on the result. The purpose of the mentioned constitutional

provision is to ensure equal starting conditions for women and men by removing social barriers and not to equalize them in results. Respectively, the disputed norm goes beyond the scope of authority conferred on the state by Article 11, paragraph 3 of the Constitution of Georgia and there is no legitimate basis for its validity.

When discussing the suitability of the restriction, the authors of the dissenting opinion noted that the Constitutional Court had not thoroughly investigated the effectiveness of the mandatory quotas in neutralizing stereotypes in society. In their view, such a regulation, on the contrary, might contribute to the strengthening of unhealthy attitudes towards the role of women, since the artificial determination of the number of women MPs creates a risk of promoting public opinion about their undeserved entry into office. At the same time, the representation of women provided by the disputed norm, even in its absence, was almost achieved after 2016 parliamentary elections. Accordingly, the disputed regulation does not change the expected data in terms of improving the representation of women in the Parliament of Georgia, due to which it cannot be considered as a suitable means of achieving a legitimate aim.

Discussing the necessity stage, the authors of the dissenting opinion noted that the results of the 2008-2016 parliamentary elections indicate a growing rate of women's representation in the Parliament of Georgia. Women representation in the Parliament as a whole has increased from 6% to 12% and then to 16% in the last three parliamentary elections. Additionally, in the proportional system women representation increased from 10.66% to 14.29% and then to 23.38%. In 2016, the representation of women in the Parliament as a whole, as well as in the part of the proportional system, more than doubled, and in fact, the representation of women provided by the disputed norm was almost achieved. In the presence of these data, the Constitutional Court's claim that the dynamics of increasing the representation of women in the Parliament of Georgia under natural conditions is insufficient is baseless. Thus, the authors of the dissenting opinion considered that there was no necessity to impose a restriction by the disputed norm and that it did not constitute the least restrictive measure.

Discussing the issue of proportionality *stricto sensu*, the authors argued that representative democracy implies that the policy-making decisions of a country are made by those individuals who are elected with the most support based on the free will of the electorate, and that any artificial interference should be ruled out as much as possible. Consequently, like a professional position, it is no less dangerous to entrust the adoption of the most important decisions for the country to a person with the lack of appropriate support and, thus, with insufficient legitimacy. The fact that the disputed measure was introduced four months prior to the parliamentary elections, is also noteworthy. Political parties were not given a reasonable amount of time to take care of popularizing the appropriate number of women candidates and properly increasing their support. At the same time, those political parties that had naturally high female representation found themselves in an advantageous position over other political parties that did not have sufficient number of female candidates with appropriate political ratings. Due to above-mentioned factors, the authors of the dissenting opinion consider that the obligation to include at least one woman in every four members on the party list contradicts the electoral right protected by the first sentence of the first paragraph of Article 24 of the Constitution of Georgia.