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# EDITORIAL

The present XIV edition of the Journal is dedicated to constitutional and judicial reform in Georgia and abroad. This topic has been chosen by the Editorial Board, due to comprehensive revision of the Constitution of Georgia, as well as complete renewal of the composition of the Supreme Court of Georgia, which constituted one of the most significant reforms in Georgian judiciary.

However, while working on the 14<sup>th</sup> edition of the journal, COVID-19 pandemic encompassed the world, which, in its turn, served as a significant challenge for proper functioning of democratic society and human rights protection. Many states, including Georgia, adopted restrictive measures to deal with pandemic, which lead to declaration of a State of Emergency, enforcement of strict quarantine measures, and restriction of a set of fundamental rights and freedoms for a relatively long period<sup>1</sup>.

Therefore, on the one hand, we decided to expand the topic of the current edition, and to offer interesting analytical materials on legal aspects of dealing with pandemic to our readers, and on the other hand, we had to respond to the extraordinary legal regime operating in our country for last several months which caused active discussions not only in professional circles but in the general public as well. We do believe that ongoing discussions as well as decisions/rulings/judgements on the pending cases before Courts, might be beneficial to improve existing legislation and eliminate substantive gaps in it, which, in turn, could enable our country to establish a balanced effective and human rights oriented mechanisms to fight against pandemics. Thus, the present review is divided in two parts: in the first part, we will review the legal aspects of the State of Emergency declared in Georgia due to COVID-19 pandemic, as well as their impact on human rights protection. In the second part, there is a possibility to read brief overviews of academic papers published in this edition.

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<sup>1</sup> See <https://verfassungsblog.de/states-of-emergency/>

# 1. COVID-19, STATE OF EMERGENCY AND HUMAN RIGHTS PROTECTION IN GEORGIA

On 21 March, the President of Georgia issued Order N1 *“On Declaring the State of Emergency throughout the Whole Territory of Georgia”*<sup>2</sup> and Decree N1 *“On Measures to be Implemented in relation with the Declaration of the State of Emergency throughout the Whole Territory of Georgia”*<sup>3</sup>. Initially, the State of Emergency was declared for one month, but later was extended until May 22, 2020.<sup>4</sup> The Decree restricted the following constitutional rights: a) Right to freedom; b) Right to movement; c) Right to respect for private and family life, personal space and privacy of communication; d) Right to fair administrative proceedings, access to public information, informational self-determination and compensation of damage inflicted by public authority; e) Right to property; f) Freedom of assembly; g) Freedom of labor, freedom of trade unions, right to strike and freedom of enterprise.

On 23 March, 2020, based on the above-mentioned Decree, the Government of Georgia adopted an Ordinance N181 *“On Approval of Measures to be implemented in connection with the Prevention of the Spread of New Coronavirus in Georgia”*<sup>5</sup>. This act was a framework document, based on which, the government was enabled to set a curfew, to restrict public gathering of more than three people, both in public and in private (except dwellings), to forbid intercity movements and movement within municipalities, etc. Overall, the Decree at issue was valid for 2 months and it was amended on 41 occasions within this period, which once again emphasizes that the government, for responding to the situations caused by the pandemic, had to permanently modify the regimes restricting human rights and freedoms.

The most problematic issues (regulations) – that led to broad discussions in society, including the professional circles, and litigation before the Constitutional Court – would be analyzed in a detail below.

## The Issue of Legality

First of all, it should be emphasized that while declaring the State of Emergency based on Article 71 of the Constitution of Georgia (upon the request of the Prime Minister), the President of

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2 See Order N1 of the President of Georgia, available at: <https://www.president.gov.ge/geo/sajaro-informacia/samartlebrivi-aqtebi/saqartvelos-prezidentis-brdzaneba-N-1.aspx> [Accessed: 20.06.2020, 10:20]

3 Decree N1 of the President of Georgia, available at: <https://matsne.gov.ge/ka/document/view/4830372> [Accessed at: 20.06.2020, 10:22]

4 See Order N2 of the President of Georgia from April 21, 2020 *“On Declaring the State of Emergency throughout the Whole Territory of Georgia”*, available at: <https://www.president.gov.ge/geo/sajaro-informacia/samartlebrivi-aqtebi/saqartvelos-prezidentis-brdzaneba-N-2.aspx> [Accessed: 21.06.2020, 10:23]

5 See Ordinance N181 of the Government of Georgia, available at: <https://matsne.gov.ge/ka/document/view/4830610?publication=41> [Accessed: 21.06.2020, 10:29]

Georgia is entitled to **restrict** or **suspend** a number of rights on the basis of a decree.<sup>6</sup> Accordingly, the Constitution offers two various mechanisms that allow for a possibility to interfere in human rights through the course of a State of Emergency. By scrutinizing the text of the Constitution and analyzing the provisions thereof, we can conclude that restriction of rights under the Presidential decree implies a possibility to substitute the requirement “prescribed by law” with the notion of “prescribed by decree”. In contrast, **suspension of rights** constitutes a classic case of derogation in the time of emergency, through the course of which, the State is allowed to suspend guarantees provided by a particular right and the scope of legitimate aims for an interference are enlarged. However, in both circumstances, considering the requirements of Rule of Law and the mechanisms of checks and balances within the Constitution of Georgia, the decision on interfering with rights and freedoms shall be made by legislature, not by executive government.

This is important insofar as under the Presidential decree the rights were **restricted** not **suspended**, thus, the principle of legality is invariably applied to the Presidential decree. Thus, any normative act (decree, in this case) used for interfering with rights shall, both formally and materially, comply with the requirements of the Constitution.

This issue was disputed in almost every constitutional complaint submitted before the Constitutional Court. For example, in the case *“Citizen of Georgia Giorgi Tchautchidze v. the Government of Georgia”*, the plaintiff argues that interference with Article 14 (Freedom of movement) of the Constitution of Georgia is allowed only on the basis of law, and during the time of State of Emergency – upon Presidential decree.<sup>8</sup> Meanwhile, the plaintiff also argues that *“the Order of the President of Georgia on declaring the State of Emergency, as well as the Presidential decree, does not set out specific regulations and transfers full authority to restrict constitutional rights to the Government of Georgia, which constitutes a violation of the Constitution of Georgia. According to the Constitution of Georgia, the Georgian Government is not entitled to determine, expand or reduce the scope of restriction of basic human rights at its own discretion, but it is obliged to only implement the acts issued and approved by the Parliament regarding the State of Emergency”*.<sup>9</sup>

Accordingly, one of the key issues in this case is constitutionality of the delegation of powers to the Government of Georgia. As for the interrelationship between the principle of legality and delegation of powers by the legislative authority to the executive government, the Constitutional Court of Georgia stated that *“an essential requirement that constitutional rights may only be restricted in accordance with law does not exclude a possibility of the Parliament to delegate authority to regulate these issues to other authorities”*<sup>10</sup>. *“Herewith, requirement to restrict a right on the basis*

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6 See Article 71 §4 of the Constitution of Georgia, available at: <https://matsne.gov.ge/ka/document/view/30346?publication=35> [Accessed: 21.06.2020, 10:42]

7 See recording notice of the Constitutional Court of Georgia N2/5/1498, available at: <https://constcourt.ge/ka/judicial-acts?legal=9101> [Accessed: 21.06.2020, 11:01]

8 Ibid, I.5

9 Ibid

10 See the Judgment №3/3/763 of the Constitution of Georgia from July 20, 2016 on the case *“The group of Members of Parliament (Davit Bakradze, Sergo Ratiani, Roland Akhalaia, Giorgi Baramide and others, 42 MPs in total) v. the Parliament of Georgia, II-78)*.

of law does not imply only formal adoption of law and formal participation of the Parliament in the settlement process. It is important that the restricting law should comply with the requirements of the Constitution of Georgia, both formally and substantively. Thus, the Parliament of Georgia is obliged to make decisions on all principal issues having impact over constitutional rights and delegate settlement of technical and procedural rights to other authorities that require adjustment to variable circumstances”<sup>11</sup>.

Therefore, with regard to the Presidential decree, the plaintiff argues on the extent to which the legislative authority fulfilled its duty and whether, while adopting the decree, the Parliament decided on all principle matters to restrict human rights and freedoms in a State of Emergency. The same was argued in other cases.<sup>12</sup>

In addition, in one of the constitutional complaints, the plaintiff extended that argument and disputed constitutionality of ordinances of the Parliament on authorizing a State of Emergency on the basis that the requirements of adopting/issuing, signing, publishing and enacting of these ordinances were violated.<sup>13</sup>

In particular, the plaintiff argues that the validity of the presidential Decree was restricted by the term of the Order “*On Declaring the State of Emergency*” issued by the President of Georgia on March 21, 2020, i.e. for 1 month. On April 21, 2020 the President of Georgia issued a new order on the extension of the State of Emergency (Order N2), although she failed to issue a new decree. The Parliament of Georgia, in its turn, approved the Presidential Order repeatedly without discussing the Decree and thus, the term of the Decree was automatically extended within the framework of the new Order.

According to the plaintiff, in order for the Presidential Decree to be in force from April 21, 2020, the Parliament was obliged to discuss the Decree while the President issued Order Nr.2 “*On Extension of the State of Emergency*”. This was required from the Parliament in order to comply with the requirements based on such interpretation of the Article 71 of the Constitution, which stipulates that the term of validity of the Decree is fully attached to the Presidential Order. Due to the fact that the Parliament didn’t comply with these requirements, the plaintiff believes that the Presidential Decree was not valid after April 21, 2020, as its validity was fully attached to Presidential Order Nr.1, which, in turn, became invalid while the President issued Order Nr.2 and the Parliament approved it.

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11 See the Judgment №1/7/1275 of the Constitutional Court of Georgia from August 2, 2019 on the case “*Aleksandre Mdzinarashvili v. Georgian National Communications Commission*, II-30-34).

12 See recording notice of the Constitutional Court of Georgia N1/6/1499, available at: <https://constcourt.ge/ka/judicial-acts?legal=9154> [Accessed at: 21.06.2020, 11:35],

See recording notice of the Constitutional Court of Georgia N3/6/1502, available at: <https://constcourt.ge/ka/judicial-acts?legal=9189>, [Accessed: 21.06.2020, 11:37],

See recording notice of the Constitutional Court of Georgia N3/7/1503, available at: <https://constcourt.ge/ka/judicial-acts?legal=9190>, [Accessed: 21.06.2020, 11:39],

13 See the constitutional complaint N1504, available at: <https://constcourt.ge/ka/judicial-acts?legal=9192>, [Accessed at: 21.06.2020, 11:47]

Otherwise, the plaintiff considers, that there could be a reality that if the Parliament once discusses the content of a specific Decree and adopts it, the Decree will be valid „permanently“ until the State of Emergency is in force in the country. In this scenario, it is possible, in principle, that the President, upon the request from the Prime Minister, might continue the term of validity of the Decree even when the Parliament declines extension of the State of Emergency and/or re-adoption thereof. Therefore, the plaintiff requests the Constitutional Court to declare the adoption of the State of Emergency by the Parliament unconstitutional as the procedures envisaged by the Constitution were violated.

## The Matter of Substantive Compliance

Besides the compliance of disputed regulations with the principle of legality, these regulations has become disputable with regard to the rights and freedoms, restriction of which is allowed during a State of Emergency and Martial Law. In particular, within different cases citizens challenged the decision on closing Marneuli Municipality,<sup>14</sup> introduction of curfew,<sup>15</sup> introduction of isolation and quarantine rules,<sup>16</sup> restriction of the freedom of gathering, manifestation and assembly,<sup>17</sup> restriction of transportation of more than three people via vehicle and restriction of seating a passenger next to the driver,<sup>18</sup> introduction of a rule of administrative proceedings different from the one envisaged under Georgian legislation.<sup>19</sup>

As far as that the list of disputable topics is long and extensive, considering the format of the editorial, we decided to focus on the topic which might be interesting not only in Georgian context but rather it could be important for the protection of human rights in general – **introducing responsibility through Presidential Decree and normative acts issued by the executive government.**

More specifically, according to the Article 8 of the Decree Nr.1 of the President of Georgia „infringement of the regime of the State of Emergency envisaged under the present Decree and the Decree of the Georgian Government will result: 1. Administrative responsibility – fine amounting to GEL 3 000 for physical persons, fine amounting to GEL 15 000 for legal entities“. The constitutionality of this regulation has been disputed in two cases, one of which was accepted for the hearing on merits.<sup>20</sup> In that case, the plaintiff argues that according to the principle of legality, any act shall be declared as a crime and/or administrative offence on the basis of law. In the given case, an act as well as a liability for its violation is established by the Presidential Decree and Ordinance of the Gov-

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14 See recording notice of the Constitutional Court of Georgia N2/5/1498, available at: <https://constcourt.ge/ka/judicial-acts?legal=9101>

15 See recording notice of the Constitutional Court of Georgia N1/6/1499, available at: <https://constcourt.ge/ka/judicial-acts?legal=9154>

16 See recording notice of the Constitutional Court of Georgia N3/7/1503, available at: <https://constcourt.ge/ka/judicial-acts?legal=9190>

17 *ibid*

18 *ibid*

19 See recording notice of the Constitutional Court of Georgia N3/6/1502, available at: <https://constcourt.ge/ka/judicial-acts?legal=9189>

20 *ibid*

ernment. Therefore, it constitutes a violation of the constitutional right that “No one shall be held responsible for an action that did not constitute an offence at the time when it was committed”.

In another case<sup>21</sup>, the plaintiff provides an additional argument with regard to Article 31.5 of the Constitution of Georgia, according to which “*A person shall be presumed innocent until proved guilty, in accordance with the procedures established by the law*”. The plaintiff argues, that the given constitutional provision establishes important guarantees, including a requirement that the rule of pronouncing a person guilty shall be established in accordance with the law. Moreover, the term „pronouncing a person guilty “does not only refer to the crimes envisaged under the Criminal Code but to administrative offences as well. Also, Article 74.4 of the Constitution of Georgia doesn’t envisage derogation from Article 31.5 of the Constitution as well as it doesn’t provide the President of Georgia with the authority to restrict or suspend the constitutional guarantees of pronouncing a person guilty under his/her Decree. Thus, introduction of any liability through Presidential Decree and/or any Act issued by the Executive Government is in contradiction with the requirements of the Constitution.

## Status Quo

On May 23, 2020, a State of Emergency expired. However, certain restrictions are still in force on the basis of the regulations which recently has been supplemented to the existing legislation and remains in force until 15 July 2020. Moreover, although a State of Emergency is revoked, Georgia extended the derogations from certain obligations under European Convention on Human Rights until 15 July 2020.

With regard to the tentative regulations in force until 15 July 2020, Article 45<sup>3</sup> was added to the „Law of Georgia on Public Health“, which envisaged, that Georgian government could establish the rules of isolation and quarantine, elaborate corresponding regulations and restrict the rights and freedoms of movement, ownership, labor, professional or economic activities guaranteed by the Constitution.<sup>22</sup> Based on this legislative provision, the Government of Georgia adopted an Ordinance Nr.322 “*On Determining Isolation and Quarantine Rules*“.

The constitutionality of the mentioned legislative regulations has already become subject of disputes and at this point, several constitutional complaints have been submitted to the Constitutional Court, and one of those cases has been submitted to the hearing on merits.<sup>23</sup> In the aforesaid

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21 See Constitutional complaint N1504, available at: <https://constcourt.ge/ka/judicial-acts?legal=9192>

22 See „Law of Georgia on Public Health“, available at: <https://matsne.gov.ge/document/view/21784?publication=29> [Accessed: 21.06.2020, 14:25]

23 See recording notice of the Constitutional Court of Georgia N1/9/1505, available at: <https://constcourt.ge/ka/judicial-acts?legal=9519> [Accessed: 21.06.2020, 14:28]

cases, plaintiffs still argue with regard to the principle legality for the interference in the rights and freedoms,<sup>24</sup> as well as they claim unconstitutionality of certain restrictions.

We do believe, that the restrictive measures adopted to fight COVID-19 pandemic once again proved, that there are certain problematic issues both, at the legislative level and in practice. These issues require corresponding legal analysis as well as careful assessment and examination through Judicial Review.

We do hope that the judiciary as well as other branches of the government and professional circles will continue to work on these matters and we will have clearer vision, as to when, how and based on which rules could human rights be restricted in a manner, that, on one hand, it will be possible to fulfill the legitimate aims necessary to fight against pandemic and, on the other hand, their implementation will not result into excessive and disproportionate interference into fundamental rights and freedoms.

## 2. REVIEW OF ACADEMIC PAPERS

In the present edition of the Journal the reader has a possibility to get acquainted with the academic researches of three foreign and four Georgian authors, which are provisionally divided into two sections.

The first section includes the works of Gábor Halmai, the Professor of European University Institute, Alan Greene, Professor at Birmingham University, and Kanstantsin Dzehtsiarou, Professor at Liverpool University.

The article by Prof. Halmai is about the problems of liberalism in East-Central Europe. The author referring to modern Poland and Hungary, attempts to answer the question whether the convincing and coherent theory of illiberal constitutionalism exists or not. Professor Halmai argues, that the rejection of liberalism in these countries is caused by the lack of general agreement on liberal values, as well as poor culture of constitutionalism and rise of populism. However, the author argues, that the backslide of democracy in Poland and Hungary is not caused by the „failure“ of the concept of liberal democracy as such, as illiberal leaders and their court ideologists want people to believe.

We do believe, that it will be especially interesting for Georgian readers to draw parallels between constitutional-legal reality in Georgia and the situation in East-Central Europe, the analysis of which is perfectly portrayed in the work of Professor Halmai.

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<sup>24</sup> *ibid*

In the same section, we offer our reader to get familiar with contradicting positions of two authors, as to how important it is, in the process of fighting against COVID-19 pandemic, for the signatories to the European Convention on Human Rights to exercise their power to derogate from the obligations under the Convention.

As for the works of Georgian authors, the second section starts with article by Konstantine Kublashvili, Professor of Ilia State University, the focus of which are the shortcomings and challenges of the new edition of the Constitution of Georgia. Within the article there is an extensive discussion with regard to Article 71 of the Constitution of Georgia, which regulates the matters regarding the restriction of human rights during State of Emergency and Martial Law. This part of the article especially corresponds to the content of the researches presented in the first section of the Journal and the ongoing context, within which the present issue of the Journal was published. Moreover, the author reviews other shortcomings of the new edition of the Constitution with regard to the provisions on the freedom of religion and the right to privacy.

Also, in the present issue of the Journal the reader has the possibility to get acquainted with the academic review prepared by Kakha Tsikarishvili, Ph.D. candidate at the Tbilisi State University and project coordinator at the NGO „Rights Georgia“. The review focuses on the independence and accountability of the courts as well as discusses viewpoints of Supreme Court Judicial Candidates. The author analyzes the concepts of judicial independence and accountability, the major problems that Georgia is facing in this regard and the viewpoints of those twenty Supreme Court Judicial Candidates, who had been presented before the Parliament of Georgia.

We do believe that this review is a good attempt to carry out academic appraisal and critical analysis regarding one of the most important reforms implemented in the Georgian judiciary.

The academic review provided by Kakha Uriadmkopeli, Professor at Georgian-American University and invited Professor at Ilia State University and Georgian Institute of Public Affairs, is extremely interesting. The topic of the review is dedicated to analyze important Parliamentary control mechanisms envisaged under the New Rules of Procedure of Parliament, such as: Post-Legislative Scrutiny (PLS), Thematic Inquiry and Thematic Rapporteur. The author indicates that Georgia had very unsuccessful practice with regard to Parliamentary oversight. Thus, it is important that the given oversight mechanisms were adopted within the framework of reforming the Rules of Procedures of Parliament. Therefore, the author believes that it is crucial to examine the essence and importance of these mechanisms.

And finally, we offer our readers the academic review by Shota Kobalia, graduating student of Free University of Tbilisi, which attempts to show the essence of the Entitling Norm in the context of the two concepts of liberty and the dogmatic peculiarities related to its constitutional control. In this review the following position is argued – that in case the norm is in substantial connection with the realization of civil and political rights, the core of which is the negative liberty, notwithstanding its formally entitling nature, cannot be considered as entitling, from a dogmatic perspective. The paper criticizes the practice of the Constitutional Court of Georgia and identifies logical, as well as substantive cases of inconsistency in judicial reasoning.

Gábor Halmai\*

# ILLIBERALISM IN EAST-CENTRAL EUROPE\*\*

*Modern liberalism has become obsolete  
Vladimir Putin*

## I. Illiberal Constitutional Theories

### A. Are There Such Things as 'Illiberal or Nonliberal Constitutionalism'?

1. Populist Autocrats Against Liberal Democracy and Constitutionalism
2. Authoritarian Populism As A Rhetoric
3. Is There Such A Thing As Authoritarian Constitutionalism?
4. Can 'Nonliberal Constitutionalism' Be Really Constitutionalist?

### B. Attempts to Legitimize 'Illiberal Constitutionalism'

1. Majoritarian (Westminster) System
2. Political Constitutionalism
3. Constitutional Identity

## II. Illiberal Societies<sup>36</sup>

### A. Social Relations, Religion, Culture

1. Regional Heritage
2. The Role of Religion
3. Cultural War

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\*\* The article was first published on by European University Institute. The new version of the article is being published in the journal, with Amendments and Additions, in the revised form.

## B. Economic Relations

## C. Political Relations

### 1. Hungary

### 2. Poland

## III. Conclusion

Illiberalism can be understood as a critical reaction to liberalism. The subject of illiberal criticism are both liberal theories and liberal societies. As Stephen Holmes argues, illiberals or antiliberals are unwilling to examine liberal theories and liberal societies separately, because they assume that liberal societies perfectly embody liberal ideas, therefore failing of liberal societies follow directly from the inadequacy of liberal principles<sup>1</sup>. This paper will discuss the current state of play of both illiberal theories and illiberal societies in East Central Europe.

Also, illiberal critics of liberalism portrays and demonizes liberalism as a single coherent phenomenon. But for instance conservative liberals have little in common with social democratic ones, or neo-liberals with classical ones<sup>2</sup>. As Ralf Dahrendorf has rightly pointed out, Friedrich von Hayek and Karl Popper may well both be seen as liberal thinkers, but their views are quite different from each other<sup>3</sup>.

The main object of illiberal critique are the values of political liberalism: human rights, justice, equality and the rule of law, its commitment to multiculturalism and tolerance, ideas of Isaiah Berlin's 'negative liberty', Karl Popper's 'open society', John Rawls' 'overlapping consensus, or Ronald Dworkin's equality as the 'sovereign virtue'. From an institutional point of view, illiberalism challenges liberal democracy, which isn't merely a limit on the public power of the majority, but also presupposes rule of law, checks and balances, and guaranteed fundamental rights. This means that there is no democracy without liberalism, and there also cannot be liberal rights without democracy<sup>4</sup>. In this respect, there is no such a thing as an 'illiberal or anti-liberal democracy,'<sup>5</sup> or 'demo-

1 See S. Holmes, *The Anatomy of Antiliberalism*, 1993. XIV.

2 See J. Zielonka, *Counter-Revolution*, Oxford University Press, 2018. 20.

3 R. Dahrendorf, *Reflections on the Revolution in Europe*, London: Times Books, 1990. 25-26.

4 Cf. Jürgen Habermas, Über den internen Zusammenhang von Rechtsstaat und Demokratie, in *Zum Begriff der Verfassung. Die Ordnung der Politischen*, hrsg., Ulrich Preuss, Fischer, 1994. 83-94. The English version see Jürgen Habermas, Rule of Law and Democracy, *European Journal of Philosophy*, 1995/3. Also Juan Juan José Linz and Alfred Stepan assert that if governments, even being freely elected violate the right of individuals and minorities, their regimes are not democracies. See Juan José Linz and Alfred Stepan, 'Toward Consolidated Democracies', *Journal of Democracy*, 1996. 14, 15. Similarly, János Kis claims that there is no such thing as nonliberal democracy, or non-democratic liberalism. See János Kis, Demokráciából autokráciába. A rendszertipológia és az átmenet dinamikája [From Democracy to Autocracy. The System-typology and the Dynamics of the Transition], *Politikatudományi Szemle*, 2019/1. 45-74. Those critics, which argue that liberalism as a three hundreds year old concept predates liberal democracy forget that not only democracy but also liberalism presupposes general and equal suffrage.

5 J-W. Müller, 'The Problem with 'Illiberal Democracy'' *Project Syndicate*. 21 January. 2016.

cratic illiberalism<sup>6</sup> for that matter. Those who perceive democracy as liberal by definition also claim that illiberalism is inherently hostile to values associated with constitutionalism, as an institutional aspect of liberal democracy: separation of powers, constraints on the will of the majority, human rights, and protections for minorities. Therefore, the also oxymoronic ‘illiberal’ or ‘populist’ constitutionalism<sup>7</sup> is necessarily authoritarian in character<sup>8</sup>.

For the same reason, I find it misleading to distinguish between antidemocrats, nativists and populists, as the main challengers of political liberalism and liberal democracy<sup>9</sup>. The illiberals are all antidemocrats, who delegitimize representative democracy’s normative foundation, nativists, who protect the interests of the native-born or established inhabitants against those of immigrants, and they are populists, referring to the ‘pure people’ against the ‘corrupt elite’<sup>10</sup>.

Another highly discussed issue of the illiberal turn in East-Central Europe started in the 2010s is to what extent was the liberal democratic revolution of 1989-1990 responsible for the illiberal counter-revolution two decades later. Francis Fukuyama in his famous essay written at the dawn of the 1989 liberal democratic transition predicted the ‘unabashed victory of political liberalism’ and ‘the universalization of Western liberal democracy as the final form of human government’ (Fukuyama 1989). In their book, Ivan Krastev and Stephen Holmes argue that the fact that liberal democracy had no alternative in 1989, and East-Central European countries had to imitate the Western model, contributed to the success of illiberalism in the region<sup>11</sup>. They also claim that illiberalism in

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6 Takis S. Pappas defines modern populism as democratic illiberalism, and calls the current Hungarian regime ‘illiberal democracy.’ T. S. Pappas, ‘When Populists Come to Power’, *Journal of Democracy*, Volume 30, Number 2, April 2019.

7 For instance, Paul Blokker considers ‘populist constitutionalism’ as an alternative, conservative understanding of constitutional order, which is, among other things is a reaction to injustices resulting from liberal democratic politics, to unbalanced emphasis on formalistic liberal institutions, rights, and norms, and an aggressive institutionalisation of a liberal understanding of law in the post-1989 transformation. See Paul Blokker, ‘Populist Constitutionalism’, in Carlos de la Torre (ed.), *Routledge Handbook of Global Populism*, Routledge, 2018; Paul Blokker, ‘Populism As a Constitutional Project!’, 17:2 *ICON*, 2019. Using Isaiah Berlin’s terminology on ‘false populism’ I argue somewhere else that this ‘authoritarian populist constitutionalism’ is only a rhetoric, and not a real populist appeal to the ‘people.’ See G. HALMAI, ‘Populism, Authoritarianism and Constitutionalism’, 20 *German Law Journal*, No. 3. 2019.

8 Following Juan José Linz’s classical categories authoritarianism is inbetween democratic and totalitarian political system. See Juan José Linz, *Totalitarian and Authoritarian Regimes*, Lynne Rienner, 2000. Writing about Franco’s Spain Linz has already outlined the following four main characteristics of authoritarianism: limited, not responsible political pluralism, without elaborate and guiding ideology, without political mobilization, and with formally ill-defined, but quite predictable limits of power. See Juan José Linz, ‘An Authoritarian Regime: the Case of Spain’, in *Cleavages, Ideologies and Party Systems*, Eric Allard and Yrjo Littunen (eds.) Helsinki, 1970. About the constitutional markers of authoritarianism as a pretence of democracy, such as the lack of procedural rights, institutional guarantees and public discourse see Gábor Attila Tóth, *Constitutional Markers of Authoritarianism*, *Hague Journal on the Rule of Law*, Published online: 10 September 2018.

9 See T. S. Pappas, ‘Distinguishing Liberal Democracy’s Challengers’, *Journal of Democracy*, Volume 27, Number 4, October 2016.

10 While in my view nowadays all illiberals are populists, not all populist are necessarily illiberals, for instance some of the left populists are not. Even in East-Central Europe the populism of the Czech Prime Minister, Andrej Babis is lacking strong illiberal components. Contrary to my understanding Andrew Arato and Jean Cohen, analysing the normative theory of left populism by Ernesto Laclau and Chantal Mouffe respectively claim that left populism also cannot avoid illiberal authoritarianism inherent in the strategy and logic of populism despite the inclusionary and democratizing projects of the left movements it attaches to and despite the democratic socialist rhetoric of left populist leaders and their organic intellectuals. See Arato (2013) and Cohen (2019). In my view it is certainly true for Latin American populist from Peron through Morales, Correa, till Chavez and Maduro, but not necessarily for European left populist parties, such as Podemos, the Five Star Movement and Syriza. The last two did not even show serious illiberal pursuits while being in power.

11 I. Krastev and S. Holmes, *The Light that Failed: A Reckoning*, Allen Lane, 2019. 23.

the region is deeply rooted in the outflow of people, especially young people from these countries and the demographic anxieties that this 'expatriation of the future' has left behind<sup>12</sup>.

In my view, there was both a rightist nationalistic and a leftist democratic socialist alternative during the post-communist transition, and copying the West could only be harmful if there would have been equally promising scenarios available, and the two mentioned ones were not such. After all, the imitation of liberal democracy in Germany after WWII and in Spain, Portugal and Greece did not result in illiberal regimes. Also, the 'demographic panic' has intentionally been caused by the illiberal leaders themselves discouraging liberal minded people to stay in the hostile political, religious and cultural environment of their home countries as more or less enemies of the regime. Krastev and Holmes assert themselves that the contemporary illiberalism is directed at post-national individualism and cosmopolitanism, and the gravest threat to the survival of the white Christian majority for illiberals in East-Central Europe is the incapacity of Western societies to defend themselves<sup>13</sup>. One visible sign of the defense of Christian majorities is the establishment of "The Hungary Helps Agency" by the government of Viktor Orbán in April 2019. The Agency's task is to coordinate programs to help persecuted Christians.<sup>14</sup>

Contrary to many contemporary theorists Krastev and Holmes also argue that multiculturalism is not the main target of illiberalism, therefore it cannot be combatted by abandoning identity politics, as those theorists suggest<sup>15</sup>. But for instance Hungarian Prime Minister Viktor Orbán's emphasis of ethnic homogeneity of the Hungarian nation proves that illiberals fight against the concept of a multicultural society: „We do not want to be diverse and do not want to be mixed... We want to be how we became eleven hundred years ago here in the Carpathian Basin”<sup>16</sup>.

Distinct from illiberal theories, the second part of the paper discusses three main relations of illiberal societies: the social, the economic and the political ones. Among other things, I want to figure out, whether the backsliding of liberalism in East-Central Europe is a proof or consequence of failure of liberal ideas.

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12 *Ibid*, 40.

13 *Ibid*, 43.

14 <https://www.kormany.hu/en/prime-minister-s-office/news/hungary-helps-agency-established>

15 See M. Lilla, *The Once and Future Liberal: After Identity Politics*, Harper. 2017.

16 Viktor Orbán's Speech at the Annual General Meeting of the Association of Cities with County Rights, 8 February 2018.

## I. ILLIBERAL CONSTITUTIONAL THEORIES

### A. Are There Such Things as ‘Illiberal or Nonliberal Constitutionalism’?

#### 1. Populist Autocrats Against Liberal Democracy and Constitutionalism

In a speech delivered on July 26, 2014, before an ethnic Hungarian audience in the neighboring Romania, Prime Minister Viktor Orbán proclaimed his intention to turn Hungary into a state that “will undertake the odium of expressing that in character it is not of liberal nature.” Citing as models he added:

We have abandoned liberal methods and principles of organizing society, as well as the liberal way to look at the world . . . . Today, the stars of international analyses are Singapore, China, India, Turkey, Russia . . . and if we think back on what we did in the last four years, and what we are going to do in the following four years, then it really can be interpreted from this angle. We are . . . parting ways with Western European dogmas, making ourselves independent from them . . . If we look at civil organizations in Hungary, . . . we have to deal with paid political activists here . . . [T]hey would like to exercise influence . . . on Hungarian public life. It is vital, therefore, that if we would like to reorganize our nation state instead of it being a liberal state, that we should make it clear, that these are not civilians . . . opposing us, but political activists attempting to promote foreign interests . . . This is about the ongoing reorganization of the Hungarian state. Contrary to the liberal state organization logic of the past twenty years, this is a state organization originating in national interests<sup>17</sup>.

Four years later at the same venue Orbán again expressed his support for illiberal democracy, adding that he considers Christian democracy as illiberal as well:

There is an alternative to liberal democracy: it is called Christian democracy...Let us confidently declare that Christian democracy is not liberal. Liberal democracy is liberal, while Christian democracy is, by definition, not liberal: it is, if you like, illiberal.<sup>18</sup>

In June 2019, after Fidesz was suspended from the center-right party family, EPP has set up a special committee to examine the Fidesz party’s adherence to democratic standards. One of the questions the members of the committee, former Austrian Chancellor Wolfgang Schüssel, former European Council President Herman Van Rompuy and former European Parliament President Hans-

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<sup>17</sup> See Viktor Orbán, *Speech at Băile Tuşnad (Tusnádfürdő) of 26 July 2014*, Budapest Beacon, July 29, 2014, <http://budapestbeacon.com/public-policy/full-text-of-viktor-orbans-speech-at-baile-tusnad-tusnadfurdo-of-26-july-2014/>.

<sup>18</sup> See Prime Minister Viktor Orbán’s Speech at the 28<sup>th</sup> Bálványos Summer Open University and Student Camp, 28 July 2018. Tusnádfürdő (Băile Tuşnad). <http://www.miniszterelnok.hu/prime-minister-viktor-orbans-speech-at-the-29th-balvanyos-summer-open-university-and-student-camp/>

Gert Pöttering addressed to Viktor Orbán has been: “Please explain what you mean by the expression ‘illiberal state’? Here is the Fidesz chairman and Hungarian Prime Minister’s response:

We are Christian democrats and we are differing nowadays at least in three aspects from the liberals: The first one is the conviction that family is fundamental, and family is based on one man and one woman. We believe that this needs to be protected, which the liberals deny. Secondly, while the cultural life of every country is diverse, a Leitculture, a cultural tradition is present everywhere. In Hungary this is Christian culture. We respect other cultures, but our own has a prominent role for us, and it is our responsibility to preserve it. Liberals refuse this concept. The third aspect is that liberal democrats are everywhere pro-immigration while we are against immigration. So whether one admits it or not: Christian democrats are illiberal by definition<sup>19</sup>.

In a conversation with the French philosopher, Bernard-Henry Lévy Orbán identified liberalism with totalitarianism, and illiberalism with true democracy:

Liberalism gave rise to political correctness—that is, to a form of totalitarianism, which is the opposite of democracy. That’s why I believe that illiberalism restores true freedom, true democracy.<sup>20</sup>

In July 2019 in the yearly Băile Tuşnad/Tusnádfürdő Free University Orbán admitted that ‘illiberalism’ carries a negative connotation, and therefore he changed the terminology calling illiberalism ‘Christian liberty,’ which according to him is ‘a genuine model of a theory of state, a unique Christian democratic state.’ He made it clear however that ‘Christian liberty does not mean individual liberty, because ‘individual freedoms can never encroach on the interests of the community. There is indeed a majority that must be respected, that is the foundation of democracy.’<sup>21</sup>

In a speech, delivered in mid September 2019 at the 12<sup>th</sup> congress of the Association of Christian Intelligentsia he said that ‘Christian liberty’ is superior to the individual liberty – defined by John Stuart Mill in his *On Liberty* -, which can only be infringed upon if the exercise of one’s liberty harms others. Christian liberty, by contrast, holds that we ought to treat others as we want to be treated.<sup>22</sup> “The teachings of ‘Christian liberty’ – he added – maintain that the world is divided into nations.” As opposed to liberal liberty, which is based on individual accomplishments, the followers of ‘Christian

19 The leaked letter has been published by Politico: <https://www.politico.eu/article/viktor-orban-rejects-epp-concerns-rule-of-law/>

20 Bernard-Henry Lévy, ‘How an Anti-totalitarian Militant Discovered Ultrnationalism. After 30 years, I spoke with Viktor Orbán again’, *The Atlantic*, May 13, 2019.

21 <http://www.miniszterelnok.hu/yes-to-democracy-no-to-liberalism/>. As Yale law and history professor, Samuel Moyn pointed out President Trump has also begun to nudge the political culture to the same direction. He quoted Sohrab Ahmari, a conservative journalist, who approvingly explained Trump’s policy as re-ordering the common good and ultimately the ‘Highest Good,’ that is, the Christian God – Moyn argues. See Samuel Moyn, ‘We’re in An Anti-Liberal Moment. Liberals Need Better Answers,’ *The Washington Post*, 21 June 2019.

22 <http://www.miniszterelnok.hu/orban-viktor-beszede-a-keresztény-ertelmiségiek--szovetsegének-kesz-xii-kongresszusán/>. This time the webpage of the Prime Minister besides the original Hungarian text of the speech contains no English, but only a German language translation:

<http://www.miniszterelnok.hu/viktor-orban-erde-der-demokratie-und-der-christlichen-intellektuellen-keresztény-ertelmiségiek-szovetsege-kesz/>

liberty' acknowledge only those accomplishments that also serve the common good. While liberals are convinced that liberal democracies will eventually join together to form a world government a' la Immanuel Kant in the name of liberal internationalism, Christian liberty by contrast considers "nations to be as free and sovereign as individuals are, and therefore they cannot be forced under the laws of global governance."

In the system 'Christian liberty' Hungary has a special place:

We shouldn't be afraid to declare that Hungary is a city built on a hill, which, as is well known, cannot be hidden. Let's embrace this mission, let's create for ourselves and show to the world what a true, deep, and superior life can be built on the ideal of Christian liberty. Perhaps this lifeline will be the one toward which the confused, lost, and misguided Europe will stretch its hand. Perhaps they will also see the beauty of man's work serving his own good, the good of his country, and the glory of God.<sup>23</sup>

Another new element of the speech that Orbán puts 'Christian liberty' at the center of the 'Christian democratic state', 'a new and authentic model of state and political theory,' which has been reached in the last thirty years by two big steps. The first has been the liberal democratic transition in 1989, while the second, more important one is the national or Christian regime change in 2010.

Regarding the new constitutional order, introduced by the 2011 Fundamental Law of Hungary, Orbán admitted that his party did not aim to produce a liberal constitution. He said:

In Europe the trend is for every constitution to be liberal, this is not one. Liberal constitutions are based on the freedom of the individual and subdue welfare and the interest of the community to this goal. When we created the constitution, we posed questions to the people. The first question was the following: what would you like; should the constitution regulate the rights of the individual and create other rules in accordance with this principle or should it create a balance between the rights and duties of the individual. According to my recollection more than 80% of the people responded by saying that they wanted to live in a world, where freedom existed, but where welfare and the interest of the community could not be neglected and that these need to be balanced in the constitution. I received an order and mandate for this. For this reason the Hungarian constitution is a constitution of balance, and not a side-leaning constitution, which is the fashion in Europe, as there are plenty of problems there<sup>24</sup>.

Orbán also refused separation of powers, checks and balances as concepts alien to his illiberal constitutional system:

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23 As Éva S. Balogh points out this passage is taken from the Gospel of Matthew, (5:13-15), without identifying it. See Éva S. Balogh, Orbán, the New Jesus Delivers His Sermon on the Mount, *Hungarian Spectrum*, 15 September 2019. <https://hungarianspectrum.org/2019/09/15/orban-the-new-jesus-delivers-his-sermon-on-the-mount/>

24 See A Tavares jelentés egy baloldali akció (The Tavares report is a leftist action), Interview with PM Viktor Orbán in the Hungarian Public Radio, Kossuth Rádió, July 5, 2013.

Checks and balances is a U.S. invention that for some reason of intellectual mediocrity Europe decided to adopt and use in European politics<sup>25</sup>.

The ideological foundation of Orbán's illiberalism can be found in the works of his two court ideologues, the sociologist and former liberal MP, Gyula Tellér and András Láncki, a political scientist. It is easy to prove that Orbán in his 2014 speech on 'illiberal democracy' recited a study of Tellér published earlier on that year, what Orbán assigned as compulsory reading for all his ministers.<sup>26</sup> Tellér claims that the 'system of regime-change' has failed because the liberal constitution did not commit the government to protect national interests, therefore the new 'national system' has to strengthen national sovereignty, and with it the freedom of degree of government activity. This, Tellér argues is necessary against the moral command of the liberal rule of law regime, according to which 'everything is allowed, what does not harm others' liberty'.

Láncki's antiliberal concept can be found in his book *Political Realism and Wisdom*, which was published in English in 2015, as well as in an article published in 2018, after Fidesz' third consecutive electoral victory<sup>27</sup>. Láncki's critique is an outright rejection of liberalism as a utopian ideology, which is—similar to Communism—incompatible with democracy.

Similarly to Orbán, the that time Prime Minister Beata Szydło (with Kaczyński, ruling from behind the scenes as he holds no official post), have described the actions of the PiS government dismantling the independence of the Constitutional Tribunal and the ordinary courts as a blitz to install an illiberal state. In mid-September 2016 at a conference in the Polish town of Krynica, Orbán and Kaczyński proclaimed a 'cultural counter-revolution' aimed at turning the European Union into an illiberal project. A week later at the Bratislava EU summit, the prime ministers of the Visegrád 4 countries demanded a structural change of the EU in favour of the nation states.<sup>28</sup> Witold Waszczykowski, Poland's minister of foreign affairs expressing his own and his governing PiS party's antiliberalism went as far as to mock liberalism as "a world made up of cyclists and vegetarians, who only use renewable energy and fight all form of religion"<sup>29</sup>.

Ryszard Legutko, the main ideologue and MEP of PiS, similarly to his Hungarian counterpart, Láncki, also likens liberal democracy with Communism both being fuelled by the ideas of modernization and progress, arguing that liberalism – in its 'sterility' has little if anything to say about substantive, human moral questions, indeed liberalism is 'comparably simplistic and equally improv-

25 Interview with Bloomberg News, December 14, 2014. Similarly, Tünde Handó, head of the National Judicial Office, a close ally of Orbán said "The rule of law over the State, like, for example, in the United States, is not the right way". [https://nepszava.hu/3029940\\_handonem-kell-a-birosagoknak-szembehelyezkedniuk-az-allammal](https://nepszava.hu/3029940_handonem-kell-a-birosagoknak-szembehelyezkedniuk-az-allammal)

26 See Gyula Tellér, *Született-e Orbán-rendszer 2010 és 2014 között?* [*Was an Orbán System Born between 2010 and 2014?*], NAGYVILÁG, March 2014.

27 See András Láncki, *The Renewed Social Contract—Hungary's Elections*, 2018, IX Hungarian Rev., May 2018, at [http://www.hungarian-review.com/article/20180525\\_the\\_renewed\\_social\\_contract\\_hungary\\_s\\_elections\\_2018](http://www.hungarian-review.com/article/20180525_the_renewed_social_contract_hungary_s_elections_2018). A detailed analysis of Láncki's arguments see See Kim L. Scheppelle, *The Opportunism of Populists and the Defense of Constitutional Liberalism*, 20 GERMAN LAW JOURNAL, 3, 2019.

28 Sławomir Sierakowski even speaks about an 'illiberal international'. See S. Sierakowski, 'The Polish Threat to Europe', Project Syndicate, January 19, 2016.

29 <https://www.bild.de/politik/ausland/polen/hat-die-regierung-einen-vogel-44003034.bild.html>

erishing as communist thought was.’<sup>30</sup> Another critique of liberalism expressed by Legutko is its inauthenticity, ‘being more and more remote from reality.’<sup>31</sup> As Paul Blokker observes, Láncki makes a similar point in his *Political Realism and Wisdom* that liberalism fails to engage with reality.<sup>32</sup> According to Legutko, a further problem with liberalism is that it drives to egalitarianism, which renders ‘all social hierarchies as immediately problematic because they were obviously, not natural.’<sup>33</sup> In his communitarian reading, human rights become ‘arbitrary claims, ideologically motivated, made by various political groups in blatant disregard of the common good, generously distributed by the legislatures and the courts, often contrary to common sense and usually detrimental to public and personal morality’<sup>34</sup>.

In Poland, besides Legutko Marek Cichocki, Marcin Król, Dariusz Gawin, Zdzislaw Krasnodebski, and Lech Morawski are recognized as prominent illiberal intellectuals<sup>35</sup>. The late Lech Morawski, who was one of PiS’ illegally appointed judges of the Constitutional Tribunal, who harshly criticized the ‘liberal state, in which the political system is based on the individualistic concept of rights as trump card against community (R. Dworkin)’<sup>36</sup>

Both Láncki and Legutko assert together with other antiliberals with one voice that liberalism and Communism, or for that matter its ideology, Marxism are secretly allied and share a common ancestry that they are two offshoots of an Enlightenment tradition. Legutko also accuses liberalism’s tendency to root out all forms of inequality, and that human right – as legal norms that promote equality become “arbitrary claims, ideologically motivated, made by various political groups in blatant disregard of the common good.”<sup>37</sup>

This anti-liberal political theory is present outside East-Central Europe as well. For instance Patrick Deneen’s book<sup>38</sup> is directed at the left in the US targeting both contemporary progressivism and ‘classical liberalism’ of conservatives. The Israeli political theorist Yoram Hazony, whose book<sup>39</sup> also criticizes those conservatives who defend liberal democracy. The common goal of all these

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30 See Ryszard Legutko, *The Demon in Democracy: Totalitarian Temptations in Free Societies*, 2016. 118.

31 *Ibid*, 13.

32 P. Blokker, ‘Populist Counter-Constitutionalism, Conservatism, and Legal Fundamentalism’, *European Constitutional Law Review*, Volume 15, Issue 3, September 2019. 519-543. Fn. 18.

33 See Legutko, *ibid*, 132.

34 *Ibid*, 140.

35 See B. Trencsényi, M. Kopecek, L.L. Gabrielcic, M. Falina, M. Baár, M., *A History of Modern Political Thought in East Central Europe, Volume II: Negotiating Modernity in the ‘Short Twentieth Century and Beyond*, Oxford University Press. 2018.

36 L. Morawski, Morawski, ‘Contribution to Symposium „The Polish Constitutional Crisis and Institutional Self-defense”, 9 May, Trinity College, University of Oxford, 2017.

37 Legutko, *ibid* n. 21, 135. In a recent article, Paul Blokker characterises both Legutko and Láncki as a conservative intellectual who has provided ideas for the conservative populist project, and important contribution to rethinking/re-imagining constitutional democracy in the contemporary European context. See Paul Blokker, ‘Populist Counter-Constitutionalism, Conservatism, and Legal Fundamentalism’, *European Constitutional Law*, forthcoming.

38 P. Deneen, *Why Liberalism Failed*, 2018.

39 Y. Hazony, *The Virtue of Nationalism*, 2018.

thinkers is to conflate liberal democracy with contemporary progressivism and thus to suggest that conservatives should have no interest in supporting or defending liberal democracy.<sup>40</sup>

This critique of liberalism goes back to the concept of *Volksgemeinschaft* (national community), or *völkisches Recht*, one of the core principles of National Socialist law, which can be characterized negatively by rejection of the individualistic, normative concept of the people (*Volk*) as the sum of nationals of the State, as presented in the 1918 Weimar Constitution<sup>41</sup>. *Volksgemeinschaft* together with the *Führerprinzip*, the other main principle of National Socialist *Weltanschauung* aim to overcome individualism, hence it means strong anti-liberalism. Due the Carl Schmitt's well-known flirts with National Socialism it isn't surprising that the critical stance of the new illiberals towards liberal constitutionalism is also related to a Schmittian understanding of the constitution, and to his critique of liberal constitutionalism and its conception of the rule of law<sup>42</sup>. The constitution in Schmitt's view is an expression of "the substantial homogeneity of the identity and the will of the people", and guarantee of the state's existence, and ultimately any constitutional arrangement is grounded in, or originates from, an arbitrary act of political power. The absolute authority of the political will of the people overrides all constitutional requirements, which according to Schmitt are signs of depoliticization tendencies caused by liberal democracies. This is the reason that he elaborated *The concept of the Political*<sup>43</sup> (*Das Politische*) based on the distinction between friend and enemy, which is precisely the opposite of liberal neutrality<sup>44</sup>.

In other words, in Schmitt's view the basis of the constitution is "a political decision concerning the type and form of its own being", made by the people as a "political unity", based on their own free will. This political will "remains alongside and above the constitution."<sup>45</sup> Schmitt also portrays the people as an existential reality as opposed to the mere liberal representation of voters in parliament, holding therefore that Mussolini was a genuine incarnation of democracy. Schmitt goes so far as to claim the incompatibility of liberalism and democracy, and argues that plebiscitary democracy based on the homogeneity of the nation is the only true form of democracy. But Schmitt is talking about these intermittent plebiscites as a tool to tap the resource of consent by the governed within a 'qualitative' and strong totalitarian state, the authority of which rests on the military and the bu-

40 See M. Plattner, 'Illiberal Democracy and the Struggle on the Right', *Journal of Democracy*, Volume 30, Number 1, January 2019. 16-17.

41 About the role of *Volksgemeinschaft* in National Socialist law see Oliver Lepsius? 'The Problem of Perceptions of National Socialist Law or: Was There A Constitutional Theory of National Socialism?', in Christian Joerges and Navraj Singh Ghaleigh (eds.), *Draker Legacies of Law in Europe. The Shadow of National Socialism and Fascism over Europe and its Legal Traditions*, Hart Publishing, 2003. 19-41.

42 As Heiner Bielefeld demonstrates Carl Schmitt systematically undermines the liberal principle of the rule of law. See Heiner Bielefeld, 'Deconstruction of the Rule of Law. Carl Schmitt's Philosophy of the Political', 82 *Archiv für Rechts- und Sozialphilosophy*, 1996. 379-396.

43 Carl Schmitt, *The Concept of the Political*, 2007.

44 See Heiner Bielefeld, 'Carl Schmitt's Critique of Liberalism: Systematic Reconstruction and Counter-criticism', *Canadian Journal of Law and Jurisprudence*, Vol. X, No. 1. (January 1997). 67.

45 See Carl Schmitt, *Constitutional Theory*, 2008. 125-126. This idea is also shared by a part of the French constitutional doctrine, influenced by Rousseau's general will. This is the reason that the representatives of this doctrine hold that during a constitutional transition a referendum is sufficient to legitimate a new constitution. See the French Constitutional Council's approval of De Gaulle's 1962 amendment to the 1958 Constitution, ignoring the Constitution's amendment provisions.

reaucracy, and which cannot accept the existence of political opposition<sup>46</sup>. In other words the strong state cannot be liberal<sup>47</sup>.

As Mattias Kumm argues, Carl Schmitt's interpretation of democracy, inspired by Rousseau, and used by authoritarian populist nationalists, like Viktor Orbán as 'illiberal democracy', becomes an anti-constitutional topos.<sup>48</sup> The Hungarian political scientist, András Körösiényi, implementing the Weberian concept calls the Orbán regime as 'plebiscitary leader democracy', where the activity of the leader (or Führer? – G.H.) is posteriorly approved by the people, but since this approval can be withdrawn this is still a democratic system<sup>49</sup>. In contrast, Wojciech Sadurski using Guillermon O'Donnell's 'delegative democracy' concept characterises the Polish system after 2015 as 'plebiscitary autocracy', in which the electorate approves of governmental disregard of the constitution<sup>50</sup>. In Hungary even the electoral approval is manipulated, hence the formal democratic character of the regime can be also be questioned. This lead Larry Diamond to call the Hungarian sytem as 'pseudo-democracy'<sup>51</sup>.

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46 See Carl Schmitt, *Legalität and Legitimität*, note 51, at 93-94. Quoted by Alexander Somek, *Authoritarian Constitutionalism: Austrian Constitutional Doctrine 1933-1938 and Its Legacy*, in *Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism Over Europe and Its legal Traditions* (Christian Joerges and Navraj Singh Ghaleigh eds., 2003), 375.

47 About the revival of Carl Schmitt in the Hungarian political and constitutional theory see Attila Antal, 'The Rebirth of the Political – A Schmittian Moment in Hungary,' Transcript of the lecture given at the Constitutional systems in Middle Europe The cycle of meetings about political ideas of Tadeusz Mazowiecki organized by Polska Fundacja im. Roberta Schumana on 6th November 2017, Warsaw. [https://www.academia.edu/35061692/The\\_Rebirth\\_of\\_the\\_Political\\_-\\_A\\_Schmittian\\_Moment\\_in\\_Hungary\\_Transcript\\_of\\_Lecture?email\\_work\\_card=thumbnail](https://www.academia.edu/35061692/The_Rebirth_of_the_Political_-_A_Schmittian_Moment_in_Hungary_Transcript_of_Lecture?email_work_card=thumbnail). Also Zoltán Balázs, 'Political Theory in Hungary After the Regime Change', *7 International Political Anthropology*, 2014. no. 1, 5–26. On Schmitt's influence of the Polish constitutional discourse see Dawid Bunikowski, 'The crisis in Poland, Schmittian Questions, and Kaczyński's Political and Legal Philosophy,' [https://www.academia.edu/31450497/The\\_crisis\\_in\\_Poland\\_and\\_Schmittian\\_questions\\_in\\_the\\_rule\\_of\\_law\\_debate](https://www.academia.edu/31450497/The_crisis_in_Poland_and_Schmittian_questions_in_the_rule_of_law_debate)

48 Mattias Kumm, *Demokratie als verfassungsfeindlicher Topos*, *Verfassungsblog*, Sept. 6, 2017.

49 See András Körösiényi, *Weber és az Orbán-rezsim: plebisciter vezéremokrácia Magyarországon* [Weber and the Orbán-regime: Plebisciter Leader Democracy in Hungary], *Politikatudományi Szemle*, 2017/4. 7-28. In a more recent interview however, Körösiényi admitted that the for the withdrawal of approval currently a miracle is needed. See *Csak a csoda segít* [Only the Miracle Helps], *hvg*, 20 June 2019.

50 See Wojciech Sadurski, *Poland's Constitutional Breakdown*, Oxford University Press, 2019. 242-243. Similarly, Juan José Linz to avoid confusion proposes the addition of adjectives to 'authoritarianism' rather than to 'democracy' for such regimes: for example 'electoral authoritarianism.' See Juan José Linz, *Totalitarian and Authoritarian Regimes*, Lynne Rienner, 2000. 34. Also, Larry Diamond refers to 'electoral authoritarianism' in hybrid regimes. See Larry Diamond, 'Thinking About Hybrid Regimes' *13/2 Journal of Democracy*, 2002. 21, 24.

51 „The test of a democracy is not whether the economy is growing, employment is rising, or more couples are marrying, but whether people can choose and replace their leaders in free and fair elections. This is the test that Hungary's political system now fails. When Viktor Orbán and his Fidesz party returned to power in 2010 with a parliamentary supermajority, they set about destroying the constitutional pillars of liberal democracy ... By the 2014 elections, Orbán had rigged the system. Yes, multiparty elections continued, but his systematic degradation of constitutional checks and balances so tilted the playing field that he was able to renew his two-thirds majority in parliament with less than a majority of the popular vote (and did so again in 2018) ... Orbán has transformed Hungary into not an illiberal democracy but a pseudo-democracy". See Larry Diamond, 'How Democratic Is Hungary?', *Foreign Affairs*, September/October 2019. Similarly, Steven Levitsky and Lucan Way recently argued: "Clearly, Hungary is not a democracy. But understanding why requires a nuanced understanding of the line between democracy and autocracy ... Orbán's Hungary is a prime example of a competitive autocracy with an uneven playing field". Steven Levitsky and Lucan Way, 'How autocrats can rig the game and damage democracy', *The Washington Post*, 4 January 2019. See also András Bozóki & Dániel Hegedűs, 'An externally constrained hybrid regime: Hungary in the European Union' (2018) *Democratization* 1173.

## 2. Authoritarian Populism As A Rhetoric

The illiberal regimes in Central and Eastern Europe manifests themselves populist, using anti-representation and pro-direct democracy arguments. But in reality this is only a rhetoric, which does not necessarily correspond with these populists' practice. For instance, Viktor Orbán's FIDESZ party tried to undermine the legitimacy of representation after losing the 2002 parliamentary elections<sup>52</sup>. He refused to concede defeat, declaring that 'the nation cannot be in opposition, only the government can be in opposition against its own people'. After the 2010 electoral victory, he claimed that through the 'revolution at the voting booths', the majority has delegated its power to the government representing it. This means that the populist government tried to interpret the result of the elections as the will of the people, viewed as a homogenous unit. Also, the Orbán government, which after in 2010 overthrowing its predecessor as a result of a popular referendum made it more difficult to initiate a valid referendum for its own opposition. While the previous law required only 25 percent of the voters to cast a vote, the new law requires at least 50 percent of those eligible to vote to take part, otherwise the referendum is invalid<sup>53</sup>. The ambivalence of authoritarian populists towards representation and referenda in government and in opposition applies to their attitude regarding established institutions. While they readily attack the 'establishment', while in opposition, they very much protect their own governmental institutions. The situation is different with transnational institutions, like the EU, which are also attacked by these autocratic populist governments as threats to their countries' sovereignty<sup>54</sup>. A good example is again the Hungarian Parliament's reaction to the European Parliament's critical report from July 2013 on the constitutional situation in Hungary. The Hungarian parliamentary resolution on equal treatment reads: "We, Hungarians, do not want a Europe any longer where freedom is limited and not widened. We do not want a Europe any longer where the Greater abuses his power, where national sovereignty is violated and where the Smaller has to respect the Greater. We have had enough of dictatorship after 40 years behind the iron curtain." These words very much reflect the Orbán government's view of 'national freedom', the liberty of the state (or the nation) to determine its own laws: "This is why we are writing our own constitution...And we don't want any unconsolidated help from strangers who are keen to guide us...Hungary must turn on its own axis".<sup>55</sup>

52 About the use of populist rhetoric by Viktor Orbán and his government see a more detailed description in my article 'Populism, Authoritarianism and Constitutionalism', 20 *German Law Journal*, 3 (2019), 296-313.

53 It is the irony of fate that due to these more stringent conditions, the only referendum that the Orbán government initiated – one against the EU's migration policy – failed. On 2 October 2016, Hungarian voters went to the polls to answer one referendum question: "Do you want to allow the European Union to mandate the relocation of non-Hungarian citizens to Hungary without the approval of the National Assembly?". Although 92 % of those who casted votes and 98 of all the valid votes agreed with the government, answering 'no' (6 % were spoiled ballots), the referendum was invalid because the turnout was only around 40 percent, instead of the required 50 percent.

54 Andrea Pin in the parallel special issue argues that supranational courts are partially also responsible for the rise of populism by judicialization of political choices and replacing national debates and rules. In my view this critique does not apply in the case of Member States of the EU, such as Hungary and Poland, where the democratic process is not operating satisfactorily, and the political institutions of the EU seem to be unable or unwilling to act. Here the CJEU or the ECtHR for that matters, despite their otherwise problematic depoliticized language, can be the last resort to enforce compliance with European values. See Andrea Pin, *The Transnational Drivers of Populist Backlash in Europe: The Role of the Courts*, XX GER L.J. XX (2019).

55 The English-language translation of excerpts from Orbán's speech was made available by Hungarian officials, see e.g. Financial Times: Brussels Blog, 16 March 2012.

Orbán repeated the same populist, nationalist mantra at the plenary debate of the European Parliament on 11 September 2018, when defying the Sargentini report, on the basis of which the Parliament launched Article 7 TEU proceedings against Hungary: “...you are not about to denounce a government, but a country and a people. You will denounce the Hungary, which has been a member of the family of Europe’s Christian peoples for a thousand years; the Hungary which has contributed to the history of our great continent of Europe with its work and, when needed, with its blood. You will denounce the Hungary which rose and took up arms against the world’s largest army, against the Soviets, which made the highest sacrifice for freedom and democracy, and, when it was needed, opened its borders to its East German brothers and sisters in distress. Hungary has fought for its freedom and democracy. I stand here now and I see that Hungary is being arraigned by people who inherited democracy, not needing to assume any personal risk for the pursuit of freedom. [...] the report before you is an affront to the honor of Hungary and the Hungarian people. Hungary’s decisions are made by the voters in parliamentary elections. What you are claiming is no less than saying that the Hungarian people are not sufficiently capable of being trusted to judge what is in their own interests. You think that you know the needs of the Hungarian people better than the Hungarian people themselves.”<sup>56</sup>

Hence, I claim that autocrats’ populism is ‘false’<sup>57</sup> and they only use populist rhetoric, but their decisive characteristic is authoritarianism. What makes them distinct from non-populist autocrats are the democratic elections through which they come to power, even though being in government they often change the electoral law to keep their power.

### **3. Is There Such A Thing As Authoritarian Constitutionalism?**

Constitutionalism is often defined as ‘limited government.’ For instance Giovanni Sartori defines constitutionalism as “a fundamental law, or a fundamental set of principles, and a correlative institutional arrangement, which would restrict arbitrary power and ensure ‘limited government’”<sup>58</sup>. Also, András Sajó and Renáta Uitz describe constitutionalism as a liberal political philosophy that is concerned with limiting government<sup>59</sup>. The main aim of limiting government is to guarantee individual rights. In other words, modern constitutionalism is by definition liberal<sup>60</sup>. This does not

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56 <http://www.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/address-by-prime-minister-viktor-orban-in-the-debate-on-the-so-called-sargentini-report>

57 The term ‘false’ populism was used by Isaiah Berlin defining “the employment of populist ideas for undemocratic ends”. See *To Define Populism*, The Isaiah Berlin Virtual Library, Isaiah Berlin 1968, The Isaiah Berlin Literary Trust 2013. Posted 14 October 2013. 6. <http://berlin.wolf.ox.ac.uk/lists/bibliography/bib111bLSE.pdf>. 10.

58 See Giovanni Sartori, *Constitutionalism: A Preliminary Discussion*, 56 *The American Political Science Review*, 1962. 855.

59 András Sajó and Renáta Uitz, *The Constitution of Freedom: An Introduction to Legal Constitutionalism*, Oxford University Press, 2017. 13.

60 In contrast, others also regard other models of constitutionalism, in which the government, although committed to acting under a constitution, is not committed to pursuing liberal democratic values. See for instance Mark Tushnet, *Varieties of Constitutionalism*, 14 *Int’l J. Const. L.* 1 (2016). On 11 October 2019 Tushnet posted the following message to his Facebook page: “My lecture today was on “Varieties of Constitutionalism,” and argued that a thin version of constitutionalism requires only (1) that there be some entrenched provisions,

mean, however, that constitutions cannot be illiberal or authoritarian. Therefore, it is legitimate to talk about constitutions in authoritarian regimes, as Tom Ginsburg and Alberto Simpser do in their book,<sup>61</sup> but I do not agree with the use of the term “authoritarian constitutionalism”<sup>62</sup> or “constitutional authoritarianism”.<sup>63</sup>

Mark Tushnet for instance tries to generally pluralize the normative understanding of non-liberal constitutionalism, differentiating between an absolutist, a mere rule-of-law, and an authoritarian form of constitutionalism, Singapore being the main example of the latter<sup>64</sup>. Tushnet defines authoritarian constitutionalism as an intermediate normative model between liberal constitutionalism and authoritarianism<sup>65</sup> that has moderately strong normative commitments to constitutionalism in nations with specific social and political problems, such as a high degree of persistent ethnic conflict.<sup>66</sup> In other words, he refers to a distinct type of regime, wherein there are faulty practices and a constitution with an authoritarian content.

In contrast to Tushnet’s understanding of authoritarian constitutionalism, which can also be considered as an empirical work about hybrid regimes, Roberto Niembro Ortega provides a more conceptual approach that refers to a very sophisticated way in which ruling elites with an authoritarian mentality exercise power in not fully democratic states<sup>67</sup>. Here the regimes do have a liberal democratic constitution, but instead of limiting the power of the state it is used for practical and authoritarian ideological functions to mask the idea of constitutionalism. But, as pointed out earlier, if the constitution does not limit the government’s power, it cannot fulfil the requirements of constitutionalism, and can only be considered as sham constitution<sup>68</sup>, and as a rhetorical tool, just as populism is in the hands of autocrats.

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(2) that there be some mechanism for resolving disputes about what the law is that is oriented solely to making decision according to law, and (3) that the regime receive popular consent to the regime as a whole measured over some reasonable period of time. (Lots of complexities elided here.) The first subtext, which almost surfaced in the discussion afterwards, is that the Chinese leadership doesn’t really have to fear constitutionalism as such (as it seems to do), if the very thin version I outlined counts as constitutionalism (which I think it does). The second subtext is that, if the idea of thin constitutionalism were accepted the way would be open for discussions about whether thin constitutionalism should be thickened (discussions that are harder to have if the idea of constitutionalism is ruled off the table for the outset)’. Similarly, Gila Stopler defines the state of the current Israeli constitutional system as ‘semi-liberal constitutionalism’. Cf. Gila Stopler, *Constitutional Capture in Israel*, ICONnect, August 21, 2017.

61 Tom Ginsburg and Alberto Simpser, *Constitutions in Authoritarian Regimes*, 2014.

62 See for instance Alexander Somek, *Authoritarian Constitutionalism: Austrian Constitutional Doctrine 1933-1938 and Its Legacy*, in *Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism Over Europe and Its Legal Traditions* (Christian Joerges and Navraj Singh Ghaleigh eds., 2003); Turkuler Isiksel, *Between Text and Context: Turkey’s Tradition of Authoritarian Constitutionalism*, 11 *Int’l J. Const. L.* 702 (2013).

63 Steven Levitsky & Lucan A. Way, *The Rise of Competitive Authoritarianism*, 13 *Journal of Democracy* 51 (2002).

64 Mark Tushnet, *Authoritarian Constitutionalism*, 100 *Cornell Law Review* 391 (2015), 391-561.

65 Tushnet provides the following rough definition of authoritarianism: all decisions can potentially be made by a single decision maker (which might be a collective body), whose decisions are both formally and practically unregulated by law. *Ibid.*, 448.

66 In the case of Singapore Tushnet argues that the government needs to preserve ethnic and religious harmony, without indicating why this goal can only be achieved by authoritarian tools. He mentions Malaysia, Mexico before 2000, Egypt under Mubarak, and Taiwan between 1955 and the late 1980s, and South Korea between 1948 and 1987 as candidates of authoritarian constitutionalism. See *ibid.*, 393.

67 See Roberto Niembro Ortega, ‘Conceptualizing Authoritarian Constitutionalism’, *Verfassung und Recht in Übersee* (VRÜ), 49 (2016), 339-367.

68 About the concept of sham constitution see David S. Law and Mila Versteeg, *Sham Constitutions*, 101 *Calif. L. Rev.* 863 (2013).

Most of the chapters in a recently published book<sup>69</sup> – as the editors’ preface states – “challenge the notion of a single ‘proper sense’ of constitutionalism that is coextensive with and exhausted by the discrete elements of the liberal paradigm”. In the introductory chapter, Günter Frankenberg argues that “liberal orthodoxy treats authoritarian constitutionalism not just as a contested concept, but as a mere travesty or deceitful rendition of the rules and principles, values and institutions of what is innocently referred to as ‘Western constitutionalism’”<sup>70</sup>.

Referring to Roberto Gargarella’s book on Latin American constitutionalism<sup>71</sup> Frankenberg claims that the orthodoxy gives ‘obsessive attention to issues of rights’, especially enforceable civil and political rights at the expense of redistributive policies or social entitlements, free and fair election, separation of powers, judicial review. He introduces authoritarian constitutionalism as ‘one of modernity’s narratives alloying rule and law,’ by using Machiavellian constitutional opportunistic technology, like Chinese head of state Xi Jinping observing established constitutional amendment procedure while stripping himself of the existing term limit, or more Hobbesian claim to defend the public good and people’s interest, like Hungarian Prime Minister Viktor Orbán referring to European Christian values while denouncing human rights of refugees.<sup>72</sup>

As Helena Alviar Garcia and Michael Wilkinson demonstrate in their contributions to the same book, political authoritarianism entertains an affinity with economic neoliberalism<sup>73</sup>. This can perfectly be proven by the neoliberal economic policy of the current authoritarian regime of Viktor Orbán’s Hungary. One of the most tragic historical example of this relationship is the politics of the van Papen government in the last period of the Weimar Republic as clearly seen by Hermann Heller already in 1933<sup>74</sup>. Heller claims that Papen wanted the state and the economy to be ‘strickly separated from one another. Legitimising this policy, Carl Schmitt in November 1932 lectured on ‘the state and economy,’ arguing that the total state makes an attempt to order the economy in an authoritarian way, drawing a sharp line of separation vis-à-vis the economy, although ruling on the other hand with the strongest military means and the means of mass manipulation (Radio, Cinema).<sup>75</sup> Besides from retreating from economic and social policy, this authoritarian state is also supposed to retreat from socio-cultural policy. Heller concludes that this ‘authoritarian liberalism,’ which is characterised by the retreat of the authoritarian state from social policy, liberalization of

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69 Authoritarian Constitutionalism. Comparative analysis and Critique (Helena Alviar Garcia and Günter Frankenberg eds., 2019).

70 See Günter Frankenberg, *Authoritarian Constitutionalism: Coming to Terms with Modernity’s Nightmares*, in *Authoritarian Constitutionalism. Comparative analysis and Critique* (Helena Alviar Garcia and Günter Frankenberg eds., 2019), 7.

71 Cf. Roberto Gargarella, *Latin American Constitutionalism 1810-2010: The Engine Room of the Constitution*, Oxford University Press, 2013.

72 Günter Frankenberg, *Authoritarian Constitutionalism: Coming to Terms with Modernity’s Nightmares*, in *Authoritarian Constitutionalism. Comparative analysis and Critique* (Helena Alviar Garcia and Günter Frankenberg eds., 2019), 13-17.

73 See Helena Alviar Garcia, *Neoliberalism As a Form of Authoritarian Constitutionalism*, in *Authoritarian Constitutionalism. Comparative analysis and Critique* (Helena Alviar Garcia and Günter Frankenberg eds., 2019), 37-56., and Michael A. Wilkinson, *Authoritarian Liberalism As Authoritarian Constitutionalism*, in *Authoritarian Constitutionalism. Comparative analysis and Critique* (Helena Alviar Garcia and Günter Frankenberg eds., 2019), 317-337.

74 Cf. Heller’s paper on ‘Authoritarian Liberalism?’, which originally appeared in 1933 in vol. 44 of *Die Neue Rundschau* (289-298). See the English translated version in *European Law Journal*, Vol. 21. No. 3. May 2015. 295-301.

75 *Ibid.*, 299-300.

the economy and dictatorial control by the state of politico-intellectual functions cannot be ruled in democratic forms, proving the claim made earlier here that not only democracy presupposes liberalism, but there is no liberalism without democracy either. Together with Juan José Linz we can also be skeptical regarding the efforts to distinguish between ostensibly benevolent ‘authoritarian, antidemocratic political solution’, and totalitarianism in the 1930s<sup>76</sup>. Based on the experiences of the current authoritarian regimes, for instance in Russia<sup>77</sup> I would add the same doubts about the benevolence of ‘authoritarian constitutionalism’ altogether.

Besides the constitutions in the Communist countries, both current theocratic and communitarian constitutions are considered as illiberal.<sup>78</sup> Theocratic constitutions, in contrast to modern constitutionalism, reject secular authority.<sup>79</sup> In communitarian constitutions, like the ones in South Korea, Singapore and Taiwan, the well-being of the nation, the community and society receive utilitarian priority rather than the individual freedom, which is the principle of liberalism. But in these illiberal polities, there is no constitutionalism, their constitutions – using Pablo Castillo-Ortiz’s term – are ‘de-normativised.’<sup>80</sup> In other words, in my view ‘illiberal constitutionalism’ is an oxymoron.

#### 4. Can ‘Nonliberal Constitutionalism’ Be Really Constitutional?

Besides illiberal constitutionalism there are also attempts to legitimate ‘nonliberal constitutionalism’ as a subtype of constitutionalism. Graham Walker uses the term for constitutionalist structures, ‘wherever people value some aspects of communal identity more than autonomy of individual choice.’<sup>81</sup> Walker’s main example for the nonliberal, rather local than universal values is the multicultural grant of group right to native peoples and the distinct society of Québec, but he also mentions the state of Israel, which fails its noncitizen residents in many regrettable ways, as well as the tribal life of the native American nations in the US. The common characteristic of all these approaches is “to indict the notion of individual autonomy rights as a form of naïve and homogenizing universalism, and to unmask the ethnic and moral ‘neutrality’ of the liberal state as a covert form of coercion.”<sup>82</sup> Walker builds up his concept using Charles Howard McIlwain’s understanding of consti-

76 <sup>22</sup> See Juan José Linz, *Totalitarian and Authoritarian Regimes*, Lynne Rienner, 2000. 51.

77 Among the Machiavellian technologies Frankenberg mentions the Putin-Medvedev tandemocracy. Günter Frankenberg, *Authoritarian Constitutionalism: Coming to Terms with Modernity’s Nightmares*, in *Authoritarian Constitutionalism. Comparative analysis and Critique* (Helena Alviar Garcia and Günter Frankenberg eds., 2019), 15.

78 Li-Ann Thio, *Constitutionalism in Illiberal Polities*, in *Oxford Handbook of Comparative Constitutional Law 133* (Michel Rosenfeld, & Andrés Sajó eds., 2012). Contrary to my understanding, Thio also talks about ‘constitutionalism’ in illiberal polities.

79 There are two subcategories distinguished here: The Iranian subcategory, where Islam is granted an authoritative central role within the bounds of a constitution; and the Saudi Arabian subcategory, where Islam is present, without the formal authority of modern constitutionalism.

80 See Pablo Castillo-Ortiz, *The Illiberal Abuse of Constitutional Courts in Europe*, 15 *European Constitutional Law Review*, 2019. 48-72, at 67.

81 Graham Walker, *The Idea of Nonliberal Constitutionalism*, *Nomos*, Vol. 39, Ethnicity and Group Rights, 1997. 154-184, at 155.

82 *Ibid.*, 157.

tutionalism in his 1940 book<sup>83</sup>. According to McIlwain the limitation of government by law isn't necessarily liberal, because the rights of individuals are not centralized, and there is no need for a public authority to be a neutral arbiter among competing value systems. Among the more contemporary thinkers, Walker relies on Stanley Fish's skepticism about individual rights of all kind. In his notorious articles from 1987<sup>84</sup> and 1992<sup>85</sup> respectively, Fish argues that because liberalism conceives its rational principles precisely as supranational and nonpartisan, "one can only conclude, and conclude nonparadoxically, that liberalism doesn't exist." According to Walker, nonliberal constitutionalism historically was anticipated in some features of Republican Rome or of medieval Europe, or in the millet system of the Ottoman Empire, while in more recent history in Canada before the 1982 Charter of Rights and Freedoms. He also considers the evolving multiculturalist/tolerantist American university campus practices as an embryonic version of nonliberal constitutionalism, and 'politically correct' thinkers who promote such policies as hostile to the notion of 'individual rights.'

The problem with Walker's concept is that he conflates constitutionalism with the constitution. While the latter indeed predates the enlightenment, the former, together with liberalism does not<sup>86</sup>. The 'constitution' as the configuration of public order defined by Aristotle or Cicero did not require the notion of individual rights, while modern constitutionalism does<sup>87</sup>. For instance Montesquieu in *The Spirit of Laws* argues that the constitutional system based on the separation of power is necessary for securing political liberty and preventing the emergence of 'tyrannical laws' and 'execution of laws in a tyrannical manner.'<sup>88</sup> This means that 'fettered power', which, according to Walker is the essence of constitutionalism, presupposes guaranteed individual rights. In other words, not only the anti- or illiberal version of constitutionalism, discussed earlier, but also the nonliberal one is an oxymoron.

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83 Charles Howard McIlwain, *Constitutionalism, Ancient and Modern*, Cornell University Press, 1940.

84 Stanley Fish, Liberalism Doesn't Exist, *Duke Law Journal*, December 1987.

85 Stanley Fish, There's No Such Thing as Free Speech and It's a Good Thing, Too, *Boston Review* 17:1, 1992.

86 'Classic liberalism' in its 19<sup>th</sup> century European sense means individual liberty and free market. See András Sajó and Renáta Uitz, *The Constitution of Freedom: An Introduction to Legal Constitutionalism*, Oxford University Press, 2017. 13.

87 Carl J. Friedrich, one of the authors Walker refers to, in the later editions of his famous text on *Constitutional Government and Democracy* emphasizes that the single function of constitutionalism is safeguarding each person in the exercise of 'individual rights.' See Carl J. Friedrich, *Constitutional Governance and Democracy: Theory and Practice in Europe and America*, 4<sup>th</sup> ed., Blaisdell, 1968. 24, 7. Walter Murphy, another author, quoted by Walker after the democratic transition in Eastern Europe has also talked about 'protecting individual liberty' as the ultimate civic purpose of constitutionalism. Cf. Walter F. Murphy, *Constitutions, Constitutionalism and Democracy*, in Douglas Greenberg, Stanley N. Katz, Melanie Beth Oliviero, and Steven D. Wheatley (eds.), *Constitutionalism and Democracy: Transitions in the Contemporary World*, Oxford University Press, 1993.

88 Montesquieu, *The Spirit of the Laws*, (transl. and eds. AM Cohler, BC Miller, HS Stone, Cambridge University Press, 1999. Book XI. Chapter 6 at 157. (Quoted by Gábor Attila Tóth, Constitutional Markers of Authoritarianism, *Hague Journal on the Rule of Law*, Published online: 10 September 2018.)

## B. Attempts to Legitimize ‘Illiberal Constitutionalism’

### 1. Majoritarian (Westminster) System

Proponents of Fidesz’ illiberal constitution, as Béla Pokol, professor of law and member of the packed Hungarian Constitutional Court argues that the post-2012 constitutional system envisages the Westminster type of Parliamentary system, in which the “winner takes all”, and where principle of the unity of power prevails<sup>89</sup>. But the Hungarian or for that matter the Polish constitutional system cannot be considered as a monistic democracy, which just gives priority to democratic decision-making over fundamental rights.<sup>90</sup> Actually, the new Hungarian constitution and the Polish constitutional practice do not comply with any models of government, which are based on the concept of separation of powers. The more traditional models of government forms are based on the relationship between the legislature and the executive. For instance, Arendt Lijphart differentiates between majoritarian (Westminster) and consensual models of democracy, the prototype of the first being the British, while of the second the continental European parliamentary, as well as the U.S. presidential system.<sup>91</sup> Giovanni Sartori speaks about presidentialism and semi-presidentialism, as well as about two forms of parliamentarism, namely the premiership system in the UK, or *Kanzlerdemokratie* in Germany, and the assembly government model in Italy.<sup>92</sup> Bruce Ackerman uses, besides the Westminster and the US separation of powers systems, the constrained parliamentarism model as a new form of separation of powers, which has emerged against the export of the American system in favor of the model of Germany, Italy, Japan, India, Canada, South Africa, and other nations, where both popular referendums and constitutional courts constrain the power of the parliament.<sup>93</sup>

Hungary and Poland, from 1990 until 2010, and 2015 respectively, belonged to the consensual and constrained parliamentary systems, close to the German *Kanzlerdemokratie*, in Poland with a more substantive role for the President of the Republic. But in Hungary, the 2011 Fundamental Law abolished almost all possibility of institutional consensus and constraints of the governmental power. In Poland, despite the fact that the governmental majority isn’t able to change the Constitution, due to the legislative efforts of the PiS government, the 1997 Constitution has become a sham document. In both countries, the system has moved towards an absolute parliamentary sovereignty model without the cultural constraints of the Westminster form of government. Not to mention the fact that in the last decades, the traditional British model of constitutionalism has also been changed drastically with the introduction of a bill of rights by left-of-centre governments—and opposed by right-of-centre opposition parties—in Canada (1982), New Zealand (1990), the United Kingdom (1998), the Australian Capital Territory (2004) and the State of Victoria (2006). Contrary to

89 Béla Pokol, ‘Elismerés és kritika’ (Recognition and Criticism), *Magyar Nemzet*, 2011. március 24.

90 Bruce Ackerman distinguishes between three models of democracy: Monistic, rights fundamentalism, in which fundamental rights are morally prior to democratic decision-making and impose limits, and dualist, which finds the middle ground between these two extremes, and subjects majoritarian decision-making to constitutional guarantees. See Bruce Ackerman, 1 *We the People* 6-16 (1992).

91 Arendt Lijphart, *Patterns of Democracy. Government Forms and Performance in Thirty-Six Countries* (1999).

92 Giovanni Sartori, *Comparative Constitutional Engineering* (2nd ed., 1997).

93 Bruce Ackerman, *The New Separation of Powers*, 113 *Harv. L. Rev.* 633 (2000).

the traditional Commonwealth model of constitutionalism, in the new Commonwealth model the codified bills of rights became limits on the legislation, but the final word remained in the hands of the politically accountable branch of government. In this respect, this new Commonwealth model is different from the judicial supremacy approach of the US separation of powers model, as well from the European constrained parliamentary model. The biggest change occurred in the UK, and some even talk about the “demise of the Westminster model”.<sup>94</sup> The greatest deviation from the system of unlimited parliamentary sovereignty was the introduction of judicial review. In just over two decades, the number of applications for judicial review nearly quadrupled to over 3,400 in 2000, when the Human Rights Act 1998 came into effect in England and Wales.<sup>95</sup> The Human Rights Act has a general requirement that all legislation should be compatible with the European Convention of Human Rights. This does not allow UK courts to strike down, or “disapply”, legislation, or to make new law. Instead, where legislation is deemed to be incompatible with Convention rights, superior courts may make a declaration of incompatibility under Section 4.2. Then, the government and Parliament decide how to proceed. In this sense, the legislative sovereignty of the UK Parliament is preserved. Some academics argue that, although as a matter of constitutional legality Parliament may well be sovereign, as a matter of constitutional practice it has transferred significant power to the judiciary.<sup>96</sup>

Others go even further and argue that, although the Human Rights Act 1998 is purported to reconcile the protection of human rights with the sovereignty of Parliament, it represents an unprecedented transfer of political power from the executive and legislature to the judiciary.<sup>97</sup>

Besides the mentioned Commonwealth countries, a similarly new model has emerged in Israel, where the Basic Law on occupation, re-enacted in 1994, contains a ‘notwithstanding’ provision, similar to the Canadian one. The new model of Commonwealth constitutionalism is based on a dialogue between the judiciary and the parliament. In contrast to these new trends, in the Hungarian and Polish constitutional system the parliamentary majority not only decides every single issue without any dialogue, but practically there is no partner for such a dialogue, due to the fact that the independence of both the ordinary judiciary and the constitutional courts have been eliminated.

## **2. Political Constitutionalism**

It is striking, and of significance, how the illiberal authoritarians in Central and Eastern Europe attempt to legitimize their actions by referring to political constitutionalism as their approach to constitutional change. The main argument of Central and Eastern European illiberals to defend their constitutional projects is grounded in a claim to political constitutionalism, which favors parliamen-

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94 Cf. Philip Norton, *Governing Alone*, Parliamentary Affairs, October 2003, 544.

95 See David Judge, *Whatever Happened to Parliamentary Democracy in the United Kingdom*, Parliamentary Affairs, July 2004, 691.

96 Cf. Keith D. Ewing, *The Human Rights Act and Parliamentary Democracy*, 62 Modern L. Rev. 79, 92 (1999).

97 See Matthew Flinders, *Shifting the Balance? Parliament, the Executive and the British Constitution*, Political Studies, March 2002, 62.

tary rule and weak judicial review. To be clear, despite some academics' efforts to apply the concept of political constitutionalism in defense of illiberalism, I do not consider political constitutionalism, based on republican philosophy, or all of the concepts rejecting strong judicial review, or judicial review altogether, as populist.<sup>98</sup> Some scholars and constitutional court justices both in Hungary and Poland have attempted to interpret the new constitutional system as a change from legal to political constitutionalism. In my view, these interpretations are simply efforts to legitimize the silencing of judicial review.

One of the “fake judges” of the Polish Constitutional Tribunal, the late Lech Morawski, emphasized the republican traditions, present both in Hungary and Poland, mentioning the names of Michael Sandel, Philip Pettit, and Quentin Skinner.<sup>99</sup> Also, constitutional law professor Adam Czarnota explained the necessity of the changes, with the argument that “legal constitutionalism alienated the constitution from citizens...The place of excluded citizens was taken by lawyers.”<sup>100</sup> He proudly acknowledges that the governing party, PiS has appointed judges that represent its worldview, which according to Czarnota is based “on the principle of supremacy of the Parliament in relation to constitutional review and acceptance of a role of the judicial restraint not judicial activism which was earlier the norm.”<sup>101</sup> Czarnota interprets the present constitutional crisis in Poland and in some other countries in Central-Eastern Europe as “an attempt to take the constitution seriously and return it to the citizens,”<sup>102</sup> what he considers the fulfillment of political constitutionalism.

In Hungary, István Stumpf, constitutional judge, nominated without any consultation with opposition parties by FIDESZ right after the new government took over in 2010, and elected exclusively with the votes of the governing parties' votes, in his book argued for a strong state and claimed the expansion of political constitutionalism regarding the changes.<sup>103</sup> It is remarkable that two other members of the current packed Constitutional Court also argue against legal constitutionalism, blaming it as ‘judicial dictatorship’<sup>104</sup> or ‘juristocratic.’<sup>105</sup> In the scholarly literature, Attila Vincze argued that the decision of the Constitutional Court accepting the Fourth Amendment to the Fundamental Law—which among other things also invalidated the entire case-law of the Court prior to the new constitution—was a sign of political constitutionalism prevailing over the legal one.<sup>106</sup> Even those, like Kálmán Pócza, Gábor Dobos and Attila Gyulai who acknowledge that the Court hasn't been confrontational towards the current legislature and the government characterize this behavior

98 See for the opposite view Lucia Corso, *What Does Populism Have to Do with Constitutional Law? Discussing Populist Constitutionalism and Its Assumptions*, *Rivista di filosofia del Diritto* 443 (2014).

99 Lech Morawski, *A Critical Response*, *Verfassungsblog*, June 3, 2017.

100 Adam Czarnota, *The Constitutional Tribunal*, *Verfassungsblog*, June 3, 2017.

101 *Ibid.*

102 *Ibid.*

103 See István Stumpf, *Erős Állam – Alkotmányos Korlátok [Strong State – Constitutional Limits]* 244-249 (2014).

104 See András. Zs. Varga, *From Ideal to Idol? The Concept of the Rule of Law*, *Dialóg Campus*, Budapest, 2019. 16.

105 Béla Pokol, *The Juristocratic State: Its Victory and the Possibility of Taming*. Budapest, *Dialóg Campus*, Budapest, 2017.

106 Attila Vincze, *Az Alkotmánybíróság határozata az Alaptörvény negyedik módosításáról: az alkotmánymódosítás alkotmánybíróági kontrollja* [The Decision of the Constitutional Court on the Fourth Amendment to the Fundamental Law: The Constitutional Review of Constitutional Amendments], *Jogesetek Magyarázata* 3, 12 (2013).

as a special approach within the system of separation of powers, best described as a partnership in a constitutional dialogue<sup>107</sup>.

Political constitutionalists, like Richard Bellamy, Jeremy Waldron, Akhil Amar, Sandy Levinson, and Mark Tushnet, who themselves differ from one another significantly, emphasize the role of elected bodies instead of courts in implementing and protecting the constitution, but none of them reject the main principles of constitutional democracy, as ‘illiberal’ populist constitutionalists do. Even Richard D. Parker, who announced a “constitutional populist manifesto” wanted only to challenge the basic idea, central to constitutional law, “that constitutional constraints on public power in a democracy are meant to contain or tame the exertion of popular political energy rather than to nurture, galvanize, and release it.”<sup>108</sup> Similarly, those who describe a new model of constitutionalism, based on deliberation between courts and the legislator, with the latter retaining the final word, have nothing to do with illiberal constitutionalism.<sup>109</sup> Those scholars realize that parliamentary sovereignty tends to be increasingly restrained, either legally or politically, and that the last decades have witnessed less and less scope for the exercise of traditional *pouvoir constituant*, conceived as the unrestrained ‘will of the people’, even in cases of regime change or the establishment of substantially and formally new constitutional arrangements.<sup>110</sup> The remainders of both Hungarian and Polish constitutional review have nothing to do with any types of political constitutionalism or a weak judicial review approach, which all represent a different model of separation of powers. In the authoritarian Hungarian and in the Polish sham system of constitutionalism, there is no place for any kind of separation of powers.

Following Tamás Györfi’s theory, there are three different forms of weak judicial review: each of them is lacking one of the defining features of strong constitutional review, but all of them want to strike a balance between democracy and the protection of human rights that differs from the

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107 See K. Póczy – G. Dobos – A. Gyulai, ‘The Hungarian Constitutional Court: A constructive partner in constitutional dialogue’, in K. Póczy (ed.), *Constitutional Politics and the Judiciary. Decision-Making in Central and Eastern Europe*, Routledge, 2018. Chapter 5.

108 Analyzing Thomas Mann’s novel *Mario and the Magician*, written in 1929, Parker draws the conclusion for today that, “the point is to get out and take part in politics ourselves, not looking down from a ‘higher’ pedestal, but on the same level with all of the other ordinary people.” Richard D. Parker, ‘Here, the People Rule’: *A Constitutional Populist Manifesto*, 27 *Valparaiso Univ. L. Rev.* 583, 531-584 (1993). A similar message can be detected in the interview with Mark Lilla, a conservative liberal professor of the humanities at Columbia University, who on the day after Donald Trump’s presidential victory declared: “One of the many lessons of the recent presidential election and its repugnant outcome is that the age of identity liberalism must be brought to an end.” Mark Lilla, *The End of Identity Liberalism*. *The New York Times*, November 18, 2016. Later, in an interview on the topic of the most effective tools against the President’s populism, Lilla emphasized the importance that opponents find a way to unify: “We have to abandon the rhetoric of difference, in order to appeal to what we share.” David Remnick, *A Conversation with Mark Lilla on His Critique of Identity Politics*, *The New Yorker*, Aug. 25, 2017.

109 See Stephen Gardbaum, *The Commonwealth Model of Constitutionalism. Theory and Practice* (2013) about the new model. This model has also come to be known by several other names: “weak-form of judicial review” (Mark Tushnet, *Alternative Forms of Judicial Review*, 101 *Michigan L. Rev.* 2781 (2003)); “weak judicial review” (Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 *Yale L. J.* 1348 (2006)); “the parliamentary bill of rights model” (Janet Hiebert, *Parliamentary Bill of Rights. An Alternative Model?*, 69 *Modern L. Rev.* 7 (2006)); “the model of democratic dialogue” (Alison L. Young, *Parliamentary Sovereignty And The Human Rights Act* (2009)); “dialogic judicial review” (Kent Roach, *Dialogic Judicial Review and its Critics*, 23 *Supreme Court Law Review*, 2nd series 49 (2004)); “collaborative constitution” (Aileen Kavanaugh, *Participation and Judicial Review: A Reply to Jeremy Waldron*, 22 *Law and Philosophy* 451 (2003)); or “democratic constitutionalism” (Robert Post – Reva Siegel, *Democratic Constitutionalism*, White Paper, <https://constitution-center.org/interactive-constitution/white-pages/democratic-constitutionalism>)).

110 Carlo Fusaro & Dawn Oliver, *Towards a Theory of Constitutional Change*, in *How Constitutions Change – A Comparative Study* (Dawn Oliver & Carlo Fusaro eds., 2011).

balance struck by the ‘new constitutionalism’ of strong judicial review.<sup>111</sup> First, judicial review is limited if the constitution lacks a bill of rights, as is the case in Australia. Second, judicial review is deferential if courts usually defer to the views of the elected branches, as in the Scandinavian constitutional systems, or are even constitutionally obliged to do so, as in Sweden and Finland. Finally, and probably most importantly, there is the Commonwealth model of judicial review, where courts are authorized to review legislation, but the legislature has the possibility to override or disregard judicial decisions.<sup>112</sup>

In my view, neither the Polish nor the Hungarian model fits any of these approaches to weak judicial review, as their aim is neither to balance democracy nor the protection of fundamental rights. The weakening of the power of constitutional courts has started in Hungary right after the landslide victory of the center-right FIDESZ party in the 2010 parliamentary elections. What happened in Hungary resonated with some less successful, similar attempts to weaken constitutional review in other East-Central European countries that took place roughly around the same time. In the Summer of 2012, there was a constitutional crisis also in Romania, where the ruling socialists tried to dismantle both the constitutional court and the president, but the EU was able to exert a stronger influence over events there.<sup>113</sup> From 2014, there has also been a constitutional crisis in progress in Slovakia, where the Constitutional Court has also worked with two—and from February 2016 three—judges short, because the President of the Republic refused to fill the vacancies.<sup>114</sup> But the most successful follower of the Hungarian playbook on how to dismantle constitutional review has been Jaroslaw Kaczynski’s governing party (PiS) and its government in Poland. After the 2015 parliamentary election in Poland, the Law and Justice Party (PiS) also followed the playbook of Viktor Orbán, and started by first capturing the Constitutional Tribunal.<sup>115</sup> But these efforts have nothing to do with political constitutionalism, partly because they do not question the capacity of constitutional courts to invalidate legislation passed by parliaments, partly because they are not based on the mechanism of political accountability and checks on power.<sup>116</sup> Also, political constitutionalism emphasizes the importance of legislatures over courts, and not the direct role of citizens, as Czarnota argues. This dismantlement of constitutional review cannot be considered as a par excellence majoritarian project either.<sup>117</sup>

111 See Tamás. Györfi, *Against The New Constitutionalism* (2016).

112 See Gardbaum, *supra* note 62.

113 About the Romanian crisis see Vlad Perju, *The Romanian double executive and the 2012 constitutional crisis*, 13 *Int’l J. of Constitutional L.* 246–278 (2015); Bogdan Iancu, *Separation of Powers and the Rule of Law in Romania: The Crisis in Concepts and Contexts*, in *Constitutional Crisis In The European Constitutional Area* 153 (Armin von Bogdandy & Pál Sonnevend eds., 2015).

114 Tomáš Lálik, *Constitutional Crisis in Slovakia: Still Far from Resolution*, ICONect, August 5, 2016. <http://www.iconectblog.com/2016/08/constitutional-court-crisis-in-slovakia-still-far-away-from-resolution/>.

115 The same playbook was also used outside the region, in Turkey by Erdoğan and in Venezuela by Chavez.

116 See this requirements of political constitutionalism in Pablo Castillo-Ortiz, *The Illiberal Abuse of Constitutional Courts in Europe*, 15 *European Constitutional Law Review*, 2019. 48-72, at 64.

117 As Wojciech Sadurski rightly points out the Polish governing party, PiS obtained 18% of the votes of all eligible voters. See Wojciech Sadurski, *Poland’s Constitutional Breakdown*, Oxford University Press, 2019. 1.

### 3. Constitutional Identity

From the very beginning, the government of Viktor Orbán has justified non-compliance with the principles of liberal democratic constitutionalism enshrined also in Article 2 of the Treaty of the European Union (TEU) by referring to national sovereignty.<sup>118</sup> Lately, as an immediate reaction to the EU's efforts to solve the refugee crisis, the government has advanced the argument that the country's constitutional identity is guaranteed in Article 4 (2) TEU.

After some draconian legislative measures were adopted, the government started a campaign against the EU's plan to relocate refugees. The first step was a referendum initiated by the government. On 2 October 2016, Hungarian voters went to the polls to answer one referendum question: 'Do you want to allow the European Union to mandate the relocation of non-Hungarian citizens to Hungary without the approval of the National Assembly?' Although 92 % of those who casted votes and 98 % of all the valid votes agreed with the government, answering 'no' (6 % were spoiled ballots), the referendum was invalid because the turnout was only around 40 %, instead of the required 50 %.

As a next attempt, Prime Minister Orbán introduced the Seventh Amendment, which would have made it 'the responsibility of every state institution to defend Hungary's constitutional identity'. The most important provision of the draft amendment reads: 'No foreign population can settle in Hungary'. Since the governing coalition lost its two-thirds majority, even though all of its MPs voted in favour of the proposed amendment, it fell two votes short of the required majority. After this second failure, the Constitutional Court, loyal to the government, came to the rescue of Orbán's constitutional identity defence of its policies on migration. The Court revived a petition of the also loyal Commissioner for Fundamental Rights, filed a year earlier, before the referendum was initiated. In his motion, the Commissioner asked the Court to deliver an abstract interpretation of the Fundamental Law in connection with the Council Decision 2015/1601 of 22 September 2015.

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118 The first reaction of the Hungarian government to the so called 'Tavares report' of 3 July 2013 of the European Parliament on the Hungarian constitutional situation (<http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2013-0229&language=EN>) was not a sign of willingness to comply with the recommendations of the report, but rather a harsh rejection. Two days after the European Parliament adopted the report at its plenary session, the Hungarian Parliament adopted Resolution 69/2013 on 'the equal treatment due to Hungary'. The document is written in first person plural as an anti-European manifesto on behalf of all Hungarians: 'We, Hungarians, do not want a Europe any longer where freedom is limited and not widened. We do not want a Europe any longer where the Greater abuses his power, where national sovereignty is violated and where the Smaller has to respect the Greater. We have had enough of dictatorship after 40 years behind the iron curtain.' The resolution argues that the European Parliament exceeded its jurisdiction by passing the report, and creating institutions that violate Hungary's sovereignty as guaranteed in the Treaty on the European Union. The Hungarian text also points out that behind this abuse of power there are business interests, which were violated by the Hungarian government by reducing the costs of energy paid by families, which could undermine the interest of many European companies which for years have gained extra profits from their monopoly in Hungary. In its conclusion, the Hungarian Parliament called on the Hungarian government 'not to cede to the pressure of the European Union, not to let the nation's rights guaranteed in the fundamental treaty be violated, and to continue the politics of improving life for Hungarian families'. These words very much reflect the Orbán government's view of 'national freedom', which emphasizes the liberty of the state (or the nation) to determine its own laws: 'This is why we are writing our own constitution...And we don't want any unsolicited help from strangers who are keen to guide us...Hungary must turn on its own axis'. (For the original, Hungarian-language text of Orbán's speech, entitled *Nem leszünk gyarmat!* [We won't be a colony anymore!] see e.g. [http://www.miniszterelnok.hu/beszed/nem\\_leszunk\\_gyarmat\\_](http://www.miniszterelnok.hu/beszed/nem_leszunk_gyarmat_) The English-language translation of excerpts from Orbán's speech was made available by Hungarian officials, see e.g. Financial Times: Brussels Blog, 16 March 2012, at: <http://blogs.ft.com/brusselsblog/2012/03/the-eu-soviet-barroso-takes-on-hungarys-orban/?catid=147&SID=google#axzz1qDsigFtC>).

The Constitutional Court in its decision held that ‘the constitutional self-identity of Hungary is a fundamental value not created by the Fundamental Law – it is merely acknowledged by the Fundamental Law, consequently constitutional identity cannot be waived by way of an international treaty’.<sup>119</sup> Therefore, the Court argued, ‘the protection of the constitutional identity shall remain the duty of the Constitutional Court as long as Hungary is a sovereign State’.<sup>120</sup> This abuse of constitutional identity aimed at not taking part in the joint European solution to the refugee crisis is an exercise of national constitutional parochialism,<sup>121</sup> which attempts to abandon the common European liberal democratic constitutional whole.

The Constitutional Court in its decision 3/2019. (III. 7.) AB also decided about the constitutionality of certain elements of the Stop Soros legislative package, and ruled that the criminalization of ‘facilitating illegal immigration’ does not violate the Fundamental Law. The Court again referred to the constitutional requirement to protect Hungary’s sovereignty and constitutional identity to justify this clear violation of freedom of association, freedom of expression hiding behind the alleged obligation to protect Schengen borders against ‘masses entering uncontrollably and illegitimately’ the EU<sup>122</sup>. Besides infringing the rights of the NGOs, the decision deprives all asylum seekers of the protection of all fundamental rights by stating that ‘the fundamental rights protection ... clearly does not cover the persons arrived in the territory of Hungary through any country where he or she had not been persecuted or directly threatened with persecution. Therefore, the requirements set forth by Article I Paragraph (3) of the Fundamental Law regarding the restriction of fundamental rights shall not be applied to the regulation of the above listed cases’<sup>123</sup>. With this the Court denies the core of human dignity: the right to have rights.

119 Decision 22/2016 AB of the Constitutional Court of Hungary [67]. See a detailed analysis of the decision G. Halmai, ‘Abuse of Constitutional Identity. The Hungarian Constitutional Court on Interpretation of Article E) (2) of the Fundamental Law, *Review of Central and East European Law*, 43 (2018), 23-42.

120 *Ibid.*

121 See the term used by M. Kumm, ‘Rethinking Constitutional Authority: On Structure and Limits of Constitutional Pluralism’, in M. Avbelj and J. Komárek, *Constitutional Pluralism in the European Union and Beyond*, Hart, 2012. 51.

122 Para [43] of 3/2019. (III. 7.) AB.

123 *Ibid.* [49].

## II. ILLIBERAL SOCIETIES

### A. Social Relations, Religion, Culture

#### 1. Regional Heritage

Historically, in the East-Central European countries there were only some unexpected moments of quick flourishing of liberalism and liberal democracy followed by an equally quick delegitimization of it. For instance shortly after 1945, till the communist parties took over, and also after 1989, when liberal democracy again seemed to be the ‘end of history’.<sup>124</sup> Otherwise, in the national history of the Central and Eastern European countries’ authoritarianism, such as the pre-1939 authoritarian Hungarian or Polish politics, played a much more important role in the transformation.<sup>125</sup> Maybe the only exception was the independent Czechoslovakia established after WWI, led by its first President Tomáš Garrigue Masaryk<sup>126</sup>.

As mentioned earlier, modernization is the main enemy of illiberal theory. As surveys on the links between modernization and democracy show, the society’s historic and religious heritage leaves a lasting imprint.<sup>127</sup> According to these surveys, the public of formerly agrarian societies, like many of the East Central European ones emphasize religion, national pride, obedience, and respect for authority, while the publics of industrial societies emphasize secularism, cosmopolitanism, autonomy, and rationality.<sup>128</sup> Even modernization’s changes are not irreversible: economic collapse can reverse them, as happened during the early 1990s in most former communist states. These findings were confirmed by another international comparative study conducted by researchers of Jacobs University in Bremen and published by the German Bertelsmann Foundation.<sup>129</sup> According to the study, which examined 34 countries in the EU and the OECD, countries in East Central Europe have had a low level of social cohesion ever since the postcommunist transformation, Hungary is ranked at 27<sup>th</sup>, between Poland and Slovakia. Social cohesion is defined as the special quality with which

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124 See B. Trencsényi, M. Kopecek, L.L. Gabrielcic, M. Falina, M. Baár, M., *A History of Modern Political Thought in East Central Europe, Volume II: Negotiating Modernity in the ‘Short Twentieth Century and Beyond*, Oxford University Press. 2018. e

125 See Slomo Avineri, Two Decades After the Fall: Between Utopian Hopes and the Burdens of History, *Dissent*, 30 September 2009.

126 When the preamble of the 1992 Czech constitution incorporated the principle of a civic nation “in the spirit of the inviolable values of human dignity and freedom as the home of equal and free citizens”, it was a hint to Masaryk’s belief in the universal validity and critical power of democracy and liberty elaborated in his study on *The Czech Question*. See J. Příbání, *The Defence of Constitutionalism. The Czech Question in Post-national Europe*, and Karolinum Press, Charles University, 2017. 115-116.

127 See R. Inglehart & C. Welzel, ‘Changing Mass Priorities: The Link between Modernization and Democracy’, *Perspectives on Politics*, 2010, Vol. 8, No. 2, pp. 551-567.

128 *Id.*, p. 553. This is one of the reason of Czechia’s less religious society. Christian Welzel in his more recent book argues that fading existential pressures open people’s minds, making them prioritize freedom over security, autonomy over authority, diversity over uniformity and creativity over discipline, tolerance and solidarity over discrimination and hostility against out-groups. On the other hand, persistent existential pressures keep people’s mind closed, in which case they emphasize the opposite priorities. This is the utility ladder of freedom. Ch. Welzel, *Freedom Rising. Human Empowerment and the Quest for Emancipation*, Cambridge University Press, 2013.

129 D. Schiefer, J. van der Noll, J. Delhey, & K. Boehnke, *Cohesion Radar: Measuring Cohesiveness*, Bertelsmann Foundation, 2013, <[www.bertelsmann-stiftung.de/bst/en/media/xcms\\_bst\\_dms\\_36378\\_\\_2.pdf](http://www.bertelsmann-stiftung.de/bst/en/media/xcms_bst_dms_36378__2.pdf)>

members of a community live and work together. Even though the transition to democracy in East Central Europe was driven by the fact that a large share of the population gave high priority to freedom itself, but people expected the new states to produce speedy economic growth, with which the country could attain the living standards of West preferably overnight, without painful reforms<sup>130</sup>. In other words, one can argue that the average people in these countries pursued the West in 1989-1990, though not so much in terms of the Western political and constitutional system, but rather in terms of the living standards of the West. Claus Offe predicted the possible backsliding effect of the economic changes and decline in living standards, saying that this could undermine the legitimacy of democratic institutions and turn back the process of democratization.<sup>131</sup> This failure, together with the emergence of an economically and politically independent bourgeoisie, the accumulation of wealth by some former members of the communist nomenclature, unresolved issues in dealing with the communist past, the lack of retributive justice against perpetrators of grave human rights violations, and a mild vetting procedure and lack of restitution of the confiscated properties, were reasons for disappointment. Again, Czechia has been different both regarding the bourgeoisie and the harsher transitional justice measures.

Trying to explain the attitudes of voters to support authoritarian pursuit of illiberal leaders, such as Orbán or Kaczyński, Ronald Inglehart and Pippa Norris suggests that it would be a mistake to attribute the rise of authoritarian populism directly to economic inequality alone, as psychological factors seem to play an even more important role. Older and less-educated people tend to support populist parties and leaders that defend traditional cultural values and emphasize nationalistic and xenophobia appeals, rejecting outsiders, and upholding old-fashioned gender roles.<sup>132</sup> Similarly, Will Wilkinson argues that urbanization is a process that divides society in cultural values. While it creates thriving, multicultural, high-density areas where socially liberal values predominate, it also leaves behind rural areas and smaller urban centres that are increasingly uniform in terms of rather illiberal values.<sup>133</sup>

Interestingly enough a more recent research of Christian Welzel and Plamen Akaliyski have a slightly different evaluation about the cultural values of East-Central European countries after the democratic transition, questioning, whether the cultural walls still stands between East and West of the former Iron Curtain<sup>134</sup>. They claim that countries that joined the European Union have converged significantly towards the cultural model of the core of EU member states., while European countries that remained outside the EU have shifted their cultural values away from this EU core.

130 As Ulrich Preuss argues, the satisfaction of the basic economic needs of the populace was so important for both the ordinary people and the new political elites that constitutions did not really make a difference. See U. K. Preuss, *Constitutional Revolution. The Link Between Constitutionalism and Progress*. Humanities Press. 1993, 3.

131 Cf. C. Offe, *Designing Institutions for East European Transitions*, Institut für Höhere Studies, 1994. 15.

132 R. Inglehart and P. Norris, *Cultural Backlash, Trump, Brexit, and Authoritarian Populism*, Cambridge University Press, 2019.

133 W. Wilkinson, *The Density Divide: Urbanization, Polarization, and Populist Backlash*, Research Paper of the Niskanen Center, June 2018.

134 Plamen Akaliyski and Christian Welzel, 'Clashing Values: Cultural and Geopolitical Transformation of Post-Cold War Europe', *World Values Research*, Volume 11/Number 4/2019. 85-123.

A recent Eurobarometer survey conducted in April 2019 proved the observation of Akaliyski and Welzel even in the case of Hungary and Poland, the most illiberal EU member states, at least regarding values related to the rule of law, democracy and fundamental rights. People in these countries acknowledge both the importance of independent constitutional institutions, including judicial review and court, as well as that all state institutions respect court rulings, and the need for improvement on these fields. When asked about the importance of “that all member states respect the core values of the EU, including fundamental rights, the rule of law, and democracy” 31% of Poles found this essential, 53% important, in Hungary the same figures were 55 and 37% respectively, which is even higher than the average of the 28 EU member states (53 and 36% respectively). Whether certain elements of these, for instance “if your rights are not respected, you can have them upheld by an independent court” need to be improved 32 and 44% of the Poles, while the 54 and 35% of Hungarians (again above the EU average of 50 and 30%) said it definitely or somewhat can.<sup>135</sup>

This relatively high awareness of the importance and the need of improvement of values such fundamental rights, the rule of law and democracy is hardly reconcilable with the continuous support – especially in the rural areas, mentioned by Will Wilkinson – of the authoritarian governments of Hungary and Poland, which openly defy these values.<sup>136</sup> Here I cannot even try to fully explain all the possible reasons of this discrepancy. In Hungary one of them is certainly due to the lack of the independent media, and the freedom of civil society organisations people, even though admitting the necessity of improvement in complying with European values people do not necessarily object to the autocratic pursuits of the government. Moreover, in Poland neither the media nor civil society organisation have yet been dismantled. Here, the main reason of the support of the authoritarian government may lie in the very popular social benefits. In 2016 the PiS government introduced a child benefits programme called ‘500+’: all parents get 500 Polish zloty (about 115 Euros) per month per child, from the second child on. Low-income families object from the first child. In early 2019, Jaroslaw Kaczyński, the leader of PiS announced another set of social benefits: a monthly 500 zloty for each child, the increase of pension benefits and tax levies for persons under 26 years of age.<sup>137</sup>

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135 <http://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/survey/getsurveydetail/instruments/special/surveyky/2235>. Here are some other some other data on the importance and need of improvement of certain rule of law issues. 1. When asked about the importance of having independent controls ensuring that laws can be challenged and tested, 28% of the Polish and 55% of the Hungarian people believe it essential and 57 and 36% respectively important (the average results for the whole EU are 49% and 41% respectively). When asked whether this particular issue can be improved 26% of the Polish and 50% of the Hungarian respondents replied that it definitely can and 48 and 36% respectively said it somewhat can (the average results for the whole EU are 49% and 33% respectively). 2. 41% of the Polish and 61% of the Hungarian respondents believe it essential, and 49 and 32% respectively important that judges are independent and not under the influence of politicians or economic interests (the average results for the whole EU are 65% and 29% respectively). Whereas 35% of the Poles and 54 % of the Hungarians assert that it’s definitely essential that this issue should be improved, 45 and 35% respectively thereof believe that it is somewhat important that this should be improved (the average results for the whole EU are 51% and 31% respectively). 3. When it comes to assessing the importance of public authorities and politicians respecting and applying court rulings, 39% of the Polish and 59% of the Hungarian people deem it essential whilst 52 and 33% respectively important (the average results for the whole EU are 60% and 34% respectively). 34% of the Polish and 52 % of the Hungarian respondents indicated that it can definitely and 44 and 37% respectively that it can somewhat be improved.

136 According to Politico’s Poll of Polls polling projection, the support of PiS, the Polish governing party was at 47% on 25 September 2019 (<https://www.politico.eu/europe-poll-of-polls/poland/>), while that of Fidesz, the Hungarian ruling party at 53% in 15 September 2019 <https://www.politico.eu/europe-poll-of-polls/hungary/>.

137 See <https://www.reuters.com/article/us-poland-politics-childbenefits/child-benefits-and-tax-breaks-as-polish-government-gears-up-for-election-idUSKCN1TS24G>

## 2. The Role of Religion

Religion plays a crucial role both in Poland and Hungary in national legitimization of illiberalism by characterizing the nation as a Christian community, narrowing even the range of people who can recognize themselves as belonging to it. This does not appear in the Polish constitution, since PiS, the Polish governing party was not able to change it, but in Hungary, the new constitution, entitled the Fundamental Law of 2011 shows this role of religion. The preamble to the Fundamental Law, which is compulsory to take into consideration when interpreting the main text commits itself to Christianity: “We are proud that our king Saint Stephen built the Hungarian state on solid ground and made our country a part of Christian Europe.” Further, the text recognizes Christianity’s “role in preserving nationhood.”

The preamble, while giving preference to the thousand-year-old Christian tradition in Hungary, states that “we value the various religious traditions of our country.” The choice of words indicates a model of tolerance in which various worldviews do not have equal status, although following them is not impeded by prohibition or persecution. It is, however, significant that the declared tolerance only extends to particular “religious traditions,” especially Christian ones, but does not apply to more recently established branches of religion or to those that are new to Hungary or to non-religious convictions of conscience. Clearly, the religious turn in Hungary started well before the refugee crisis of 2015, with the introduction of a System of National Cooperation (SNC)<sup>138</sup>, the multi-confessional setup of which gave space to Protestantism as well as Catholicism.

The refugee crisis of 2015 demonstrated the intolerance of the Hungarian governmental majority, which styled itself as the defender of Europe’s “Christian civilization” against an “Islamic invasion.” At the beginning of the crisis, prime minister Viktor Orbán claimed that “Christian culture is the unifying force of the nation [... and] Hungary will either be Christian or not at all.”<sup>139</sup> The latest change of the Fundamental Law regarding Christianity was the Seventh Amendment adopted on June 20, 2018, which reads: “The protection of Hungary’s self-identity and its Christian culture is the duty of all state organizations.” Most probably, the same intention to legitimize his anti-European idea had led Orbán to recently reframe his concept of ‘illiberal democracy’ as a fulfilment of ‘Christian democracy’, which is ‘by definition illiberal’.<sup>140</sup>

138 In June 2010, after the parliamentary elections the governing supermajority coalition (FIDESZ and the Hungarian Christian Democratic Party, the two parties that ran jointly) approved the Declaration of National Cooperation (*Nemzeti Együttműködés Nyilatkozata*), which intended to express the ideals and objectives of the System of National Cooperation (*Nemzeti Együttműködés Rendszere*).

139 Orbán’s speech in Debrecen on May 18, 2015. [http://index.hu/belfold/2015/05/18/orban\\_magyarország\\_kereszteny\\_lesz\\_vagy\\_nem\\_lesz/#](http://index.hu/belfold/2015/05/18/orban_magyarország_kereszteny_lesz_vagy_nem_lesz/#)

140 See Prime Minister Viktor Orbán’s Speech at the 28<sup>th</sup> Bálványos Summer Open University and Student Camp, 28 July 2018. Tusnádfürdő (Băile Tușnad). <http://www.miniszterelnok.hu/prime-minister-viktor-orbans-speech-at-the-29th-balvanyos-summer-open-university-and-student-camp/>

### **3. Cultural War**

Cultural War (or using the Central European term *Kulturkampf*) is a usual tool of illiberal leaders to fight against the alleged liberal influence in culture and education. Here again, the Hungarian government went the farthest by dismantling the independence of academic institutions such as universities and the Hungarian Academy of Sciences, arguing that they represent a threat to their proudly followed illiberal ideology<sup>141</sup>.

In April 2017 the Hungarian Parliament amended the Act on National Higher Education to force the Central European University (CEU) to cease its operation in Budapest. According to the law, Hungarian universities are restricted to delivering programs of European universities only and not of countries from the OECD (including the US). Despite these nonsensical hurdles CEU has opened a campus in New York State, and the State authorities were ready to sign an agreement with the Hungarian government, who then refused to comply with its own condition. The new law thus made it impossible for CEU to continue its research and teaching activities, including its highly ranked master and doctoral programs.

Hungarian universities are also not exempt from harassment by the government, the privileged method here being the decrease of state funds, sometimes replaced by an oligarchic privatization of public educational institutions like in the case of the Corvinus University. Due to this dry-out policy, the number of Hungarian students attending university has dropped by 28% since 2010, due to the discouragement of enrollment. The only heavily subsidised university is the brand new National Public Service University, the university of the new cadres of the 'illiberal state' that does not even appear in World University Rankings 2020 that references 1,400 universities across 92 countries.

Besides not government-loyal institutions of higher education, another target of the Orbán government's attacks has been the Hungarian Academy of Sciences. The aim of the government has been the destruction of the academy's independence and self-government. This has taken place throughout the total reorganization of the network of research institutes that brings together approximately 5,000 researchers. All 15 institutes of the Academy have been placed under direct governmental oversight. Some members of the new governing board are nominated by the Academy, but the government now nominates the majority of the board, including its chair, and all members are appointed by the Prime Minister himself.

All these attacks against academic freedom have already triggered the departure of several thousands of young scholars to the West. But many others who cannot and do not want to leave will not be able to continue their academic work because universities and research institutions are now financially strapped.

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141 See the infamous speech delivered on July 26, 2014, in which Viktor Orbán proclaimed his intention to turn Hungary into a state that "will undertake the odium of expressing that in character it is not of liberal nature." *Speech at Băile Tuşnad (Tusnádfürdő) of 26 July 2014*, Budapest Beacon, July 29, 2014, <http://budapestbeacon.com/public-policy/full-text-of-viktor-orbans-speech-at-baile-tusnad-tusnadfurdo-of-26-july-2014/>.

## B. Economic Relations

Paradoxically, politically illiberal leaders, like Viktor Orbán of Hungary use (neo)liberal economic policy to support their autocratic (constitutional) agenda<sup>142</sup>. As many argue referring to Karl Polányi's influential book, *The Great Depression* the resistance to social democracy through authoritarianism in the name of economic liberalism prepared the ground for Fascism, and can lead to autocracy again<sup>143</sup>.

While other, mostly left-wing populists react to the unfulfilled promise of social-rights constitutionalism, based on T.H. Marshall's concept of social rights being continuous to civil and political rights, which turned out to be a lie in most of East Central European countries' constitutional practice.<sup>144</sup> As Samuel Moyn argues, a commitment to material equality disappeared, in its place market fundamentalism has emerged as the dominant force of national and global economics<sup>145</sup>.

The new illiberal system of 'national cooperation' in Hungary has left behind the vulnerable members of society, homeless people and refugees, and tries to diminish or cut the solidary actions of the members of the Hungarian society. In this respect Orbán's right-wing authoritarian populism even differs from the policy of other right-wing populists, such as the French National Front or Austria's Freedom Party, who – similarly to Orbán – mobilize their supporters with exclusion through immigration policy, but as opposed to the Hungarian PM, they often also emphasize inclusion through social rights and economic security<sup>146</sup>.

The packed Hungarian Constitutional Court rubberstamps the government's neoliberal economic policy, changing its predecessor's practice, which in the mid 1990's was willing to strike down austerity measures for the protection of social rights closely tying them to the protection of equal human dignity. Although social solidarity was an underdeveloped societal practice from the beginning of the democratic transition for several reasons, the that time Constitutional Court strongly committed itself to the protection of human dignity and this way guaranteed a higher profile for social (solidarity) rights, especially in case of social care based on neediness.

142 This phenomena is called by Michael Wilkinson as authoritarian liberalism. See M. A. Wilkinson, 'Authoritarian Liberalism as Authoritarian Constitutionalism', in H. Alviar and G. Frankenberg (eds.), *Authoritarian Constitutionalism*, Edward Elgar, 2019.

143 See Wilkinson, *ibid*, and also B. Bugarcic, 'The Two Faces of Populism: Between Authoritarian and Democratic Populism', 20 *German Law Journal*, No. 3. 2019.

144 Andrew Arato and Jean Cohen, analysing the normative theory of left populist, Ernesto Laclau and Chantal Mouffe respectively go even further by claiming that left populism also cannot avoid the authoritarianism inherent in the strategy and logic of populism despite the inclusionary and democratizing projects of the left movements it attaches to and despite the democratic socialist rhetoric of left populist leaders and their organic intellectuals. See Andrew Arato, 'Political Theology and Populism', *Social Research*, Vol. 80: No. 1. Spring 2013., as well as Andrew Arato, 'Socialism and Populism', *Constellations*, 2019: 26., and Jean L. Cohen, 'What's Wrong with the Normative Theory (and the Actual Preactice) of Left Populism?', *Constellations*, 2019: 26. In my view it is certainly true for Latin American populist from Peron through Morales, Correa, till Chavez and Maduro, but not necessarily for European left populist parties, such as Podemos, Five Star and Syriza. The last two did not even show serious authoritarian pursuits while being in power. One of the proofs provided by Andrew Arato himself in a paper, in which he discusses how populist governments dismantle constitutional courts. None of the European left populist governments are subject of the comaparison. See. Andrew Arato, 'Populism, Constitutional Courts and Civil Society', in Christine Langfried (ed.), *Judicial Power: How Constitutional Courts Affect Political Transformations*, Cambridge University Press, 2019. 318-341.

145 S. Moyn, *Not Enough. Human Rights in an Unequal World*, Harvard University press, 2018.

146 See A. Weale, *The Will of the People. A Modern Myth*, Polity, 2018. 40-42.

Then, as a contrast, in the ‘non-solidary’ system of the Hungarian Fundamental Law of 2011 social security does not appear as a fundamental right, but merely as something the state ‘shall strive’ for, which is a step backward in comparison with the 1989 Constitution. Social insurance is not a constitutional institution any more, and the provisions of the Fundamental Law do not guarantee equal dignity and the former level of property protection. The recent case law of the Constitutional Court reaffirms the initial concerns, the dignity supported social solidarity got lost in the illiberal backsliding of the past ten years.

## **C. Political Relations**

The expansion of political illiberalism in East Central Europe through the introduction of a new illiberal constitutional regime went the furthest in Hungary and Poland. In the case of the former through a brand-new constitution enacted in 2010, or through legislative changes that ignore the valid liberal constitution, as is the case in Poland since 2015. Ironically, both countries are still members of the European Union, a value community based on the principles of liberal democracy.

### **1. Hungary**

The new constitution, entitled the Fundamental Law of Hungary was passed by the Parliament on 18 April 2011.<sup>147</sup> The drafting of the Fundamental Law took place without following any of the elementary political, professional, scientific and social debates. These requirements stem from the applicable constitutional norms and those rules of the House of Parliament that one would expect to be met in a debate concerning a document that will define the life of the country over the long term. The debate, which lasted for nine days — effectively— took place with the sole and exclusive participation of representatives of the governing political parties.<sup>148</sup>

Here I address some of those flaws in its content in relation to which the suspicion arises that they may permit exceptions to the European requirements of democracy, constitutionalism and the protection of fundamental rights, and, thus, that in the course of their application they could conflict with Hungary’s international obligations.

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147 For the ‘official’ English translation of the Fundamental Law, see: <http://www.kormany.hu/download/7/99/30000/THE%20FUNDAMENTAL%20LAW%20OF%20HUNGARY.pdf>

148 In its opinion approved at its plenary session of 17-18 June 2011, the Council of Europe’s Venice Commission also expressed its concerns related to the document, which was drawn up in a process that excluded the political opposition and professional and other civil organisations. See: [http://www.venice.coe.int/docs/2011/CDL-AD\(2011\)016-E.pdf](http://www.venice.coe.int/docs/2011/CDL-AD(2011)016-E.pdf). Fidesz’s counter-argument was that the other Parliamentary parties excluded themselves from the decision-making process with their boycott, with the exception of Jobbik, which voted against the document.

1. Government without checks<sup>149</sup>. The new constitution *appears* to still contain the key features of constitutional constraint imposed by checked and balanced powers. But those constraints are largely illusory, because key veto points have been abolished or seriously weakened. Appointments to key offices, like Constitutional Court judgeships, ombudsmen, the head of the State Audit Office and the public prosecutor, no longer require minority party input. Independent boards regulating crucial institutions necessary for democracy, like the election commission and the media board, no longer ensure multiparty representation. The Constitutional Court itself has been packed and weakened because its jurisdiction has been limited. The constitutional reforms have seriously undermined the independence of the ordinary judiciary through changing the appointment and oversight rules of judges.

2. Identity of the political community. An important criterion for a democratic constitution is that everybody living under it can regard it as his or her own. The Fundamental Law breaches this requirement on multiple counts.

a) Its lengthy preamble, entitled National Avowal, defines the subjects of the constitution not as the totality of people living under the Hungarian laws, but as the Hungarian ethnic nation: “*We, the members of the Hungarian Nation ... hereby proclaim the following*”. A few paragraphs down, the Hungarian nation returns as “our nation torn apart in the storms of the last century”. The Fundamental Law defines it as a community, the binding fabric of which is ‘intellectual and spiritual’: not political, but cultural. There is no place in this community for the nationalities living within the territory of the Hungarian state. At the same time, there is a place in it for the Hungarians living beyond the borders.

The elevation of the ‘single Hungarian nation’ to the status of constitutional subject suggests that the scope of the Fundamental Law somehow extends to the whole of historical, pre-WWI Hungary, and certainly to those places where Hungarians are still living today. This suggestion is not without its constitutional consequences: the Fundamental Law makes the right to vote accessible to those members of the ‘united Hungarian nation’ who live outside the territory of Hungary. It gives a say in who should make up the Hungarian legislature to people who are not subject to the laws of Hungary.

b) It characterises the nation referred to as the subject of the constitution as a Christian community, narrowing even further the range of people who can recognise themselves as belonging to it. “We recognise the role of Christianity in preserving nationhood”, it declares, not only as a statement of historical fact, but also with respect to the present. And it expects everyone who wishes to identify with the constitution to also identify with its opening entreaty: “God bless the Hungarians”.

c) The preamble of the Fundamental Law also claims that the ‘continuity’ of Hungarian statehood lasted from the country’s beginnings until the German occupation of the country on 19 March

149 See a more detailed analysis on the lack of checks and balances in M. Bánkuti & G. Halmai & K. L. Scheppelle, ‘From Separation of Powers to a Government without Checks: Hungary’s Old and New Constitutions’, in G. A. Tóth (Ed.), *Constitution for a Disunited Nation. On Hungary’s 2011 Fundamental Law*, CEU Press, 2012.

1944, but was then interrupted only to be restored on 2 May 1990, the day of the first session of the freely elected Parliament. Thus, it rejects not only the communist dictatorship, but also the Temporary National Assembly convened at the end of 1944, which split with the fallen regime. It rejects the national assembly election of December 1945.

3. Intervention into the right to privacy. The Fundamental Law breaks with a distinguishing feature of constitutions of rule-of-law states, namely, that they comprise the methods of exercising public authority and the limitations on such authority on the one hand and the guarantees of the enforcement of fundamental rights on the other. Instead of this, the text brings several elements of private life under its regulatory purview in a manner that is not doctrinally neutral, but is based on a Christian-conservative ideology. With this, it prescribes for the members of the community a life model based on the normative preferences that fit in with this ideology in the form of their obligations towards the community. These values, which are not doctrinally neutral, in other words they are nonliberal in the Walkerian sense discussed earlier, and feature as high up as the Fundamental Law's preamble entitled National Avowal:

“We recognise the role of Christianity in preserving nationhood.”

“We hold that individual freedom can only be complete in cooperation with others.” “We hold that the family and the nation constitute the principal framework of our coexistence, and that our fundamental cohesive values are fidelity, faith and love”.

“Our Fundamental Law ... expresses the nation's will and the form in which we want to live.” In other words, these values are illiberal in the Orbánian sense quoted earlier.

4. Weakening of the protection of fundamental rights. The decline in the level of protection for fundamental rights is significantly influenced not only by the substantive provisions of the Fundamental Law pertaining to fundamental rights, but also by weakening of institutional and procedural guarantees that would otherwise be capable of upholding those rights that remain under the Fundamental Law. The most important of these is a change to the review power of the Constitutional Court, making it far less capable than before of performing its tasks related to the protection of fundamental rights. Added to this is the change in the composition of the Constitutional Court, taking place prior to the entry into force of the Fundamental Law, which further impeded it in fulfilling its function as protector of fundamental rights.

5. Constitutional entrenchment of political preferences. The new Fundamental Law regulates some issues which are to be decided by the governing majority, while it assigns others to laws requiring a two-third majority. This makes it possible for the current government enjoying a two-thirds majority support to write in stone its views on economic and social policy. A subsequent government possessing only a simple majority will not be able to alter these even if it receives a clear mandate from the electorate to do so. In addition, the prescriptions of the Fundamental Law render fiscal policy especially rigid since significant shares of state revenues and expenditures are impossible to be modified in the absence of pertaining two-third statutes. This hinders good governance since it makes more difficult for subsequent governments to respond to changes in the economy.

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This can make efficient crisis management impossible. The very possibility created by the Fundamental Law to regulate such issues of economic and social policies by means of two-third statutes is incompatible with parliamentarism and the principle of the temporal division of powers.

On 11 March 2013, the Hungarian Parliament added the Fourth Amendment to the country's 2011 constitution, re-enacting a number of controversial provisions that had been annulled by the Constitutional Court. The most alarming change concerning the Constitutional Court was the decision to annul all Court decisions prior to when the Fundamental Law entered into force. At one level, this would have made sense, but the Constitutional Court had already worked out a sensible new rule for the constitutional transition by deciding that in those cases where the language of the old and new constitutions was substantially the same, the opinions of the prior Court would still be valid and could still be applied. In cases in which the new constitution was substantially different from the old one, the previous decisions would no longer be used. Constitutional rights are key provisions that are the same in the old and new constitutions – which means that, practically speaking, the Fourth Amendment annuls primarily the cases that defined and protected constitutional rights and harmonised domestic rights protections to comply with European human rights law. With the removal of these fundamental Constitutional Court decisions, the government has undermined legal security with respect to the protection of constitutional rights in Hungary.

On 30 March 2020 the Hungarian government of Viktor Orbán introduced their Enabling Act<sup>150</sup> similar to Hitler's *Ermächtigungsgesetz* of 1933. The Act gives dictatorial powers under cover of declaring a state of emergency to fight COVID-19. The Act was needed, because on 11 March the government by its decree declared a 'state of danger', a special state of emergency regulated by the Fundamental Law in order to get exceptional competences to combat the coronavirus. According to the Fundamental Law the Parliament is required to authorize the extension beyond 15 days. But the Act violates Fidesz' own constitution, the Fundamental Law of Hungary enacted in 2011 with the exclusive support of the governing party, not just because the 15 days deadline has already expired when the law was enacted. Article 53 of the Fundamental Law mentions only natural disasters and industrial accidents and not pandemics. The latter cause of a state of danger is only covered by the Act 128 of 2011 concerning the management of natural disasters. In other words, there was no constitutional authorization either for the decree, or for the Enabling Act.

The Act, also enacted exclusively with the votes of the governing majority, enables the government to take any measure by executive decree for an indefinite period of time. These measures, which are not tailored to fight the coronavirus can include suspending or overriding any laws, or simply departing from them, suspending by-elections and referenda as well the functioning of ordinary courts. The Constitutional Court, which could be the only body to check the government is allowed to continue to exercise its review power, but it has been packed by government loyal

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<sup>150</sup> See the translation of the draft law, which was enacted by the Hungarian Parliament at its last session before the emergency power entered into force without any change. The government rejected all the amendment proposals submitted by opposition parties, including one which aimed at imposing a 90 days time limit on governmental actions, and the President of the Republic, a founder of Orbán's Fidesz party, signed the bill within two hours. <https://hungarianspectrum.org/2020/03/21/translation-of-draft-law-on-protecting-against-the-coronavirus/>

judges since 2013. The Enabling Act inserted two new crimes to the Criminal Code, which will not go away when the emergency is over. Anyone who „claim[s] or spread[s] a distorted truth in relation to the emergency in a way that is suitable for alarming or agitating a large group of people” can be punished for a term up to five years in prison. Also, anyone who interferes with the operation of measures that the government takes to fight the pandemic could also face a jail sentence of up to five years. These clearly unconstitutionally disproportionate threats to freedom of expression can silence the remainders of free media and independent civil society organisations. Besides the law, governmental decrees enacted after 11 March also contain unconstitutional provisions, the validity of which have now been extended by the Enabling Act. One of those allowed for the army to deploy around 140 state owned and private strategic factories. In this case not only the Fundamental Law, but not even the law on the management of natural disasters, mentioned above, gives power to the government to make extraordinary rules concerning the army.

The blanket authorization of uncontrolled executive power will last as long as the ‘state of danger’ persist, which will be determined by the government itself. There are legitimate worries about the end of the current emergency power, because the special ‘state of emergency caused by mass migration’ introduced in 2015 is still in force without having any refugees in the country.

## **2. Poland**

Poland’s 1989 negotiated democratic transition preceded Hungary’s, but it followed Hungary’s constitutional backsliding after the Law and Justice Party (known as PiS), led by Jarosław Kaczyński, won parliamentary elections in October 2015. The party had already taken over the presidency in May that year. After Solidarity, led by the proletarian leader Lech Wałęsa, won massive electoral support in partially free elections held in June 1989, Poland’s last communist president, General Jaruzelski – based on an arrangement known as “your president, our prime minister” – was forced to appoint Tadeusz Mazowiecki, Wałęsa’s former leading adviser, a liberal intellectual nominated by Solidarity, as prime minister. At the end of 1990, Jarosław Kaczyński ran Wałęsa’s winning campaign for the presidency and was rewarded with a position as the head of the presidential chancellery, but later accused him of betraying the revolution, and becoming “the president of the reds.” Kaczyński’s conspiracy theory that liberal intellectuals had become allies to former communists led to a final split known as Solidarity’s “war at the top.”<sup>151</sup> The alleged conspiracy between other dissidents and the governing Polish United Workers party also determined how Kaczyński viewed the “roundtable” agreement in 1989, which lead eventually to the end of the communist regime.<sup>152</sup> The new government parties both in Hungary and Poland rejected “1989” for the same reasons: namely, absence of radicalism of the democratic transition, and for the alleged liberation of the Communist elites.<sup>153</sup>

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151 Ch. Davis, ‘The Conspiracy Theorists who have taken over Poland’, *The Guardian*, 16 February 2016.

152 See J. Gross, ‘Jaroslaw Kaczynski’s Party is Rewriting the History of Poland’, *Financial Times*, 13 March 2016.

153 See I. Krastev, ‘Walesa, Gorbachev and Freedom’s End’, *The New York Times*, 14 March 2016.

As in Hungary in 1994, the fight among erstwhile Solidarity allies brought Poland's former communists back into power: the Democratic Left Alliance, the successor to the Polish United Worker's Party, won parliamentary elections and the presidency in 1993 and 1995 respectively. In contrast to their failed attempt in Hungary in 1995–1996, the Polish post-communists and the liberals successfully negotiated a new liberal democratic constitution, enacted in 1997. Because the new document enshrined the Catholic church's role in public life, illiberal conspiracy theorists charged that it provided additional evidence of a secret liberal-communist alliance. According to the conspiracists, there is no difference between liberal secularism and communist atheism or between liberal democracy and communist authoritarianism. This led in 2001 to the final division of Solidarity into two rival parties: Civic Platform (led by Donald Tusk), and Law and Justice (led by the Kaczyńskis, Jarosław and his twin brother, Lech), the former acknowledging, and the latter denying, the legitimacy of the new constitutional order.

In 2005, Law and Justice defeated Civic Platform, and Tusk won both the parliamentary and the presidential elections. Lech Kaczyński became President of the Republic, while Jarosław became head of the coalition government, which consisted of Law and Justice, the agrarian-populist Self Defense Party and the nationalist-religious League of Polish Families. The new government proposed a decommunization law, which was partly annulled as unconstitutional by the still independent Constitutional Tribunal. The coalition fell apart in 2007, and Civic Platform won the subsequent elections. Donald Tusk replaced Jarosław Kaczyński as Prime Minister, while Lech remained President until he died after his plane crashed in the Katyn forest near Smolensk in Western Russia in April 2010. Although his support had collapsed by the beginning of 2010, and his chances of re-election at the end of the year were widely assumed to be very low, his death fed the theory of a conspiracy between then Poland's Prime Minister Tusk and Russian President Putin willing to kill the Polish President.<sup>154</sup>

Jarosław Kaczyński's Law and Justice Party returned to power with a vengeance, committed to reshaping the entire constitutional system in order to create a "new and virtuous Fourth Republic." This meant a systemic and relentless annihilation of all independent powers that could check the will of the ultimate leader. In that respect, his role model is Viktor Orbán.<sup>155</sup> In 2011, PiS published a long document, authored largely by Kaczyński himself, on the party's and its leader's vision of the state. The main proposition of this paper is very similar to the one that Orbán described in a speech in 2009: a well-ordered Poland should have a "centre of political direction," which would enforce

154 I. Krastev, 'The Plane Crash Conspiracy Theory That Explains Poland', *Foreign Policy*, 21 December 2015. On 10 April 2016 at an event to commemorate the sixth anniversary of the crash, Jarosław Kaczyński said that "One wanted to kill our memory, as one was afraid of it. Because someone was responsible for the tragedy, at least in moral terms, irrespectively of what were its reasons...Donald Tusk's government was responsible for that." He added: "Forgiveness is necessary, but forgiveness after admitting guilt and administering proper punishment. This is what we need." 'Poland's Kaczyński blames Tusk's government for President's Jet Crash', *Business Insider*, 11 April 2016. In early October Kaczyński expressed his doubts that the Polish government will support Tusk for his second term in the European Council with the same explanation. See [www.ft.com/content/d6a93538-8a36-11e6-8cb7-e7ada1d123b1?ftcamp=crm/email/nbe/BrusselsBrief/product](http://www.ft.com/content/d6a93538-8a36-11e6-8cb7-e7ada1d123b1?ftcamp=crm/email/nbe/BrusselsBrief/product).

155 As early as 2011 Kaczyński announced he wanted to create 'Budapest in Warsaw.' Cf. J-W. Müller, 'The Problem with Poland', *The New York Review of Books*, February 11, 2016.

the true national interest. This illiberal counter-revolution of both Orbán and Kaczyński is based on a Communist rejection of checks and balances, as well as constitutionally entrenched rights.<sup>156</sup>

Unlike FIDESZ in 2011, PiS lacks the constitution-making or amending two-thirds majority in the Polish parliament. Therefore, it started to act by simply disregarding the liberal democratic Constitution of 1997. The first victim was the Constitutional Tribunal, which already in 2007 had struck down important elements of PiS' legislative agenda, including limits on the privacy of public officials to be lustrated and freedom of speech and assembly.<sup>157</sup> In Orbán's playbook, which is seemingly followed by Kaczyński, the other major target has been the media, the civil service and the ordinary courts. As opposed to Hungary, for the dismantlement of liberal democratic institutions PiS does not really need a new constitution because what they have been doing since the fall of 2015 is already a *de facto* change to the constitution through sub-constitutional laws. Wojciech Sadurski calls this a constitutional coup d'état.<sup>158</sup>

In October 2015, before the end of the term of the old Parliament, five judges had been nominated by the outgoing Civil Platform government, even though the nine-year terms of two of the judges would have expired only after the parliamentary elections. Andrzej Duda, the new President of the Republic nominated by PiS, refused to swear in the five new judges elected by the old Sejm, despite the fact that the terms of office for three of them had already started to run. In early December, in accordance with a new amendment to the Law on the Constitutional Tribunal, the new Sejm elected five new judges, who were sworn into office by President Duda in an overnight ceremony. As a reaction to these appointments, the Constitutional Tribunal ruled that the election of two judges whose terms had not expired before the dissolution of the previous Sejm in October 2015 was unconstitutional. The Tribunal also ruled that the election of the other three judges was constitutional, and obliged the President to swear them in. Since President Duda refused to do so, the chief judge of the Tribunal did not allow the five newly elected judges to hear cases.

The governing majority also passed an amendment regarding the organisation of the Tribunal, increasing the number of judges required to be in attendance from 9 out of 15 to 13 out of 15. It also required decisions of the Tribunal to be taken by a two-thirds majority, rather than a simple majority, which was the existing rule prior to the amendment. With the five new judges, as well as the one remaining judge appointed by the PiS when it was last in government from 2005 to 2007, it may no longer be possible for the Tribunal to achieve the necessary two-thirds majority to quash the new laws. The six-member PiS faction, combined with the new quorum and majority rules, will be enough to stymie the court. Furthermore, the Tribunal is bound to handle cases according to the date of receipt, meaning it must hear all the pending cases, most likely regarding laws enacted

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156 Wojciech Sadurski, professor of constitutional law, who was the Kaczyński brothers' fellow student at the University of Warsaw in the 1970s, says that this vision bears a striking resemblance to the writings of Stanislaw Ehrlich, their joint ex-Marxist professor. See W. Sadurski, 'What Make Kaczyński Tick?', *I•CONnect*, 14 January 2016.

157 About the battle for the Constitutional Tribunal see T.T. Koncewicz, 'Polish Constitutional Drama: Of Courts, Democracy, Constitutional Shenanigans and Constitutional Self-Defense', *I•CONnect*, December 6, 2015.

158 M. Steinbeis, 'What is Going on in Poland is an Attack against Democracy', Interview with Wojciech Sadurski, <http://verfassungsblog.de/what-is-going-on-in-poland-is-an-attack-against-democracy/>

by previous parliaments, before any new ones adopted by the new Sejm. For the same reason, the amendment also states that no decision about the constitutionality of a law can be made until the law has been in force for six months. Disciplinary proceedings against a judge can also be initiated in the future by the President of the Republic or by the Minister of Justice, which gives power to officials loyal to PiS to institute the dismissal of judges. In early March 2016, the Constitutional Tribunal invalidated all of the pieces of the law restricting its competences. The government immediately announced that it would not publish the ruling because the Court had made its decision in violation of the very law it invalidated. By Polish law, the decision of the Court takes effect as soon as it is published. If the decision is not published, it cannot take effect. As a reaction to the government's (lack of) action, the General Assembly of Poland's Supreme Court judges adopted a resolution stating that the rulings of the Constitutional Tribunal should be respected, in spite of a deadlock with the government. The councils of the cities of Warsaw, Lodz and Poznan have resolved to respect the Constitutional Tribunal's decisions, in spite of the fact that the government is not publishing its rulings.<sup>159</sup>

At the end of 2016, the Polish parliament adopted three new laws that permitted the President of the Republic to name a temporary Constitutional Tribunal President to replace the outgoing head of the court. The new interim President's first action was to allow the three so-called 'anti-judges', unlawfully elected by the PiS majority in the Sejm, to assume their judicial duties suspended by the previous Tribunal President and participate in the meeting to nominate a new President to the head of the state, who two days later appointed the temporary President as the new permanent President of the Tribunal. With this the Constitutional Tribunal has been captured.

In Orbán's playbook, which is seemingly followed by Kaczyński, the other major target has been the media. At the end of 2015, the PiS government introduced a new law, the so-called 'small media law', amending the former Law on Radio and Television Broadcasting. This amendment enabled the government to appoint and dismiss the heads of the public television and radio. According to the new rules, the presidents and members of the board of both institutions are to be appointed and dismissed by the Minister of Treasury instead of the National Broadcasting Council from among multiple candidates. The law also terminated the previous managers' and board members' contracts with immediate effect, allowing the government to replace them. Since the 'small media law' was about to expire on 30 June 2016, the government in April submitted the 'large media law' to the Sejm. The draft bill planned to turn public broadcasters into 'national media', which is obliged to spread the views of the Polish parliament, government and president, and have to 'respect Christian values and universal ethical principles'. The national media entities are supervised by the newly established National Media Council.

The third danger to PiS' 'centre of political direction' has been an apolitical civil service. Here Kaczyński, just like Orbán, started the complete politicization of the civil service by removing a previously existing rule that the new head of the civil service must be a person who has not been a mem-

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159 <http://www.thenews.pl/1/9/Artykul/250415,Polands-Supreme-Court-opposes-government-in-constitutional-wrangle>

ber of a political party for the last five years. The same law also allows the new head to be appointed from outside the civil service. Another element of Orbán's agenda was to build up a surveillance state. In early February 2016, the new Polish Parliament also passed a controversial surveillance law that grants the government greater access to digital data and broader use of surveillance for law enforcement. On 13 June 2016, the Venice Commission issued an opinion on this, criticising the government for exercising nearly unlimited capacities without adequate independent checks or reasonable limits to the law.<sup>160</sup>

The next target was the ordinary judiciary. In the summer of 2017, the government rushed three new legislative acts through the Polish Parliament: (a) The law on the Supreme Court; (b) the Law on the National Council for the Judiciary; and (c) the Law on the Ordinary Courts' Organisation. The first two laws were vetoed but the third adopted<sup>161</sup>. The latter alone is enough to undermine the independence of Polish courts by permitting the government to replace the leadership of the lower courts.

In early May 2016, Jarosław Kaczyński announced his party's aim to change the 1997 Constitution: 'the constitution must be verified every twenty years', hinting 'next year will be the 20<sup>th</sup> anniversary of Poland's contemporary basic law'. He admitted however that 'we might not find enough support to change the constitution this term, but it's time to start to work. We can ask Poles if they prefer Poland that we've all seen or the one that's ahead of us'.<sup>162</sup> A day later Polish President Andrzej Duda said the country's current constitution was a 'constitution of a time of transition', adding that 'it should be examined, a thorough evaluation carried out and a new solution drawn up'.<sup>163</sup> On 3 May 2017, on the anniversary of the 1791 Polish constitution, President Duda announced that he wanted to hold a referendum in 2018 on the current constitution. His stated reason was that the present Polish people should decide what kind of constitution they wanted, how strong the president and parliament should be, and which rights and freedoms should be emphasized.<sup>164</sup> These references to a new basic law leave open how the party intends to circumvent the lack of the necessary two-thirds majority in the Sejm for constitution-making. But as critics argue, PiS does not really need a new constitution because what they have been doing since the fall of 2015 is already a *de facto* change to the constitution through sub-constitutional laws.

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160 [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2016\)012-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)012-e)

161 As Wojciech Sadurski argued President Duda's bills tabled to replace the laws vetoed by him are as unconstitutional as the original ones. See W. Sadurski, 'Judicial „Reform” in Poland: The President's Bills are as Unconstitutional as the Ones he Vetoed', *Verfassungsblog*, 28 November 2017.

162 <http://uatoday.tv/news/poland-may-soon-change-its-constitution-j-kaczy-ski-642126.html>

163 <http://www.thenews.pl/1/9/Artykul/251184,Polish-president-calls-for-constitution-to-be-reexamined>

164 <http://foreignpolicy.com/2017/05/03/on-anniversary-of-first-constitution-polish-president-calls-for-referendum/>

### III. CONCLUSION

In the first part of this paper, I tried to answer the question, whether there is a genuine constitutional theory of ‘illiberal constitutionalism’? I argued that the constitutional concept, which rejects liberalism as a constitutive precondition of democracy, cannot be in compliance with the traditional idea of liberal democratic constitutionalism. This concept has nothing to do with any majoritarian constitutional model based on the separation of power, or with political constitutionalism, or any kind of weak judicial review, and it misuses the concept of constitutional identity.

The second part of the paper investigated the social, economic and political relations of illiberal societies. Regarding the first I found that there has been a very weak historical tradition of liberalism and modernization in the East-Central European societies, and also the main driving force of the transition to liberal democracy was to reach the living standard of the West. The lack of success to achieve this goal, together with the accumulation of wealth by some former members of the Communist nomenclature, and the failures of redistributive justice effort were the reasons of disappointment also in the liberal democratic pursuits. Regarding the economic relations the rise of economic inequality and the decline of social security and solidarity has paradoxically partly been caused by the neoliberal economic policy of some of the illiberal political forces. These political actors have changed the entire political and constitutional structure into a illiberal system mostly not based on their ideological conviction, but rather for the sake of building up and keeping an unrestrained power.

One of the reasons of the illiberal turn has been that there was a lack of consensus about liberal democratic values at the time of the transition. In the beginning of the democratic transitions in these new democracies, preference was given to general economic effectiveness over mass civic and political engagement.<sup>165</sup> The satisfaction of basic economic needs was so important for both ordinary people and the new political elites that constitutions did not really make a difference.<sup>166</sup> Between 1989 and 2004, all political forces accepted a certain minimalistic version of a ‘liberal consensus’, understood as a set of rules and laws rather than values, according to which NATO and EU accession were the main political goals. But as soon as the main political goals were achieved, the liberal consensus died,<sup>167</sup> and full democratic consolidation was never achieved.<sup>168</sup>

An initial failure of the 1989 constitutional changes – namely the disproportional election systems – also contributed to the electoral victories of Fidesz in Hungary and PiS in Poland, the illiberal

165 Dorothee Bohle and Béla Greskovits state that East Central European democracies had a ‘hollow core’ at their inception. See D. Bohle and B. Greskovits, *Capitalist Diversity on Europe’s Periphery*, Cornell University Press, 2012.

166 See Preuss 1993, 3.

167 See I. Krastev, ‘Is East-Central Europe Backsliding? The Strange Death of the Liberal Consensus’, 18. *Journal of Democracy*, (October 2007), 56-63.

168 J. Dawson and S. Hanley, ‘What’s Wrong with East-Central Europe? The Fading Mirage of the Liberal Consensus’, 7 *Journal of Democracy*, (January 2016), 20-34.

autocratic forces. In the case of Fidesz 53 percent vote share into 68 percent in 2010 and 45.5 percent into 67 percent of the seats in Parliament in 2014. This made Fidesz able to change the entire constitutional system after its electoral success in 2010. PiS in 2015 got 51 percent of the seats in the Sejm for 37.6 percent of the votes. With their absolute majority they were able to enact laws after packing the Constitutional Tribunal even unconstitutional ones – without any need to consult with their parliamentary opposition.

According to some authors, the prospects for liberal constitutional democracy in the newly independent states of Central and Eastern Europe following the 1989–90 transition were diminished by a technocratic, judicial control of politics, which blunted the development of civic constitutionalism, civil society, and participatory democratic government as necessary counterpoints to the technocratic machinery of legal constitutionalism.<sup>169</sup> Adherents to this viewpoint argue that the legalistic form of constitutionalism (or legal constitutionalism), while consistent with the purpose of creating the structure of the state and setting boundaries between the state and citizens, jeopardised the development of participatory democracy.<sup>170</sup> In other words, legal constitutionalism fell short, reducing the Constitution to an elite instrument, especially in countries with weak civil societies and weak political party systems that undermine a robust constitutional democracy based on the idea of civic self-government.<sup>171</sup>

One can raise the hypothetical question whether earlier and more inclusive or participatory constitution-making processes could have ensured the durability of democratic institutions. Indeed, there was no early constitution making, and the amendment processes that happened instead were not participatory. Neither Poland nor Hungary enacted a new constitution right after the democratic transitions of 1989. Instead, in both countries as a result of the Round Table negotiations, between the representatives of the authoritarian Communist regime and their democratic opposition, the illegitimate legislature was put in the position of enacting modifications to the old Stalinist constitutions. This was done based on the elite agreement without any consultation with the people. In the case of Poland, the 1952 Constitution was slightly modified in April 1989, while in Hungary the 1949 Constitution was comprehensively amended in October 1989. This was called by Andrew Arato ‘post-sovereign’ constitution-making.<sup>172</sup> It is true that in Poland, the democratically elected Parliament enacted the so called Small Constitution in 1992, but it only changed some elements of the state organization, without the ambition of becoming the final closing act of the democratic transition. The new constitution was only enacted in 1997, again without participatory process, like a referendum. In Hungary, a similar new constitution-making effort failed in 1996, and even

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169 See this argument in P. Blokker, *New Democracies in Crises? A Comparative Constitutional Study of the Czech Republic, Hungary, Poland, Romania and Slovakia*, Routledge, 2013. Also Wojciech Sadurski argued that legal constitutionalism might have a ‘negative effect’ in new democracies and might lead to the perpetuation of the problem of both weak political parties and civil society. See W. Sadurski, ‘Transitional Constitutionalism: Simplistic and Fancy Theories’, in A. Czarnota, M. Krygier & W. Sadurski (Eds.), *Rethinking the Rule of Law After Communism*, CEU Press, Budapest, 2005, pp. 9-24.

170 See R. Albert, ‘Counterconstitutionalism’, *Dalhousie Law Journal*, Vol. 31, No. 1, 2008, p. 4.

171 Cf. Sadurski, 2005, p. 23.

172 A. Arato, ‘Post-Sovereign Constitution-Making in Hungary: After Success, Partial Failure, and Now What?’, *South African Journal of Human Rights*, Vol. 26, 2010.

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though the content of the 1989 comprehensive amendment fulfilled the requirements of a liberal democratic constitution, but its heading had 1949 in it. With that Fidesz after its electoral victory in 2010 could claim the need to enact a new constitution of the democratic transition and it had all the votes to enact what it was wishing to. But this wasn't a liberal democratic constitution anymore.

One can only speculate, whether an earlier and more participatory constitution-making would have been a guarantee against backsliding. There is nothing to suggest that an earlier and more participatory constitution-making process would have prevented the populist turn. As the Polish example proves even the existence of a liberal democratic constitution does not constitute an obstacle against backlash. In my view, those proponents of participatory constitutionalism who argue that with participation backsliding would not necessarily have happened, do not sufficiently take into account the rise of populism and the lack of civic interest in constitutional matters, due to poor constitutional culture.<sup>173</sup>

So far the liberal elite seems to be unable to protect the liberal democratic ideals, which certainly indicates that the special historical circumstances require a longer period of time to build up a liberal democratic political and constitutional culture. But the democratic backsliding is not a proof of the failure of liberal democracy altogether, as illiberal leaders and their court ideologists want people to believe.

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173 See similarly the critical reviews on Blokker's book (Fn. 140) by Jiri Priban and Bogusia Puchalska in ICONnect. *Book Review/Response: Paul Blokker, Jiri Priban and Bogusia Puchalska on Civic Constitutionalism*, Int'l J. Const. L. Blog (10 September 2013).

Kanstantsin Dzehtsiarou\*

# COVID-19 AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS\*\*

Our life has changed. The main if not the only topic that everyone is interested in is the ongoing pandemic. The World Health Organisation is one of the most popular international organisations at the moment. This crisis will undoubtedly have a significant impact on how we live, travel and perceive our governments. These long-term effects will clearly be a subject of numerous dissertations, articles and monographs. This blogpost will make a very brief overview of the role of the European Convention on Human Rights in assessment of this crisis. In recent days a number of states (for example, Georgia, Estonia, Armenia, Romania, and Latvia) submitted their derogations from the ECHR under Article 15. When the situation calms down it would be very interesting to analyse the exact wording and utility of these declarations. Here, I will start by considering implications of Article 15 to the situation at hand. I will then briefly analyse how other Articles of the Convention can be engaged in the COVID-19 crises. Of course, this is only a suggestion, the real impact of COVID-19 will be seen in 5-6 years when measures taken by the Governments now will be analysed in judgments of the European Court of Human Rights.

## ARTICLE 15 DEROGATION IN CASE OF EMERGENCY

Article 15 allows the Contracting Parties to derogate in case of emergency. The COVID-19 pandemic will clearly fall within the definition of emergency. However, the most important aspect here is that Article 15 does not allow the Contracting Parties to interfere with any rights the way they wish during the emergency. These interferences should be clearly linked to the pandemic, limited in time and strictly necessary. The Court reserves the competence to review the measures. I argue that in case of pandemic, Article 15 derogations are not particularly useful and they send an unnecessary

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\*\* The blog was first published on March 27,2020 by Strasbourg Observer, available at: <https://strasbourgothers.com/2020/03/27/covid-19-and-the-european-convention-on-human-rights/>

message to people that states will start limiting their human rights. I will now explain why deployment of Article 15 will not make too much difference in the context of the COVID-19 crisis.

According to Article 15, all substantive rights of the Convention are divided into derogable and non-derogable. The latter ones can never be derogated from and include the right to life, prohibition of torture, prohibition of slavery and retrospective implementation of criminal punishment. Therefore, Article 15 derogations will have absolutely no impact on these rights. However, I argue that the impact of Article 15 will be very limited on all other rights as well. Articles 8-11 allow limitations for protection of health and public order even without any emergency. However, these limitations need to be legal and proportionate. Article 15 might help to overcome the legality requirement and loosen the scrutiny in proportionality analysis but the practical impact of Article 15 might be very limited. In terms of legality – most states make some form of emergency legislation and this will perhaps satisfy the Court to accept that these measures are legal. That said, national laws that transfer unlimited powers to the executives might be deemed unlawful under the Convention but Article 15 derogation will not be able to convert an unlawful action into a lawful one in this context. In relation to proportionality – the extent of pandemic is such that fairly restrictive measures will nevertheless fall within the scope of allowed limitations. Article 5 for example might be applicable if people are not allowed to leave their homes but here again the ECHR enshrines Article 5-1(e) which allows the lawful detention of persons for the prevention of the spreading of infectious diseases. Again Article 15 might be considered in the Court's analysis of Article 5 but I do not think that formal derogation will have any significant effect on this assessment. This emergency is almost equal in all European states and formal derogation will make little impact on the ECtHR.

Another example of the right in relation to which Article 15 can have some impact is Article 6 (right to a fair trial). At the moment, it is not clear how Article 6 can really be involved. This is not impossible but one needs to see how the crisis develops; for instance, in some countries courts and tribunals either stopped working at all or decide cases behind closed doors. This leads to multiple violations of national procedures. In these circumstances, Article 15 can be helpful but more information is needed to consider this possibility.

## ARTICLE 2 RIGHT TO LIFE

Since people die in significant numbers, Article 2 of the Convention can be engaged. Initially, the UK government has adopted the strategy which can be called the herd immunity. According to this strategy a significant number of population would have to get sick but develop immunity to the virus. As a side effect some vulnerable people (elderly and with pre-existing conditions) would pass away. Quickly this plan was rejected and more stringent measures protecting the population were put in place. Even if the initial strategy was left intact it would be necessary to prove that the victim

had died as a direct result of the state actions or omissions, alternatively one would need to prove that the state failed to protect people's life. Although not outside of the realm of possibilities, such causal link is difficult to establish. The Court will probably recognise the difficulty of the current situation and only find violations of Article 2 if there was discriminatory treatment or flagrant denial of medical help.

## ARTICLE 3 PROHIBITION OF TORTURE

Lack of medical treatment can fall under the definition of Article 3 of the Convention. This Article is absolute and non-derogable and, if the State fails to provide proper medical help, a violation is possible. Two criteria need to be satisfied here: the treatment or lack thereof needs to reach the minimal level of severity and the state's involvement should be proved. While involvement of the state is easier to establish – proving the minimal level of severity will be a much more complex task. Many illnesses lead to significant sufferings and some can even be lethal. The Court cannot blame the state for that; the state is obliged to provide adequate care. In the circumstances of pandemic and sheer numbers of potential victims the meaning of adequate care can be significantly changed. For example, if a state cannot ensure a proper medical treatment in prison, it is under the obligation to transfer a person to a civilian hospital. That said, if a patient is already in a civilian hospital and other options are unavailable then the Court will unlikely to find a violation of the Convention. Proving that the state policy was a reason for overcrowded hospitals is a futile exercise at the ECtHR in times of pandemic.

## ARTICLE 4 FORCED LABOUR

Article 4 case law of the ECtHR is very sparse and it is very rarely invoked by the applicants. Section 1 of Article 4 is absolute, and therefore the government will not be able to enslave people even in time of emergency. When it comes to forced labour, the government can make people to get involved in removing the consequences of an emergency but the measures in place should be clearly linked and proportionate to the danger faced by the public. Needless to say, this Article will only apply to forced labour; if the state calls for volunteers and members of the public agree to participate it will not fall within the ambit of Article 4.

## ARTICLE 5 RIGHTS TO LIBERTY AND SECURITY

As I have already argued this Article may be interfered with by the measures that prevent the pandemic from spreading. Strict house arrests fall within the definition of a “deprivation of liberty” under Article 5. That being said, there are two crucial issues that need to be discussed here. First, the degree of limitations should be significant. In other words, if a person is prescribed to stay within 1 kilometre from her home this will be arguably not enough to trigger Article 5. Second, Article 5-1e allows legal detention of those who can spread infectious diseases. This provision and the case law of the ECtHR talks about the conditions when such detention will be in compliance with the ECHR: it should be made in accordance with national law, it should be limited in time and it should serve the purpose it is initiated for – namely, preventing spreading of infectious diseases. Otherwise, such detention will be arbitrary and hence in violation of the ECHR.

## ARTICLE 8 RIGHT TO PRIVACY

Perhaps, the COVID-19 crisis poses a huge challenge to the right to privacy and other qualified rights. In order to prevent spreading the pandemic the state needs to know whether people comply with the quarantine, it needs to have a major amount of medical data, it also needs to know who people infected were in contact with etc. This information falls within the scope of privacy understood by the ECtHR. Even measuring your temperature and reporting about your international travels is an interference with Article 8 rights. Article 8 allows legal interferences, the key challenge here is their proportionality. Although, this emergency might be able to justify many things, it will not justify all of them. This crisis might lead to changes in interpretation of the Convention and perhaps, some decrease of the level of protection is possible but only the ECtHR can rule on how this crisis will really impact the scope of Article 8.

## ARTICLES 9 AND 11 FREEDOM OF RELIGION AND FREEDOM OF ASSOCIATION

Many states have already banned all public gatherings to prevent the rapid spread of COVID-19. These measures include religious masses, political rallies, concerts, sport events and all other meetings of a major number of people. These measures are perhaps justifiable if they are used for the

purpose of preventing spreading of the virus. If these measures are not necessary and the virus is used as a pretext for silencing the opposition, for example, then the Court can find a violation of the Convention. That said, it is safe to suggest that the prohibition of rallies in countries with a significant threat of pandemic will be found in compliance with the Convention. It will be close to impossible to prove that it was not necessary in a democratic society.

## ARTICLE 10 FREEDOM OF EXPRESSION

Although those forms of freedom of expression that require public gatherings can be limited, this right is extremely important during any crisis and the Court is likely to apply a high level of scrutiny if states unjustifiably limit freedom of expression. Free speech keeps governments accountable, free speech prevents authorities from trying to “crack a nut with a sledgehammer”. Freedom of expression allows us to access information that the state tries to keep secret and access to such information is crucially important in the circumstances of emergency. Therefore, although some aspects of free speech can be limited the core of this right should stay intact and should be fiercely protected.

## ARTICLE 2 OF PROTOCOL 4 FREEDOM OF MOVEMENT

The right provided by Article 2 of Protocol 4 is clearly engaged if any quarantine measures are introduced. That said, these interferences can be in compliance with the ECHR if they are introduced in accordance with national law for the protection of health. Unless these limitations are disproportionate it is difficult to see how the Court will find a violation of this Article in the context of COVID-19 pandemic.

## CONCLUSION

This short snapshot overview of potential engagement of the ECHR in the context of the COVID-19 pandemic is of course incomplete. Prohibition of discrimination, right to property, right to education and other rights can also be involved. What this overview clearly shows is that human rights as a whole and the ECHR in particular are not the obstacles to effective governmental measures targeting the pandemic. It also shows that it is especially crucial in case of emergency to hold on to human rights, to keep the authorities accountable and within certain limits because the crisis legislation giving new extensive powers to the executive branch can have long-lasting disproportionate effects on our lives, our freedoms and our societies.

Konstantine Kublashvili\*

# SHORTCOMINGS AND CHALLENGES OF THE NEW EDITION OF THE CONSTITUTION OF GEORGIA\*\*

## INTRODUCTION

In the relatively brief history of the existence of the Constitution of Georgia since 1995, the year 2017 holds a special place. Even though relatively principled amendments were introduced to the Constitution previously (in 2004 and 2010), but with its extent, the constitutional law<sup>1</sup>, adopted by the Parliament in 2017, significantly exceeds all previous amendments. These amendments were adopted by the parliament of Georgia on 13 October of 2017 by the constitutional law, which came into force on 16 December 2018, upon the oath of the newly elected president. It may be stated that from December 17, our country resulted in completely new legal constitutional reality, as provisions to the Constitution have changed so drastically in terms of content, structure, and quantity, that Georgia became a classical parliamentary republic, but the number of articles reduced from 109 to 78. Changes were introduced to all chapters of the Constitution, in particular the responsibilities of the president, parliament, and government. Slight changes were made to chapter 2 of the Constitution, provisions determining the fundamental rights and freedoms<sup>2</sup> of a person. Part of the amendments introduced in this chapter may be evaluated positively, as we can bring examples of recognizing namely fundamental rights such as academic freedom, physical inviolability, and access to the internet. Despite that, it is obvious that because of the changes, some gaps were encountered in several articles of the second chapter of the Constitution, which create serious legal constitutional challenges and provoke problems that may, on one hand, create difficulties in terms of the protection of human rights. The purpose of this article is to analyze the mentioned gaps and challenges and demonstrate to politicians, as well as to legal constitutionalists, the problems that are deriving from them, as these challenges may be responded to and the problems solved only by the proper changes in the Constitution.

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\*\* The article was first published in the collection "Constitutionalism. Achievements and Challenges" (2019). The new version of the article is being published in the journal, with a different title, Amendments and Additions, in the revised form.

1 The Constitutional Law of Georgia on "The Amendments to the Constitution of Georgia", N1324, October 13, 2017.

2 Instead of the words, "Fundamental rights and freedoms of a person", the following words will be used, "Fundamental rights of a person" or "Fundamental rights".

## ANALYSIS

Among the shortcomings of the new Constitution, first of all, we must mark out Article 71 (“State of Emergency and Martial law”), which is not included in the second chapter of the Constitution – “Fundamental Human Rights”, but paragraph 4 of this article by essence, directly and substantially relates to fundamental human rights and determines the title of the State concerning the extent of the restriction of fundamental rights in a state of emergency and martial law. It is noteworthy, that in the old edition of the Constitution these provisions were covered by the second chapter (“Citizenship of Georgia Fundamental Human Rights and Freedoms”) (Art. 46), by which the topic was decided more precisely in terms of systematic organization of constitutional norms. However, the main challenge of Article 71 is a completely different provision.

According to Article 71, during the period of a state of emergency and martial law, the president of Georgia (with the introduction of prime-minister) issues decrees having the force of organic law, which may “*restrict*” fundamental rights recognized by Article 13 of the Constitution (Freedom of Person), Article 14 (Freedom of Movement), Article 15 (Rights to Personal and Family Privacy, Personal Space and Privacy of Communication), Article 17 (Rights to Freedom of Opinion, Information, Mass Media and the Internet), Article 18 (Rights to Fair Administrative Proceedings, Access to Public Information, Informational Self-determination, and Compensation for Damage Inflicted by a Public Authority), Article 19 (Right to Property), Article 21 (Freedom of Assembly) and Article 26 (Freedom of Labor, Freedom of Trade Unions, Right to Strike and Freedom of Enterprise) (p. 4, s. 1).<sup>3</sup> In comparison to the standards applied periods of peace, according to which it is possible to restrict the fundamental rights of only a particular person, and only with the purpose of protecting particular public good/public interests (that are named in each article determining fundamental rights), this provision is the so-called common, general basis for restricting fundamental rights, based on which the State is entitled simultaneously to restrict several rights, and this restriction may apply not only to one, but all persons living in a particular territory (where a state of emergency is declared) or throughout the whole country, in other words, in general to everyone at the same time (for instance, assembly and manifestation, strike, transportation/movement, access to public information, etc.<sup>4</sup>). Naturally, such restrictions are justified by a state of emergency and martial law existing in the country, when the constitutional order, state, public security, life and health of the people is under threat. In such circumstances, the restriction of fundamental rights is “necessary for a democratic society” and the purpose of the restriction is to ensure and protect these crucial constitutional benefits. It is noteworthy, that during a state of emergency and martial law, the old edition of the Constitution envisaged such interrelation between fundamental rights and the State – com-

<sup>3</sup> “The decree enters into force from the moment of issuance. The decree is immediately presented to the Parliament. The Parliament approves the decree upon assembly. If the Parliament does not approve the decree, the latter loses its legal force at the time of voting” – Art. 71, para. 3.

<sup>4</sup> These restrictions are determined by the law of Georgia on “State of Emergency” (October 17, 1997) and “State of Martial Law” (October 31, 1997).

mon (general) restriction for ensuring constitutional benefits. The fundamental rights, which may have been restricted during a state of emergency and martial law, were similar to the new edition.

Aside from the abovementioned similarities, nothing is in common between the old and new editions of the Constitution, as by the new edition of Article 71, a completely new model of the interrelation of fundamental rights and the State enters into constitutional space – the president has the right not only to restrict, but to also “suspend” the effect of human rights. In general, the institute of suspension of a norm is not unfamiliar to the Georgian legal system. For instance, according to the organic law on “Constitutional Court of Georgia”,<sup>5</sup> if the constitutional court considers that the effect of a normative act may result in irreparable outcomes to one of the parties, the plenum of the constitutional court is entitled to suspend the effect of the whole normative act or a part thereof, before the final decision on the case (or for lesser period) (Art. 25, para. 2). In addition, “irreparable outcome means such a condition, when the effect of the norm may result in an irreversible violation of the right and restoration of the result will be impossible even in the case of declaring that norm as unconstitutional.”<sup>6</sup> As we see, the purpose of suspending the norm is to protect fundamental human rights, and the suspension is related to such norms (normative acts), the effect of which may violate fundamental rights. As for the suspension of the effect of human rights, as it is proposed by Article 71 of the Constitution (para. 4, sent. 2), this is a novelty for Georgian constitutional law.

While discussing the mentioned novelty, first of all, we must point to the necessity – whether there was a need for such an amendment deriving from the norms of the Constitution themselves or the 23 year long (by 2018) constitutional reality of Georgia. Since the adoption of the Constitution of Georgia (August 24, 1995), the model existed, according to which, during a state of emergency and martial law, it was possible to restrict several rights by presidential decree. Moreover, in 1997 a law on a state of emergency and martial law was adopted, which determined the range of the restriction of fundamental rights in such conditions and respective entitlements of the State. With this unity of constitutional and legislative norms, the legal framework was created, in which the State could make decisions quickly and act operatively to ensure state and public security, protect legal order and lawfulness. The constitutionality of the named laws was never a subject of revision by the constitutional court. Therefore, there was no need for a mechanism suspending fundamental rights in the Constitution and the old edition of the Constitution completely protected the balance between such constitutional benefits as fundamental rights and guarantees for state security and defensive capacity.

With regard to the discussible amendment, its scope of applicability is noteworthy – in particular, which provisions may be suspended during a state of emergency or martial law. This issue is formed in a controversial and illogical manner – from the six articles which are subject to suspen-

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<sup>5</sup> January 31, 1996.

<sup>6</sup> See records of the judgments of the Constitutional Court of Georgia on case N1/3/452,453 from May 20, 2008 “Georgian Yong Lawyers’ Association and Public Defender of Georgia against Parliament of Georgia”, II-2; Also see Liluashvili, Givi 2018, “Standard of suspension of effect of the Normative Act (according to the practice of the Constitutional Court of Georgia)”, in the Journal: “Review of Constitutional Law”, p. 15-30.

sion, for three of the articles, only those paragraphs may be suspended which entail a model of restriction of the respective fundamental right in essence (paragraphs 2-6 of Article 13, paragraph 2 of Article 14 and paragraph 3 of Article 19). For the rest of three articles, there may be suspended those paragraphs which determine the content of fundamental rights, as well as those paragraphs that define a model for the restriction of these rights (paragraph 2 of Article 15 (Right to Personal Space and Communication, the Privacy of Dwelling or Other Possessions), paragraph 3 of Article 17 (Freedom of Mass Media), paragraphs 5 and 6 and paragraph 2 of Article 18 (Right to Access Public Information)). As we see, the illogical nature and controversy of the structure of this norm is obvious, however, it is hard to investigate the reason.

This controversy becomes more obvious while discussing the occasions when “suspension” relates to restrictive provisions of the listed fundamental rights. As an example, we can site Article 19 (“Right to Property”), which may be **restricted** (para. 4, sent. 1), and paragraph 3 of the same article may be **suspended** as well (para. 4, sent. 2). According to this paragraph, it is admissible to expropriate property for the vital public necessity (a) in cases directly prescribed by the law, by the court decision or (b) in case of urgent necessity stipulated by the organic law, with prior, complete and fair compensation. Compensation in all cases is exempt from “*any taxes or fees*”. In line with this provision in Georgia, there is in force a law on “the Procedure for The Expropriation of Property for Pressing Social Needs”<sup>7</sup> and the organic law on “the Procedure for Deprivation of Property for Pressing Social Needs”.<sup>8</sup> The organic law determines the meaning of the condition “urgent necessity” (Art. 2).<sup>9</sup> The law also stipulates that “*in case of declaring a state of emergency or martial law, the decision on expropriating property for social need with prior, complete and fair compensation is made in line with the legislation of Georgia in a state of emergency and martial law*” (Art. 5). Before it was already mentioned that the legislation on a state of emergency and martial law is created by the respective norms of the Constitution of 1995 and corresponding laws,<sup>10</sup> enacted from 1997 and determine entitlements of the State. Furthermore, the cited Article 5 of the organic law imperatively stipulates, that even in a state of emergency and martial law, the expropriation of property may be carried out only with prior, complete and fair compensation. Considering all of this, it is clear that the legal grounds for the expropriation of property during a state of emergency and martial law is outlined in the Constitution of 1995 with respective provisions (Articles 21 and 46 of the old edition),<sup>11</sup> also by the laws being in force from 1997 on a state of emergency and martial law and organic law on “the Procedure for Deprivation of Property for Pressing Social Needs”. Therefore, the State is obliged to act in this legal framework and the new norm of paragraph 3 of Article 19 of the Constitution on “suspension of the effect” (Art. 71, para. 5, sent. 2) does not change or improve

7 This law defines the rules and procedure for expropriating property in peaceful circumstances, adopted on July 23, 1999.

8 November 11, 1997.

9 “Urgent necessity is a condition when, because of the threat deriving from a state of emergency or martial law, ecological catastrophe, natural disaster, epidemics, epizootics, human life and health, state and social security are endangered.”

10 See p. 3, footnote 5.

11 From the date of adoption of the Constitution, Article 21 recognized the right to property, the procedure for its restriction and expropriation was determined, and Article 46 determined those fundamental rights (including the right to property), which were subject to restriction during a state of emergency and martial law.

anything (if this was the idea of the legislator of the 2017 amendments) with regard to state entitlements. On the contrary, this norm is excessive, causes misunderstanding in terms of legislative technique and creates constitutional law problems.

Another big problem which is entailed in this provision of the Constitution (Art. 71, para. 4, sent. 2) is the assumption that the effect of fundamental rights themselves may be “suspended”. This term, grammatically, as well as legally, implies cancelation of legal force of the existing norm (even if this suspension is temporary), which directly contradicts the main essence of fundamental rights, according to which fundamental human rights are natural rights. They are directly applicable, objective laws, binding state, and these rights are available to a human only because he/she is human. Sometimes a right is attained to the fetus already in the uterus of a mother (dignity, right to life), while others are originated upon birth. Therefore, these so called “pre-state” rights may not be attained by the State or any other social, territorial entities, and a fortiori, cannot be removed from the person. On the contrary, the idea of a modern legal state is in the binding of the State with human rights. Moreover, the Constitution of Georgia recognizes fundamental rights as “eternal and supreme human values” and declares that not only the State while exercising power, but also people are restricted (bound) by these rights (Art. 4, para. 2).<sup>12</sup> The basis of the constitutional order of democratic and legal states are fundamental rights, and the “suspension” envisaged under the provision in question practically equals to confiscation of fundamental rights by the State, which contradicts the principle of a legal state, and therefore, the entire constitutional order.

Alongside the mentioned, we must point to one more condition: In constitutional law it is universally acknowledged that fundamental rights may only be “restricted”. This is evidenced by the vast majority of constitutions of democratic states. The exception is in a number of countries (including Portugal, Spain and Hungary), the constitutions of which entail the term – “suspension”, but in the theory of constitutional law the idea of the concept of restriction of fundamental rights is also shared – a democratic and legal state even in a state of emergency or martial law, must act in the framework of constitutional order, the basis of which are fundamental rights. It is inadmissible that the State exceeds this framework, declare invalid the fundamental rights and act arbitrarily, without any binding, according to its point of view. Therefore, deriving from this concept, fundamental rights apply and bind the State even in a state of emergency and martial law, and the State is obliged to interfere in a protected sphere of fundamental human rights taking into account the legitimate purpose, attaining which is the aim of interference. With regard to the model of restricting rights in peaceful conditions, the only difference is that because of a state of emergency or martial law the State has the possibility interfere into the protected sphere of simultaneously several (hundred, thousand or even more) particular fundamental human rights more intensively and widely.<sup>13</sup> Be-

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<sup>12</sup> “The State acknowledges and protects commonly recognized human rights and freedoms, as eternal and supreme values. While exercising its power, the State and people are restricted with these rights, as with the directly applicable law.” – Art. 4, para. 2, sent. 1,2.

<sup>13</sup> See Article 2, paragraph 2 of the Law of Georgia on “State of emergency”, according to which state agencies are entitled: to prohibit people to leave their dwellings or other residences without proper permission (sub. para. “d”), prohibit assemblies, political rallies, street movements and demonstrations, as well as conducting spectacular, athletic and other mass events (sub. Para. “f”), prohibit strikes (sub. Para. “k”), introduce special rules for using communication means (sub. para. “p”), restrict movement of public transportation and inspect them (sub. para. “q”).

sides, the intensity of interference may be expressed not only with the number of people, but also with radicalism, when, for instance, for the breach of curfew the police arrests person for 72 hours, without court permission.<sup>14</sup> An approximately similar provision is included in the Basic Law of Germany, which stipulates that during a state of emergency or martial law, the period of the arrest of a person without court permission shall not exceed 4 days<sup>15</sup> (Whereas during peaceful conditions, the person shall be presented to the court not later than on the second day from arrest, and the judge must immediately render a decision on his/her imprisonment or release).<sup>16</sup>

The groundlessness and problematic nature of the fundamental rights' "suspension" model is more obvious with one guarantee – inviolability of the essence of rights and freedoms. This guarantee is recognized in the theory of human rights and is nominally depicted in the constitutions of several states (Germany, Switzerland, Portugal), and in Georgia it is established by the practice of the constitutional court.<sup>17</sup> According to the mentioned guarantee, during the restriction of a fundamental right, the State shall not humiliate the essence of this right. In the "essence" the binding legal power of the State is implied, by which the fundamental right forces the State to fulfill any obligation. Therefore, the essence is humiliated and the right "exhausted" in the case when the determination of the State's legal power of binding and force will depend on any particular state body itself.<sup>18</sup> For instance, the essence of the fundamental right to dignity is humiliated by torturing a person, constant isolation and inhumane treatment. The essence of academic freedom is humiliated by prohibiting publication of research and scientific works. The essence of the fundamental right to property entails using property according to personal interests and its disposition corresponds to the free will of the owner.<sup>19</sup> The Basic Law of Germany specifies this when it declares that "*the essence of the fundamental right shall not be humiliated in any case*" (Art. 19, para2).<sup>20</sup> The same is pointed out in the Constitution of Switzerland: "*The essence of fundamental rights is inviolable*" (Art. 36, para 4).<sup>21</sup> According to Article 18 of the Constitution of Portugal, while restricting rights,

14 See Article 7, paragraph 2 of the Law of Georgia on "State of Emergency".

15 See Basic Law of Germany, Article 115 (c), para.2, sub.para.2, "Constitutions of Foreign States", Part III, p. 123, 2006; see also Law of France on "State of Emergency" (Loi n°2015-1501, November 20, 2015, www.legifrance.gouv.fr), which declared admissible home imprisonment and leg search of dwelling without court's permission towards those people whose action represents a threat to security and public order (Art. 4) (In German – Information platform Human Rights.ch)

16 See Basic Law of Germany, Article 104, and para. 3, "Constitutions of Foreign States", part III, p.113, 2006.

17 See decisions of the Constitutional Court of Georgia on cases: "Ltd. "Rusenergосervice", Ltd. Patara Kakhi", JSC "Gorgota", individual company "Farmer" of Givi Abalaki and Ltd. "Energy" v. the Parliament of Georgia and the Ministry of Energy of Georgia", II-24, 26, December 19, 2008; "Citizen of Denmark Haike Kronqvist v. the Parliament of Georgia", II-57, June 26, 2012; "Ltd. Giant Security" v. the Parliament of Georgia and the Ministry of Internal Affairs of Georgia", II-47, December 14, 2018; "Ltd. SKS" v. the Parliament of Georgia", II-33, April 18, 2019.

18 See Hesselberger, D., Das Grundgesetz, p. 168; Sachs, M. (Hrsg.), Grundgesetz Kommentar, p. 596-600.

19 This was noted by the Constitutional Court of Georgia with regard to the right to property in its decision on the case Ltd. "Rusenergосervice", Ltd. Patara Kakhi", JSC "Gorgota", individual company "Farmer" of Givi Abalaki and Ltd. "Energy" v. the Parliament of Georgia and the Ministry of Energy of Georgia" (December 19, 2008). During deliberation of this case, it appeared that by the order of the Minister, owners were practically removed from activity base on their property and could not use their assets with direct purpose. This in reality was "exhaustion" of the right, and the Court noted that "the owning of property loses its sense if the material rights of the subject become drained from content. The essence of property is guaranteed when the owner can completely implement rights considered in the property in accordance with the will determined by the function of object of the property", II-26.

20 See Basic Law of Germany, Art. 19, para. 2, "Constitutions of Foreign States", part III, p.73, 2006; „In keinem Falle darf ein Grundrecht in seinem Wesensgehalt angetastet werden" (Art. 19.2), GG, Grundgesetz, 2019.

21 „Der Kerngehalt der Grundrechte ist unantastbar" (Art. 36.4), Bundesverfassung der Schweizerischen Eidgenossenschaft, www.admin.

freedoms and guarantees, their essence must be preserved (para. 3).<sup>22</sup> As for Georgia, it was already mentioned that the Constitutional Court underlined the significance of guarantees many times and proclaimed: fundamental right “... may be restricted for reaching legitimate public purpose, by protecting proportionality principle, so that the essence of the right is not violated,”<sup>23</sup> and in all cases “the exhaustion of the main essence of the protected sphere of the right itself must be avoided”.<sup>24</sup> Hence, it is completely obvious that the constitutional legal guarantee of “inviolability of essence” of fundamental rights and freedoms is roughly infringed by introducing a “suspension” mechanism in the Constitution of Georgia, as “suspension” causes not only the cancellation of the essence of fundamental rights, but also of legal force of entirely all fundamental rights and freedoms, their extraction (even temporarily), which contradicts the principle of legal state and grounds of the constitutional order of Georgia.

Based on the summary of the abovementioned analysis, it may be said that the concept of “restricting” fundamental rights in a state of emergency or martial law, on one hand, fully complies with the essence of fundamental rights with its legal content, on the other hand in the framework of this concept. In reality, the State has the possibility to effectively act and ensure constitutional order and public security. As for the novelty introduced to the constitutional law of Georgia, by virtue of Article 71 paragraph 4 sentence 2 – the model of “suspension” of fundamental rights, it is unacceptable for the constitutional order of Georgia.

2. By the constitutional law of 13 October 2017, the structure and partial content of that article were amended, by which the freedom of belief, religion and conscience. In the new edition of the Constitution, these fundamental rights are presented in Article 16 and contain 3 paragraphs. The first paragraph recognizes these freedoms. In paragraph 2, the construction of restricting freedom of belief, religion and conscience is given. According to paragraph 3, it is prohibited to persecute anybody because of his/her belief, religion or conscience, or be coerced into expressing his/her opinion thereon. In this article, we will concentrate on the freedom of belief and religion (hereinafter: freedom of belief), their significance and shortcomings of Article 16, which represents a crucial constitutional legal problem.

In human rights law, the freedom of belief is considered one of the most important fundamental rights of a person. It is recognized by all international acts on human rights and by the constitutions of all democratic states. Freedom of belief has a special significance for the development of a person, as an independent and free individual, as it protects the sphere related to deep inner feelings and emotions of a single person, which is the ground for a democratic social system. This signifi-

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ch; See also Haller, V., p. 195, 2012; Federal Constitution of the Switzerland Confederation, “Constitutions of Foreign States”, part I, p. 563, 2008.

22 See the Constitution of Portugal: „Laws that restrict rights, freedoms and guarantees must have a general and abstract nature and may not have a retroactive effect or reduce the extent or scope of the essential content of the constitutional precepts” (Art. 18.3), www.dre.pt.

23 See the decision of the Constitutional Court of Georgia on the case “Ltd. Giant Security” v. the Parliament of Georgia and the Ministry of Internal Affairs of Georgia”, II-47, December 14, 2018.

24 See the decision of the Constitutional Court of Georgia on the case “Citizen of Denmark Haike Kronqvist v. the Parliament of Georgia”, II-57, June 26, 2012.

cance was underlined by the Constitutional Court, when it declared that “... freedom of belief is the support for personal development and autonomy of a person, at the same time, it determines the entire architecture of society, defines its quality of democracy.”<sup>25</sup> The significance of the freedom of belief, the speciality of its essence is expressed by the fact that, unlike some other fundamental rights, it is inadmissible to restrict it during a state of emergency or martial law, which is taken into account by democratic constitutions in states, and as discussed above, in Article 71 paragraph 4 of the Constitution of Georgia.

Freedom of belief entails religious, as well as non-religious beliefs. According to the definition of the Constitutional Court “... beliefs and views, which represent the grounds for honest resistance, must not be of religious nature.”<sup>26</sup> The freedom of belief protects the inner freedom (*forum internum*) to independently form and determine personal religious or non-religious (atheistic) beliefs with regard to the existence of people, personal relation to supreme forces (god), as well as the external freedoms of person (*forum externum*) to implement, publicly express and spread his/her belief and decisions made based on that belief.<sup>27</sup> Deriving from this definition, the freedom of belief protects human rights to live, act and proceed his/her entire activity in accordance with the rules-customs of his/her religion (or non-religious, ideological views) and personal inner faith. Moreover, it protects such means of execution and expression of belief such as mass, prayer, processions, church gatherings, religious or ideological celebrations and customs, diverse cultic activities, non-religious, atheistic feasts, etc.

Despite the special significance of freedom of belief, it is not an absolute right and may be restricted in line with the law, for the purpose of protecting/ensuring goods having particular public significance for a democratic society. Here we see one more sign of speciality of this fundamental right, namely that it is inadmissible to restrict the first part of the freedom of belief – inner freedom. In human rights law, this specificity of freedom of belief is the common standard. It is recognized by world scientific groups and the consistent practices of supreme and constitutional courts. If we observe closely, it cannot be any other way – each person individually creates his/her own attitude and belief, only he/she knows why he/she believes this way and not the other way round. This sphere is so deep, intimate, deriving from one’s inner attitude towards supreme forces or god, so it is impossible that there is any public, legitimate purpose, which justifies and admits interference of the State. Therefore, **inner freedom of belief is absolutely protected** and any interference in this sphere represents unjustified restriction. Accordingly, only external freedom of belief may be restricted, in other words, the public execution of decisions deriving from inner belief, their expression and implementation (freedom of confession). This particularity of the freedom of belief is explicitly indicated in constitutions of democratic states (for instance, Estonia, Poland, Finland, Netherlands, Serbia, Slovakia, Latvia, Czech Republic), also in international documents, such as the International

<sup>25</sup> See the decision of the the Constitutional Court of Georgia on the case “Public Defender of Georgia v. the Parliament of Georgia”, II-7, December 22, 2011.

<sup>26</sup> See Ibid, II-17.

<sup>27</sup> See also the definition of content of freedom of belief in the decision of the Constitutional Court mentioned above, II-5, 6, 12, 13.

Covenant on Civil and Political Rights of the UN<sup>28</sup> (hereinafter – the International Covenant) and the Council of Europe Convention on the Protection of Human rights and Fundamental Freedoms<sup>29</sup> (hereinafter – the European Convention). According to Article 18 of the International Covenant and Article 9 of the European Convention, the freedom of religion (belief) is recognized, and paragraphs 3 (International Covenant) and 2 (European Convention) of the same articles admit the restriction of only external freedom of belief: “freedom to manifest religion or belief shall be subject only to such limitations as...”.<sup>30</sup> It must be noted, that the old edition of the Constitution of Georgia shared this content of the freedom of belief and made it admissible to restrict freedom of belief only in case of its “*manifestation*”: “It is inadmissible to restrict rights listed in this article if their manifestation does not infringe on others’ rights” (Art. 19, para. 3).<sup>31</sup>

Based on the analysis presented above, while evaluating Article 16 of the new edition of the Constitution of Georgia, we must pay attention to the interrelation of paragraphs 1 and 2. According to paragraph 1, “each person has freedom of belief, confession and conscience”, and by the second paragraph, “restriction of these rights is admissible only in line with the law, with the purpose to ensure public security necessary in the democratic society, protect health or rights of others.”<sup>32</sup> By themselves, these provisions are legally completely coherent and semantically easy to understand. Nearly the same is the model of restriction for all other fundamental rights. Therefore, while restricting the freedom of belief, the State is obliged to act consequently to the necessity of democratic society, only with the procedure prescribed by law and for protecting/ensuring at least one from the mentioned legitimate purposes. However, despite such arranged interrelation between these provisions, the shortcoming is obvious. Based on paragraph 2, the State has the right to restrict the absolutely protected internal freedom of belief (*forum internum*). The presented provision brings into the framework of restriction entirely the freedom of belief and not only the external freedom of belief, and as a result restriction of this freedom may be used on the person “by ideological, psychological and moral influence, threatening, forcing” with the aim to make him/her “refuse particular belief, change it (and share some other belief).”<sup>33</sup> Such a thing is inadmissible in any case, only because it is impossible to have a condition when, for instance, for the purpose of “ensuring

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28 Adopted on December 16, 1966, effective from 23 March 1976.

29 Adopted on November 4, 1950, effective from 3 September 1953.

30 The International Covenant, Article 18, para. 3, the European Convention, Article 9, para. 2 (It is noteworthy, that provisions restricting discussed rights in these documents are identical word by word).

31 The particularity similarly as to freedom of belief is also characteristic to freedom of creativity (same as freedom of art), which is recognized by Article 20 of the Constitution (Article 23 of the old edition). In the first paragraph, the Constitution declares that the freedom of creativity is ensured, and in the second paragraph, it imperatively prohibits interference into the creative process, and considers inadmissible the censorship in the field of creative activities. Deriving from these provisions, it is clear that the substantial part of the freedom of creativity, which is related to creative ideas of an author, his/her fantasies and imaginations, as well as process of their realization, is absolutely protected from interference. The constitution considers it admissible to restrict only that part of freedom of creativity, which is called “dissemination of creative work”, based solely on the decision of the court and only when “dissemination of creative work infringes on the rights of others” (Art. 20, para. 3).

32 It is interesting that according to the old edition of the Constitution, restriction was admissible only for the purpose of protecting others’ rights (Art. 19, para. 3). Currently, the acting edition widens the scope of protection of freedom of belief; However, it does not exceed the scope established by the European Convention – according to Article 9, paragraph 2 of the Convention, the purpose of restriction may be in protecting public security interests, public order, health or moral and/or rights and freedoms of others.

33 The decision of the Constitutional Court of Georgian on the case “Public Defender v. the Parliament of Georgia”, II-12, December 22, 2011.

public security” or “protecting health”, the State will be obliged (or even entitled) to force a person to change his/her belief. Such action of the State will never be justified and will not be considered as a restriction proportionate to the essence of the inner freedom of belief. Such admission directly contradicts the essence of freedom of belief, the International Covenant (art. 18, para. 3) and the European Convention (art. 9, para. 2), as well as the practice of the European Court and the Constitutional Court of Georgia. As mentioned above, these international documents and court decisions consider it admissible to restrict freedom of belief only during its “manifestation”, “expression”, i.e. while acting based on internal freedom of belief. According to the definition of the Constitutional Court, “rough, excessive treatment, which causes changes the mind thinking process of a human, instigates spiritual suffering of the human.” Hence, the court pointed to absolute inadmissibility of such interferences and declared that “Article 19 of the Constitution<sup>34</sup> “envisages absolute protection of a human’s internal sphere, his/her inner world...”.<sup>35</sup> As for the European Court, the decision on the case “Darby v. Sweden” is important, where the court considered as inadmissible interference in the forum internum of the freedom of belief those norms of Swedish law, which forced the claimant to pay a special tax to the State church of Sweden, despite the fact that he was not attached to that church.<sup>36</sup>

Hence, after discussing the provisions of Article 16 of the Constitution, we can conclude that the acting edition of the article contradicts the essence of freedom of belief in a constitutional legal perspective, which requires immediate action from the State and respective amendments in the Constitution.

3. Under the new edition of Article 15 of the Constitution, the fundamental rights to personal and family privacy, personal space and privacy of communication are recognized. In the first paragraph, personal and family privacy, and in the 2<sup>nd</sup> paragraph, personal space and privacy of communication are guaranteed. These rights have substantial significance concerning the development and self-realization of a person. According to the definition of the Constitutional Court of Georgia, the right to “privacy of personal life, alike to all other rights, is the expression of human’s dignity...” it “is vitally necessary for person’s freedom, individuality and self-realization, facilitating its complete usage and protection are substantially determining for the development of democratic society.”<sup>37</sup> Besides, the privacy of personal and family life recognized by the first paragraph is directly connected to the right of person’s free development (Art. 12), which is broader and entails diverse spheres, differentiated by particular signs, of personal and family life, personal relationships and activity. Because of such comprehensive interrelation in its content, the Constitutional Court defined that Article 15 of the Constitution (Article 20 of the old edition) “*does not entail all aspects of the right to personal life*”.<sup>38</sup> The court shared the position of the European Court of Human rights, that it is

34 In the old edition of the Constitution, freedom of belief was recognized by Article 19.

35 The decision of the Constitutional Court of Georgian on the case “Public Defender v. Parliament of Georgia”, II-12, December 22, 2011.

36 See the decision of the European Court on Human Rights on the case “Darby v. Sweden”, September 24, 1990.

37 The decision of the Constitutional Court of Georgia on the the case “Georgia’s Yong Lawyers Association and citizen of Georgia Tamar Chugoshvili v. the Parliament of Georgia”, II-2, October 24, 2012.

38 See the ruling of the Constitutional Court of Georgia on the case “Citizens of Georgia Aleksandre Macharashvili and Davit Sartania v.

impossible to accurately and comprehensively define the personal life of humans: “The court does not consider it possible or necessarily exhaustive, to define the concept of “personal life”.”<sup>39</sup>

Despite the fact that privacy of personal and family life has special significance for each person’s thorough development (“*the constitutional right of personal life represents inseparable part of the freedom concept*”<sup>40</sup>), it is not an absolute right, which is envisaged by the Constitution of Georgia and allows its restriction. However, at the same time, it stipulates strict prerequisites for the restriction: “restriction of this right is admissible only in accordance with the law, for the purpose of ensuring state or public security necessary in a democratic society or protecting others’ rights” (art. 15, para. 1, and sent. 2). According to these circumstances, the State may interfere into the sphere protected by the right to privacy of personal and family life (restriction of fundamental right) – (a) only in accordance with the law and (b), only with the purpose of ensuring state or public security necessary in a democratic society or protecting others’ rights. Legally, this provision is stipulated correctly and clearly, however, a serious shortcoming is evident: It does not require one more extremely necessary prerequisite for state interference into the protected sphere – the court permission. So this gives the possibility for the State, to interfere into the sphere protected by the right to personal and family life only by the decision of police or other respective body, without judicial control. This construction of restriction of the right creates a very big threat that the State may exceed the scope established by the fundamental right, and act arbitrarily, which cannot be evaluated by the court anymore, which may result in the unjustified action of the State and possible violence against a person’s personal and family life sphere. The issue of the significance that the Court decision will have while interfering into the protected sphere, as the mechanism for controlling state actions, was clearly and explicitly evaluated by the Constitutional Court, which declared: “...restriction of right based on the court decision is an important constitutional guarantee as for protecting the right itself, as well as for balancing private and public interests.”<sup>41</sup>

It is noteworthy that in Article 5, paragraph 2 of the Constitution, the significance of the court decision is envisaged. According to this paragraph, the fundamental rights to privacy of personal space and communication are recognized and their restriction is admissible in case when it is done (a) only in line with the law, (b) only with the purpose of ensuring state or public security necessary in a democratic society or protecting others’ rights and (c), only by the court decision. Herein it is mentioned that restriction may also be applied without court decision “in case of urgent necessity prescribed by the law”, but the court must be notified within 24 hours from the application of restriction, and the court deliberates on the lawfulness of the restriction and decides not later than in 24 hours from the receipt of the application.<sup>42</sup> As you see, the standard of restricting fundamental

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the Parliament of Georgia and the Ministry of Justice of Georgia”, II-21, June 10, 2009.

39 See “Niemitz v. Germany”, December 16, 1992, “Costello-Roberts v. the United Kingdom”, March 25, 1993; Also see, “Georgia’s Yong Lawyers Association and citizen of Georgia Ekaterine Lomtadidze v. the Parliament of Georgia”, December 26, 2007.

40 The ruling of the Constitutional Court of Georgia on the case “Citizens of Georgia Aleksandre Macharashvili and Davit Sartania v. the Parliament of Georgia and the Ministry of Justice of Georgia”, II-21, June 10, 2009.

41 The decision of the Constitutional Court of Georgia “Georgia’s Yong Lawyers Association and citizen of Georgia Ekaterine Lomtadidze v. the Parliament of Georgia”, December 26, 2007.

42 By itself, this provision is erroneous, as the sentence is formulated as follows: “In case of urgent necessity the court must be notified

rights recognized by paragraphs 1 and 2 of Article 15 are similar word by word. The only difference is that while restricting the right to personal and family life, the court decision is not envisaged. The reason for such controversy of these provisions is unclear, as it is impossible to find out what is the deep and principal difference between these fundamental rights that in case of restricting one of them the judicial control of state actions is not necessary.

With regard to the issue under discussion, one more condition must be underlined, which relates to the old edition of Article 20 of the Constitution. From the date of the adoption of the Constitution, the right of privacy to personal life, private activity and personal space were recognized by this article. It comprised two paragraphs (as Article 15 currently in force) and the first one included the right to personal life, private activity and communication, and the second one – right to privacy of personal space. In both paragraphs, it was underlined that these rights could be restricted only with the decision of the court.<sup>43</sup> Therefore, when restricting these rights, the decision of the court, as a necessity of the important constitutional guarantee of protecting human rights, was established by the Constitution from the beginning. Once more this proves the problematic nature of the new edition of Article 15 of the Constitution.

## CONCLUSION

Several months have passed since the enactment of the amendments to the Constitution of Georgia introduced in 2017, but more time is needed for their study and analysis. Society will see outcomes of these amendments in some time, in parallel with the practical application of the new edition of the Constitution. However, before that, I think, it would be better for Georgian constitutionalists to express their views on the positive and negative aspects of these amendments. The analysis presented in this article is related to one particular part – the new edition of provisions on human rights and freedoms. Each principle, norm and provision have great significance for the coherent functioning of a democratic and legal state, but human rights are most important among them. The legislator pays special attention to formulating this part of Constitution content-wise, also grammatically and editorially unequivocally and clearly. Any mistake in this sphere may create significant challenges in terms of protecting human rights in the country. This is the reason for

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no later than 24 hours, which approves the legality of restriction within 24 hours.” It appears that the court approves legality of restriction automatically. The record is so imperative that it does not allow illegal restriction even theoretically, and even more, the court deliberation is not necessary as well, it must formally agree to the police or other body, which is definitely legal lapse. This sentence must be amended necessarily, and it must be stipulated that the court deliberates the legality of restriction and decides respectively.

43 “1. Personal life, private activity place, personal recording, texting, telephone talk and messages received by means of any other technical or untechnical means, are indefeasible. Restriction of such rights is admissible by the court decision or without it, in case of urgent necessity prescribed by the law.

2. No one shall have the right to enter a place of residence or other possessions, or to conduct a search, against the will of the possessor, if there is no court decision or urgent necessity prescribed by the law.” – Art. 20 (old edition of the Constitution).

presenting in this article-- those shortcomings of particular provisions on human rights, which are visible and their elimination is necessary as each shortcoming of the Constitution represents the problem of constitutionalism and puts in danger the free development of people, democratic functioning of constitutional bodies and entirely constitutional order.

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# THE INDEPENDENCE AND ACCOUNTABILITY OF COURTS — THE VIEWPOINTS OF THE SUPREME COURT JUDICIAL CANDIDATES

## INTRODUCTION

An independent court is not only a prerequisite for the protection of the rule of law and human rights, but also for the economic and social development of the country. Since the declaration of independence of Georgia until today, the establishment of an independent justice system in the country remains a problem, which is caused by several reasons. Probably, the main factor is the continuing nonexistence of proper political will and the lack of appropriate public awareness. Allegedly, we already got used to the fact that a politically biased court is normal and THEMIS must pay a contribution to the government: for some more, for others less.

In 2012, the main electoral promise of the “Georgian Dream” was the restoration of fairness and the creation of an independent court system. As a result of adopted amendments, the High Council of Justice was restructured, judges were given the right to name candidates for the High Council of Justice and the freedom to vote, as well as real possibilities to establish autonomy, closed court hearings became open to media, etc. Despite the mentioned, the trust of society towards the court system did not increase significantly. The reason for that may be, from one hand, the heavy legacy of the past, and on the other hand, the fact that the power within the court system was placed in the hands of the same people, who ruled the Court before 2012. This group of judges connected two interests— the interest of judges to protect themselves from prosecution and secondly, the interest of the government to control the judicial system.

The autonomy of judges, instead of normalization of the Court, became a source of self-preservation of judges and seizing of power by a small group of judges, and the new government could not overcome the temptation to control the court system and the vicious practice was restored, which existed between the political government and the Court. Between 2016 and 2019, several legisla-

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tive amendments were adopted, behind which there was an interest of an authoritative group of judges to strengthen their power.<sup>1</sup>

Building an independent court system probably entails two stages – first is the selection of judges – stage of appointment, and second – all of the rest. The approved standards and mechanisms of independence of the court fulfill their purpose only when the first stage, i.e. the appointment of judges is completed successfully, and the corpus of judges is composed of honest and qualified people. Society entrusts the execution of justice and administration of courts to such judges. In a democratic society, the judicial authority represents a separate branch where judges are appointed for a lifetime period and they are protected by immunity. Compared to other public servants, they are not responsible for professional mistakes and it is inadmissible to interfere into the work of a judge. The corpus of judges make self-renewal, self-regulation, self-normalization, obtains and preserves the trust of the public, creates and implements judicial policy, administers and disposes of budget resources.

On the other hand, if it appears that the lever of administration of the Court is put in the hand of dishonest people, all approved mechanisms may be used as damaging for democracy and in the interest of justice. In other words, we may receive a legally protected fortress, which may become a nest for corruption, nepotism, trading with justice, the abuse of authority and irresponsibility.

In 2017, an important constitutional amendment was adopted, by which the title to present judges of the Supreme Court was transferred to the High Council of Justice from the President of Georgia. In December 2018, the list consisting of 10 people was presented to the High Council of Justice by the Parliament of Georgia, which caused public outrage due to the content of this list and this grew into a political crisis. In 2019, in response to the mentioned crisis, the governing elaborated and adopted new regulations for selecting judges for the Supreme Court, based on which, the process of selecting the Supreme Court judges took place in June-December 2019. The abovementioned process resulted in sharp public and international criticism, that will be discussed further below, however, it must be appreciated that for the first time in Georgia's history, candidates for judges were standing before the public and had to respond (or not respond) to those questions which had accumulated towards judicial authority during several years. Therefore, interviews with candidates for judges of the Supreme Court presented a completely new form of accountability of the judicial system. However, another issue is how successful was the completion of this test by the judicial authority.

In this article, major problems in regard to the concepts of court independence and accountability will be discussed, as well as the visions of the 20 candidates for judges of the Supreme Court, related to court independence and accountability, who appeared before the Parliament of Georgia.

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1 See Tsikarishvili K. Clan-based administration of the Court from 2007 until today, available: <https://article42.ge/media/1001447/2019/04/22/2853cf2c9d2199d8311b47b2e4b27cce.pdf>

## WHAT IS THE INDEPENDENCE OF THE COURT?

According to one of the most recognized definitions, the independence of the court is defined as an ability of courts and judges to exercise their functions freely without interference or control from state and private subjects.<sup>2</sup>

Some researchers agree that judicial independence has at least three aspects: first – impartial decision making by the court, second – binding character of the decision and third – protection of the judge from external interference.<sup>3</sup>

Judicial independence is based on several factors, including<sup>4</sup>:

- The recognition of judicial independence by internal national legislation;
- The appointment and promotion of judges based on objective and transparent criteria, and the exclusion of political interference during the appointment of judges;
- Determining a guaranteed term of authority for judges;
- Protecting judges from direct and indirect illegal interference, influence or threat;
- Disciplining judges based on predictable standards and fair procedure;
- Adequate financing of the judicial system and its material maintenance, for uninterrupted execution of its function.
- An objective system for the distribution of cases to judges, etc.

Independence of the court system is part of the right guaranteed by Article 6 of the European Convention on Human Rights. While evaluating whether the court system is independent, the European Court on Human Rights takes into consideration diverse factors, including “the method for appointing judges and the duration of their mandate, the existence of mechanisms protecting them from external pressure and the question, whether such court gives the impression of independence.”<sup>5</sup> According to the definition of the European Court, independence of the court system implies protecting a judge from not only external but also internal pressure”. The internal independence of the court entails freedom of the judge from directives and influence of colleague judg-

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<sup>2</sup> See <https://www.britannica.com/topic/judicial-independence>

<sup>3</sup> Stephenson, M. *Judicial Independence: What It Is, How It Can Be Measured, Why It Occurs* <http://siteresources.worldbank.org/INT-LAWJUSTINST/Resources/JudicialIndependence.pdf>

<sup>4</sup> Coundhry, S. *International Standards for the Independence of the Judiciary*; [https://www.researchgate.net/publication/319403225\\_International\\_Standards\\_for\\_the\\_Independence\\_of\\_the\\_Judiciary/citation/download](https://www.researchgate.net/publication/319403225_International_Standards_for_the_Independence_of_the_Judiciary/citation/download) Judicial Matteo Mastracci, Independence: European Standards, ECtHR Criteria and the Reshuffling Plan of the Judiciary Bodies in Poland, <https://www.athensjournals.gr/law/2019-5-3-6-Mastracci.pdf>

<sup>5</sup> ECtHR 22 December 2009, Case No. 24810/06, Parlov-Tkalčić v Croatia, para. 86

es or judges having administrative functions, for instance, chairpersons of the court or chamber.”<sup>6</sup> By the practice of the European Court on Human Rights “internal independence” is infringed upon if a colleague of a judge has a level of influence on the judge and tries to sway him/her during the case hearing.<sup>7</sup>

Institutional independence of the court and the individual independence of judges differ from one another.

Individual independence of the judge implies the execution of functions by judges without external interferences, and institutional independence of the court entails the independence of the court system, as a branch of the of the government, free from interference.

## WHAT DOES ACCOUNTABILITY OF THE COURT MEAN?

The term “accountability” is defined as the relationship between two subjects when one “acting person” has the obligation to explain and justify his/her actions, and the other subject, “forum”, has the right to pose questions and conduct evaluative argumentation. Further, certain outcomes may evolve towards the actor.<sup>8</sup>

Individual accountability of a judge (for example, disciplinary responsibility of the judge or justification of the decision by the judge) and accountability of the court (for example, providing an annual report by the court or openness of the court hearings) are differentiated from one another, in accountability in terms of content (e.g. publishing grounds for a court decision) and process (e.g. the method for the distribution of cases, methods for selecting judges, etc.).<sup>9</sup>

Independence of the court system responds to the question: “Independence from whom or what?” and accountability responds to the question: “Accountable to whom or regarding what?”<sup>10</sup>

In response to the question of to whom is the court accountable, researchers allot three subjects: the supervising court, the executive branch of government and the people. Each of them has their own expectation towards the court and they have different criteria for assessment. Supervising courts use the law as an assessment criterion for the lower court, the executive government

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6 *Ibid.*

7 Joost S. *The concept of ‘internal judicial independence’ in the case law of the European Court of Human Rights*, (pp. 104). European Constitutional Law Review, volume 15

8 Tsikarishvili K. *Quantity and quality in the work of court system*, (pp.11). Tbilisi, 2011

9 *Ibid.*

10 *Ibid.* p. 12.

puts an accent on productivity and similar management values, and public accountability puts an accent on the quality of justice and service.<sup>11</sup>

## PROBLEMS EXISTING IN GEORGIA WITH REGARD TO THE INDEPENDENCE AND ACCOUNTABILITY OF THE COURT

Considering Georgian, as well as international experience, it is possible to compare two models of court: 1. the independent court model and 2. the obedient court model.

### **a. In the independent court model:**

- Qualified and honest judges are appointed. The appointed person is not accountable to anyone.
- The court system attracts independent, honest and qualified staff.
- The judge leads the proceeding impartially. He/she does not determine the decision on the case in advance; The judge decides on the case only based on evidence, law and inner belief.
- Supervising courts correct legal mistakes, ensure consistent practice and quality of justice.
- The judges do not request or accept prior approval with regard to his/her decision.
- Judges, having administrative functions (chairpersons of courts, chambers, collegiums), are selected by professional and managerial characteristics; Their function is to properly manage the court and support quality of justice.
- The distribution of cases among judges is carried out based on objective criteria. Interference into the process of distribution from on behalf of a may be necessary for regulating equal loads for the judges.
- Integrity and creativity on part of the judge are encouraged.
- The High School of Justice is designated to educate independent and qualified staff.

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<sup>11</sup> Richard M. and Francesco C. (2007) *Judicial Evaluation in Context, Principles, Practices and Promise in 9 European Countries*. European Journal of Legal Studies.

- The appointment of candidates for a probationary period has the aim to observe and select independent, honest staff.
- The promotion of judges is done based on his/her qualifications and merits, based on objective criteria; This serves as an example for other judges.
- Disciplinary proceedings towards judges are initiated for actions infringing the authority of the court, based on fair procedures. Disciplinary responsibility is the form of legal accountability of judges and a mechanism for normalizing the court.
- Elections of self-governing bodies of the court are carried out based on healthy competition among judges; Judges select the individual who can protect the interests of justice in the best way and care about increasing the quality of independence and reliability of the court.
- The court has open and transparent relations with the other branches of government within the scope of the law.
- The court considers itself accountable to the society and tries to have a healthy dialogue with the society on all important issues of court administration.
- An independent court sets its own game rules. Everyone (including the political government) is used to these rules and acts in accordance therewith. These rules are stipulated in the law and code of ethics, as well as other normative acts.

**b. In the obedient court model:**

- Obedient staff are appointed as judges, who owe (or are accountable) to the one who appoints him/her.
- The court attracts obedient staff, who have no firmness or integrity.
- The judge hears cases in a biased way; He/she knows in advance the outcome of the case and adapts court proceedings and decisions to that outcome.
- The judge gets prior approval for the decision from a third person, usually from the chairperson of the court.
- Control of the court by instances implies ensuring outcomes that are determined in advance. Courts of different instances have one assignment concerning the outcome of the case. This indication may change from one instance to another, in which case the final decision changes respectively.
- Judges having administrative functions (chairpersons) are selected by the political fidelity, and

their function is to ensure the fulfillment of political assignments.<sup>12</sup>

- Cases are distributed among judges subjectively; Cases, where the decision is determined beforehand, are allocated to those judges who can fulfill such assignments; Judges who cannot fulfill such assignments are given those cases, which are not under particular interest.
- Integrity and creativeness of the judge hinder his/her career, and it may become a reason for refusing the reappointment after the end of the term of his/her power.
- The High School of Justice is used as a workplace of obedient staff.
- The probational period entails observation and selection of obedient staff.
- Judges are promoted according to their obedience and good fulfillment of assignments and this gives example to other judges.
- Disciplinary liability is used as a punishment mechanism for disobedient judges.
- Elections of self-governing bodies of the court are carried out with the purpose of reaching the outcome determined in advance. There is no healthy competition between candidates.
- The court has secret communication channels with the other branches of government; The court receives and fulfills political and non-political assignments from these branches.
- The court has no healthy dialogue with society.
- An obedient court sets its own game rules. External subjects know that it is possible to have influence on the court and therefore, try to use such influence channels.

## THE MODEL EXISTING IN GEORGIA

Diverse studies confirm that with regard to the Georgian justice system, traditionally, there are signs of it following the “obedient court” model. For instance, in 2017, “Article 42 of the Constitution” carried out opinion research among practicing lawyers concerning the factors restricting court

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<sup>12</sup> In scientific literature, such function of the chairperson of the court is referred as a “transmission belt”. Such tradition is derived from the soviet past and still exists in some post-soviet countries. (“The main role of the court presidents was thus to ‘transmit’ orders from the Communist Party to individual judges in sensitive cases.” See David Kosar, Politics of Judicial Independence and Judicial Accountability in Czechia: Bargaining in the Shadow of the Law between Court Presidents and the Ministry of Justice, *European Constitutional Law Review*, Vol. 13, issue 1, p. 96.)

independence. As a result of the study, the following factors hindering the independence of the court were outlined:<sup>13</sup>

- Informal agreements during the selection-appointment process of judges;
- Interference on part of the executive government into the selection-appointment process;
- Nepotism during the appointment of judges;
- Insufficient research into the independence of a candidate during the appointment as judge;
- Selecting chairpersons of courts based on political motive;
- The control of court proceedings by chairpersons of the court (interference into the distribution of cases, prior approval of case outcomes with the chairperson);<sup>14</sup>
- Forced business trips for undesirable judges;<sup>15</sup>
- Transferring undesirable judges to reserve status;<sup>16</sup>
- Using disciplinary mechanisms for improper or invalid reasons in order to influence judges;<sup>17</sup>
- The passive role of associations of judges in the protection of the independence of the court;<sup>18</sup>
- Pressure from the Prosecutor's Office on the court;<sup>19</sup>
- Forcing judges to write letters of resignation;
- Expulsion of principled judges from the court system;
- Pressure on judges and their family members;
- Clan-based administration in the court.

13 Article 42 of the Constitution, Research on opinion of practicing lawyers with regard to the factors hindering independence of the court. Tbilisi, 2017.

<https://article42.ge/media/1001447/2019/01/09/df8851f838d9e9c59df59bc5630f41a9.pdf>

14 See so called hearings in the court system, see also, Georgia's Young Lawyer's Association, Justice in Georgia, 2010, p.16. [www.shorturl.at/dvFU2](http://www.shorturl.at/dvFU2)

15 Vakhtang M. (2017). *Problem of Accessibility to Justice, Reasons and Ways of Resolution*, (pp.16). [www.shorturl.at/koRY4](http://www.shorturl.at/koRY4)

16 *Ibid.* p.16.

17 See using disciplinary mechanisms for political reasons, on the so called case of Rebellious Judges, Transparency International, Refreshing Georgia's Courts Trial by jury: More democracy or a face-lift for the judiciary? p. 2 <https://www.transparency.ge/sites/default/files/Trial%20by%20Jury.pdf>

18 American Bar Association, Judicial Reform Index, Georgia, 2008, p.116; See also, Transparency International Georgia, Assessment of Georgia's anti-corruption system, 2011, p. 77.

[https://www.transparency.ge/sites/default/files/tigeorgia\\_nisreport\\_ka.pdf](https://www.transparency.ge/sites/default/files/tigeorgia_nisreport_ka.pdf)

19 See also, Transparency International Georgia, Assessment of Georgia's anti-corruption system, 2011, p. 75.

[https://www.transparency.ge/sites/default/files/tigeorgia\\_nisreport\\_ka.pdf](https://www.transparency.ge/sites/default/files/tigeorgia_nisreport_ka.pdf)

## SELECTING THE SUPREME COURT JUDGES IN GEORGIA

By the constitutional amendment adopted in 2017, the ability to name judges for the Supreme Court was transferred from the President of Georgia to the High Council of Justice. In 2019, the parliamentary majority elaborated and adopted a package of legislative amendments, which include the detailed procedure of selecting the Supreme Court judges. However, this legislation itself became the subject of criticism from international organizations, the non-governmental sector and political parties. The main argument of critics was that the suggested regulation did not allow the High Council of Justice to decide on the selection of candidates on its own view and without justification. According to this legislation, from May until December 2019, the procedure for selecting the Supreme Court judges was held in the Parliament of Georgia and the High Council of Justice. In the competition for Supreme Court judges, 143 candidates participated, the amount of which was decreased to 50 after the screening procedure done by the High Council of Justice. Interviews with 50 candidates were held at the High Council of Justice, and based on the voting after interviews, 20 candidates were presented to the Parliament of Georgia.

In September-November of 2019, the Committee on Legal Issues of the Parliament heard all 20 candidates, and on 23 September 2019, 14 candidates were selected as Judges of the Supreme Court of Georgia. Hearings of the candidates held at the High Council of Justice, as well as at the Parliament were directly broadcasted.

The process of selecting judges was subject to harsh criticism from international, as well as national organizations.<sup>20</sup>

The following particular shortcomings must be outlined:

- The list of candidates was formed with the prior approval of 10 members of the Council, which had decisive importance in terms of selecting the list of 50, as well as the 20 candidates.<sup>21</sup>
- Some candidates, who received high points could not move to the next stage of the selection process and others having lower points managed to move to the next stage.<sup>22</sup>
- During the selection stage at the High Council of Justice, clear cases of conflict of interest were evident.<sup>23</sup>

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20 The Public Defender, Report on Monitoring of selection of Candidates for Judges in the Supreme Court of Georgia by the High Council of Justice (2019). <http://ombudsman.ge/res/docs/2019100811095425887.pdf>  
21 p. 9-13.

22 The Public Defender, Report on Monitoring of selection of Candidates for Judges in the Supreme Court of Georgia by the High Council of Justice (2019). <http://ombudsman.ge/res/docs/2019100811095425887.pdf>

23 The Public Defender, Report on Monitoring of selection of Candidates for Judges in the Supreme Court of Georgia by the High Council of Justice (2019), p. 11. <http://ombudsman.ge/res/docs/2019100811095425887.pdf>

- The Court refused to make public the past decisions of several candidates.<sup>24</sup>
- The Parliament approved each candidate presented by the Legal Issues Committee in a way that their selection decision was not justified and there was no discussion on the positive or negative features of the candidates.<sup>25</sup>

Criticism was related not only to the selection procedure, but also to the results of the competition, in particular to the fact that in the final selected list, there were only those candidates who represented the acting influential group of the Court, so called clan-related judges and their supporting candidates, or persons closely related to the government.<sup>26</sup>

## VISIONS OF THE CANDIDATES FOR JUDGES OF THE SUPREME COURT WITH REGARD TO THE INDEPENDENCE AND ACCOUNTABILITY OF THE COURT

In January-February 2020, the organization of Article 42 of the Constitution and group of independent lawyers studied the interviews of the 20 candidates presented before the Parliament of Georgia which were held at the Parliament, as well as at the High Council of Justice. During the study, an accent was put on the visions of each candidate in terms of independence, reliability and accountability of the Court.<sup>27</sup> The following conclusions were made in the report:<sup>28</sup>

In response to the question on how independent the Court was before 2012, some of the candidates (Giorgi Mikautadze, Merab Gabinashvili, Tamar Alania, Miranda Eremadze) responded that the Court was independent, some of them (Zaza Tavadze, Maia Vachadze) declared that the Court

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24 A group of independent lawyers and civil activists calls on the Parliament not to approve the list of candidates for judges at the Supreme Court.

<https://democracyindex.ge/ge/news/read/33/damoukidebeli-iuristebis-da-samoqalaqo-aqtivistebis-jgufi-parlaments-mouwodebs-uzenaesi-sasamartlos-kandidatebis-sias-mxari-ar-dauchiros>

25 OSCE Office for Democratic Institutions and Human Rights, Second Report on the Nomination and Appointment of Supreme Court Judge, 2019, p. 8. <https://www.osce.org/ka/odihhr/443497?download=true>

26 A group of independent lawyers and civil activists calls on the Parliament to not approve the list of Supreme Court judicial candidates <https://democracyindex.ge/ge/news/read/33/damoukidebeli-iuristebis-da-samoqalaqo-aqtivistebis-jgufi-parlaments-mouwodebs-uzenaesi-sasamartlos-kandidatebis-sias-mxari-ar-dauchiros>

Coalition for Independent and Transparent Judiciary, Assessment of the Hearings of Supreme Court Judicial Candidates at the Parliament Legal Committee, December 11, 2019.

[http://coalition.ge/index.php?article\\_id=234&clang=0](http://coalition.ge/index.php?article_id=234&clang=0)

27 Responses of candidates in terms of competence are assessed in details in the report of Coalition for Independent and Transparent Judiciary. [http://coalition.ge/index.php?article\\_id=235&clang=0](http://coalition.ge/index.php?article_id=235&clang=0)

28 Article 42 of the Constitution, Group of independent lawyers. Analysis of interviews with candidates for the Supreme Court Judges, 2020.

was partially independent, and some candidates escaped answering the question altogether.. Only one candidate – Shalva Tadumadze – declared that the Court was under systemic pressure.<sup>29</sup>

It is interesting that this position of candidates directly contradicts the position of the governing party, which always gave a low assessment to the quality of independence of the Court before 2012.<sup>30</sup>

In response to the question – what factors were restricting the independence of the Court, a majority of the candidates stressed legislative and institutional factors, such as the rule of summing up sentences, hindering judges from the possibility of using less than a minimum number of sentences, imposing liability on the judge for rough infringement of the law, including politicians in the High Council of Justice, etc.<sup>31</sup> On the other hand, candidates avoided assessing the malpractice, which was used by the group governing the Court for the appointment of judges and having an influence on cases, including selective disciplinary liability, forced transfer of judges, manipulating the case distribution system, prior hearings of cases, etc. Some candidates refused their existence at all, part of them saying that they have not heard about these methods.

The question arises, if the Court was independent and only restricted by the law, why didn't the Conference of Judges or Association of Judges deliver public statements or not show initiatives to amend the restricting legislation? The High Council of Justice could also declare an official position, as since 2007, more than half of the members of the High Council of Justice were judges. This question was addressed to one of the candidates – Paata Silagadze, however, he stated that the format of the Conference of Judges did not provide the possibility to make such statements.<sup>32</sup> This answer is obviously unjustified, as the law never hindered the Conference of Judges, the Association of Judges, nor the High Council of Justice to make public or even critical statements.

The abovementioned fact implies that, on one hand, candidates try to evade responsibility from influential groups existing in the court system, “the clan”, for systemic problems that existed before 2012, and, on the other hand, candidates have problems in terms of values, thus cannot dissociate themselves from systemic infringement of the independence of judges, which was taking place for years from outside the Court, as well as – inside.

In response to the question of whether there was pressure on judges, all candidates stated that there was no pressure on them and they had not heard of anyone being pressured.

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29 *Ibid.*

30 See Bidzina Ivanishvili, “The court did not exist during the time of previous government”, <http://www.tabula.ge/ge/verbatim/108485-ivanishvili-sasamartlos-mivecit-tvitgadarchenisa-da-tvitaghdgenis-sashualeba>; Irakli Kobakhidze “The court system before 2012 was ineligible and everything was done as it was said by Adeishvili. There were Millions of cases, bad cases”. <http://www.tabula.ge/ge/verbatim/143898-kobaxidze-mosamartleebi-romlebic-cud-raghacebs-aketebdnen-axla-karg-raghacebs>

31 Article 42 of the Constitution, Group of Independent Lawyers. Analysis of interviews with candidates for the Supreme Court Judges, 2020.

32 *Ibid.*

To the question – what has been done to facilitate the independence of the court system in previous years, candidates particularly stressed the legislative and practical measures that took place after 2012, such as the lifelong appointment of judges, delegating the nomination of candidates for the Supreme Court judges to the High Council of Justice, reform of disciplinary proceedings, introducing an electronic system for the distribution of cases, etc.

The majority of candidates, who have spoken regarding this issue, assessed the quality of the independence of the Court with high ranking. Maia Vachadze expressed her opinion that the government may subordinate the Court if it weakens the institutional grounds for the independence of the Court.

With regard to the question – why there is no distinct opinion heard at the Conference of Judges, the majority of candidates consider that unity of the Corpus of Judges concerning important issues of the Court activity is quite natural.

Some of the candidates, for instance, Giorgi Mikautadze, do not agree with the view that there is no distinct opinion expressed at the Conference of Judges.<sup>33</sup>

In response to the question, how correct and reasonable was presenting lists of candidates for the Supreme Court judges in this form in December 2018, all candidates (who were asked) stated that the High Council of Justice has not infringed any law. Only one candidate (Maia Vachadze) noted that she would not act like that in the place of the High Council of Justice. From the responses of candidates, it is evident that they did not see any fault in terms of accountability and transparency in the selection of the Supreme Court judges by this form.

In relation to the question, how it happens that the Conference of Judges selects candidates for the members of the High Council of Justice in a way that there is no presentation of their visions taking place and no introduction, the candidates stated that judges know each other quite well and there is no need to listen to visions of candidates for members of the High Council of Justice (Zambakhidze, Vachadze).<sup>34</sup> Deriving from this position, it is clear that the candidates do not realize that by presenting visions at the Conference of Judges they are not only introducing judges, but it implies the openness of the process -- the transparency and accountability of the Court.

While responding to the question “If the decision of the Council on the selection of judges must be justified, whether the voting of the Council shall be open, and if it must be possible to appeal the decision?” – some of the candidates were in favor of justification (Kochiashvili, Mikautadze) and openness of voting (Vachadze), which must be considered as a positive fact.

In response to the question, whether Levan Murusidze is the leader of the court system, opinions between candidates were divided, part of them think that the leadership of Levan Murusidze simply implied him being the chairperson of the Conference of Judges and being secretary of the

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<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

High Council of Justice, while two candidates (Shota Getsadze, Mamuka Vasadze) stated that Levan Murusidze is not their leader.

To the question – what are the challenges existing today in the court system in terms of internal independence, some of the candidates responded that there are no challenges in this regard (Jeiranashvili, Tsintsadze, Mikaberidze, Kochiashvili), and some mentioned several challenges, such as the probationary period (Mikautadze). As for the governance of the clan, as a challenge, the majority of candidates (Jeiranashvili, Alania, Kadagidze, Miakutadze, Mikaberidze, Eremadze) directly refused the existence of the clan-based administration of the Court, and part of them noted that there is no evidence for this or they have no information (Tsintsadze, Vasadze); One candidate stated that there is no clan, but there are judges who have authority over their colleagues and they are presented in governing bodies (Vachadze).<sup>35</sup>

A major part of candidates admits the lack of public trust in the court system. Diverse measures were introduced by candidates in order to increase trust, such as increasing the level of justification of court decisions (Skhirtladze), developing consistent practice (Alania), open communication with the public (Tsintsadze) and informing the public on the positive processes within the Court (Getsadze).

Aleksandre Tsuladze expressed an interesting suggestion, that he is in favor of making public the interviews with judges of the first and second instance courts, as they are in the case of the Supreme Court judges;

## CONCLUSION

The judiciary is based on ideas and principles, for which it is vitally important to have public trust. From 2012, judges were given the possibility to “restart”, creating a new, independent court system; to implement proper system of values and recover the humiliated authority of the Court. Probably, the most clever step would have been for the Court to have evaluated the systemic problems existing before 2012 and try to correct these problems by means of dialogue with the public, and suggest to the political government new game rules. The judiciary has chosen a different path: it hid and did not admit the problems of internal independence and the systemic shortcomings; it transferred power into the hands of the governing group – the “Clan”, entered into secret agreements with the political government, and carried out lifelong appointment of judges by virtue of an agreement with the clan.

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<sup>35</sup> *Ibid.*

The process continued in relation to the appointment of the Supreme Court judges, however, with the difference that in this case, the process moved to the Parliament.

Interviews with the candidates for the Supreme Court judges showed that almost all candidates have similar opinions, which are as follow:

- Before 2012, the court system was independent or partially independent. The main factor of the independence of the Court was restricting law.
- There was no pressure on judges. /In any case, the candidates have no information in this regard. Only one candidate, Shalva Tadumadze, admitted the existence of pressure, however, noted that there was pressure on the system but it was not expressed in particular cases.
- There are no challenges in relation to the internal independence of the court system.
- There is no “clan” in the Court. There is only a group, which has authority and members of this group are in governing bodies.
- During the selection and appointment of judges, the High Council of Justice acts in line with the law.
- Today the Court is more independent than it has ever been.

The message which is disseminated by the official Court (its representatives) to the public differs from the one that was expressed by the “Georgian Dream” government during the process of justice reform. In particular, according to the official position of the “Georgian Dream”, before 2012, independence of the court system was critically low, and judges were under total political control. After 2012, the situation changed drastically and judges were freed from political pressure.

This all means that the Georgian court system is on the wrong path of development. It moves against major judicial values, as well as accountability and independence. In my view, in this way, it is impossible to create an independent, fair and reliable court system in Georgia and it will be necessary to implement fundamental reformation of the system, the first stage of which should be the admission and naming of the problems existing in the judiciary.. The creation of a healthy court system will be possible only after these measures.

Kakha Uriadmkopeli\*

# NEW POSSIBILITIES FOR PARLIAMENTARY OVERSIGHT: POST-LEGISLATIVE SCRUTINY (PLS), THEMATIC INQUIRY AND THEMATIC RAPPORTEUR

## ABSTRACT

On 6 December of 2018, the Parliament of Georgia adopted new Rules of Procedure. The reform affected the strengthening of legislation, as well as the oversight functions of the Parliament.

Within the framework of the reform, special attention was paid to the oversight activity of the Parliament, as far as Georgia had no considerable practice in this direction. In parallel to the improvement of the standard of oversight procedures, the Rules of Procedure established such novel mechanisms as post-legislative scrutiny, thematic inquiry and thematic rapporteur. The purpose of this article is to outline the essence and significance of these mechanisms.

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## INTRODUCTION

As stated, one of the main reasons for the new Rules of Procedure<sup>1</sup> of the Parliament is “the improvement of the oversight function of the Parliament in a way that ensures coherent work of state structures and the possibility to timely and effectively reveal existing gaps”.<sup>2</sup>

Parliamentary oversight mechanisms exist in the Georgian legislation starting from the 1990ies.<sup>3</sup> However, the practice of their implementation was very poor and often inconsistent.

The new Rules of Procedure modified previously existing mechanisms, specified vague procedures and established new, previously non-existent procedures, which gives the Parliament the possibility to implement the function of oversight.<sup>4</sup> Three mechanisms discussed in this article are among them: post-legislative scrutiny, thematic inquiry and thematic rapporteur.

## POST-LEGISLATIVE SCRUTINY (PLS)

One of the most important functions of the Parliament is to create legislation adapted to the interests of citizens. Additionally, the function of the Parliament is to define how adopted legislation has worked and whether its purposes were attained.<sup>5</sup>

PLS is a loop, connecting fundamental – legislative and oversight – functions of the Parliament. The political process goes through a particular cycle and moves around on a certain circle.<sup>6</sup> Lawmaking and oversight of the implementation of normative acts together create a sound political cycle, where adoption of the law, its monitoring and elaboration of new initiatives interchanges with one

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1 Rules of Procedure of the Parliament of Georgia (webpage, 14/12/2018).

2 Explanatory notes of the initiated version of the Rules of Procedure of the Parliament of Georgia (registration N 07-3/187/9).

3 Decree of the Parliament of Georgia from 20 September 1994 on “the Rules of Procedure of the Parliament of Georgia”; Decree of the Parliament of Georgia from 17 October 1997 on “the Rules of Procedure of the Parliament of Georgia”; The Rules of Procedure of the Parliament of Georgia from 17 February, 2004; The Rules of Procedure of the Parliament of Georgia from 22 June 2012.

4 Roadmap of Parliamentary Oversight, US Agency for International Development (USAID) Good Governance Initiative (GGI), 2019, p.6.

5 Franklin De Vrieze, Post-Legislative Scrutiny – Guide for Parliaments, Westminster Foundation for Democracy (WFD), London, November 2017, p. 7.

6 Guideline on the Parliamentary Oversight, USAID Good Governance Initiative (GGI), 2019, p.3.

another.<sup>7</sup> Under the UN Agenda for Sustainable Development 2030, the development<sup>8</sup> of a number of directions is determined, where the PLS mechanism may assist various countries.<sup>9</sup>

Parliament puts a lot of time and resources into legislation. However, implementation of an adopted law is such a complex issue, that it is difficult for the Parliament to precisely predict all prospective outcomes upon the adoption of the law. During the implementation process, a number of shortcomings, ambiguity of norm or faults may emerge. Besides, in some cases, it may be necessary to newly regulate diverse relations.<sup>10</sup> Norms may be given different meanings, and the basis for this amendment may be social-ethical conceptions or the change of various factual circumstances.<sup>11</sup>

The PLS mechanism is not a novelty for the Rules of Procedure of the Parliament. It existed in the legislation before as well, however, its application in practice was not consistent. It may be stated openly that this mechanism was revived by the new Rules of Procedure of the Parliament. As an assurance of this mechanism, the obligation of committees to indicate the conduct of PLS in annual action plans, was outlined.<sup>12</sup> The committee conducts PLS beyond the action plan as well. Ongoing political, legal, social or other processes may evoke the necessity to use the PLS mechanism.<sup>13</sup>

PLS becomes similar to the regulatory impact assessment (RIA), in particular, the evaluation of the existing impact (Ex-post RIA). However, the latter mechanism, as a rule, is applied by bodies of the executive government, and PLS represents its parliamentary alternative.<sup>14</sup>

The norm of the Rules of Procedure, regulating PLS, is not strict and does not entail detailed procedures.<sup>15</sup> This gives the possibility for the committee to maneuver, and in certain cases, to use measures adapted to needs. The history of parliamentary life in Georgia shows that the existence of a mechanism for parliamentary oversight in the legislation does not mean its actual application.<sup>16</sup> Parliamentary oversight mostly depends on political will, traditions of parliamentarism and practice. The United Kingdom, having the oldest parliamentary practice, stands on such traditions, where the

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7 Guideline for the Staff of Committees of the Parliament of Georgia, EU and UNDP, 2019, p. 34-35.

8 United Nations Sustainable Development Goals official web-page, Sustainable Development Goals. 01/06/2020, <https://sustainabledevelopment.un.org>

9 Fitsilis, Fotios and De Vrieze, Franklin, Parliamentary Oversight of Sustainable Development Goals and the Application of Post-Legislative Scrutiny Principles (July 27, 2019). 14th Workshop of Parliamentary Scholars and Parliamentarians, Wroxton, UK, 27-28 July, 2019, p. 2.

10 Post-legislative Scrutiny – Guideline for the Parliament, USAID Good Governance Initiative (GGI), Westminster’s Democratic Fund (WFD), 2019, p.4.

11 Reinhold Zippelius, The legal methods, Beck C.H., Munich, 2006 (in Georgian GTZ 2009), p. 31.

12 Post-legislative Scrutiny – Guideline for the Parliament, USAID Good Governance Initiative (GGI), Westminster’s Democratic Fund (WFD), 2019, p.6.

13 Post-Legislative Scrutiny – Guideline for the Parliament, USAID Good Governance Initiative (GGI), Westminster’s Democratic Fund (WFD), 2019, p.13.

14 Expert seminar: Legislative ex-post evaluation, legislative impact assessment and Post-Legislative Scrutiny, Co-organized by the Centre for Legislative Studies of the University of Hull and the Westminster Foundation for Democracy (WFD), London, 26 April 2019; Post-legislative Scrutiny – Guideline for the Parliament, USAID Good Governance Initiative (GGI), Westminster’s Democratic Fund (WFD), 2019, p.9-10.

15 Rules of Procedure of the Parliament (web-page, 14/12/2018), article 38.

16 In details see Group of authors, edit. Vakhushti Menabde, Twenty years without Parliamentary oversight, second revised edition, Tbilisi, 2019.

majority of rules derive from traditions and customs and are implemented without written regulation.<sup>17</sup> After the adoption of new Rules of Procedure, the Committee on Environmental Protection and Natural Resources and the Committee on Healthcare and Social Issues of the Parliament with the support of international partners carried out the procedure of PLS as a pilot project, which may be an attempt to establish a parliamentary tradition in this direction.<sup>18</sup>

Within the framework of PLS, the entire normative act may be selected, or only part of it. It is recommended that at least 3 years have passed, after the adoption of the normative act, to identify existent practice for making respective conclusions.<sup>19</sup>

Considering international best practices, the Georgian legislative space and reality, within the framework of PLS, the following actions may be conducted: a review of legal and other documents related to the selected normative act (explanatory note, regulatory impact assessment document, reports of the Public Defender or Audit Service, applications/letters/petitions, etc.), receive and analyze opinions from interested persons, conduct public consultations, check compliance of bylaws with the legislation of Georgia, checking bodies of work involved in the process of the implementation of the normative act and analyze court decisions.<sup>20</sup>

From these actions, the innovative provision of the new Rules of Procedure must be mentioned, according to which “the Committee, within its competence, analyzes judicial practice and takes respective measures for eradication of legislative shortcomings”.<sup>21</sup> In the framework of PLS, particular importance is attained to the fact – how a particular norm is interpreted by the Court, practicing lawyers or other addressees.<sup>22</sup>

In the final stage of PLS, the Committee elaborates conclusion or recommendation. The committee itself monitors the execution of the recommendation. The necessity to elaborate legislative amendments may appear on agenda as well. PLS is basically a mechanism placed in the hands of the committee, however, if the committee deems that, considering the importance of the issue, it must be subject to discussion by the Parliament, then the committee appeals to the Bureau to take the issue to the plenary sitting.<sup>23</sup>

17 Official web-page of the Parliament of United Kingdom, Rules and traditions of Parliament, 01/06/2020, <https://www.parliament.uk/about/how/role/customs/>

18 Official web-page of the Parliament of Georgia, Post-legislative Scrutiny, 01/06/2020, <http://parliament.ge/ge/normatiuli-aqtebis-agrulebis-kontroli>

19 Franklin De Vrieze, Post-Legislative Scrutiny – Guide for Parliaments, Westminster Foundation for Democracy (WFD), London, November 2017, p. 21; Post-legislative Scrutiny – Guideline for the Parliament, USAID Good Governance Initiative (GGI), Westminster’s Democratic Fund (WFD), 2019, p.14, 17.

20 In details, see Post-legislative Scrutiny – Guideline for the Parliament, USAID Good Governance Initiative (GGI), Westminster’s Democratic Fund (WFD), 2019; Franklin De Vrieze, Post-Legislative Scrutiny – Guide for Parliaments, Westminster Foundation for Democracy (WFD), London, November 2017.

21 Rules of Procedure of the Parliament (web-page, 14/12/2018), article 38.4.

22 Crawford, Tayla, Post-Legislative Scrutiny in New Zealand: Is a More Formal Mechanism Necessary? (April 3, 2018). Victoria University of Wellington Legal Research Paper, Student/Alumni Paper No. 32/2018, p. 6-7.

23 Rules of Procedure of the Parliament (web-page, 14/12/2018), article 38.

## THEMATIC INQUIRY

The practice of thematic inquiry derives from the British Parliament and nowadays, is used in many leading countries such as the USA, Canada, Austria, Germany, Norway, Australia, New Zealand, etc.<sup>24</sup>

Thematic inquiry is a kind of novelty for the Parliament of Georgia. This mechanism allows the parliamentary committee and standing parliamentary council to analyze received applications, ongoing events, make decisions to start scrutiny around particular significant issues considering public interest and other important factors. The mechanism ensures the involvement of interested persons in the process, as they can provide opinions through the established procedure and participate in the hearing of the issue.<sup>25</sup>

During PLS and thematic inquiry, mostly similar actions are carried out. However, in comparison to thematic inquiry, PLS has a narrow and precise purpose – to evaluate whether the adopted normative act has worked. The purpose of conducting thematic inquiry may be much wider and complex. Its task is to identify problems in the area of the work of the committee, study these problems and respond accordingly.<sup>26</sup>

Compared to PLS, the Rules of Procedure of the Parliament determine particular procedures for thematic inquiry. The reason for this is that thematic inquiry is conducted on a particular selected topic and it is relatively easier to frame it with a common standard, and the PLS relates to the implementation of normative acts of a different type and volume. Hence, in the first case, the Rules of Procedure defines particular procedures, and in the second case, the committee has more flexibility in that regard.

The procedure for thematic inquiry prescribed under the Rules of Procedure is as follows: 1. Determine an issue for thematic inquiry; 2. Form a group of thematic inquiry; 3. Stipulate technical requirements for thematic inquiry and their dissemination; 4. Receive opinions and analysis; 5. Conduct a hearing on the issue; 6. Prepare a conclusion.<sup>27</sup>

***Determining an issue for thematic inquiry.*** The issue for scrutiny may be selected considering the analysis of received applications, ongoing events, public interest and other important factors.<sup>28</sup> Thematic inquiry, in many cases, may not be related to issues regulated directly under the law, and the reason for the application of this measure may be the ambiguity and non-responded to ques-

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24 Guideline on thematic inquiry, prepared and published by initiative of the Parliament, by Westminster's Foundation for Democracy (WFD), with the support of UNDP and Swedish Government, 2019, p. 6,8.

25 Rules of Procedure of the Parliament (web-page, 14/12/2018), article 155.

26 Post-legislative Scrutiny – Guideline for the Parliament, USAID Good Governance Initiative (GGI), Westminster's Foundation for Democracy (WFD), 2019, p.10.

27 Rules of Procedure of the Parliament (web-page, 14/12/2018), article 155.

28 Rules of Procedure of the Parliament (web-page, 14/12/2018), article 155.2.

tions around this issue. For instance, in the Parliament of Georgia, thematic inquiry was conducted in relation to the following issues: “On the condition of atmospheric air in Tbilisi”, “On the participation of women in state economic programs”, “On the condition of art education in public schools and institutions outside school”, “Condition for ensuring proper dwellings for people in Georgia”, etc.<sup>29</sup>

The decision on the initiation of scrutiny is made by the majority of all enlisted members of the committee/standing council.<sup>30</sup>

**Forming a group of thematic inquiry.** In the framework of thematic inquiry, the thematic inquiry group is formed. If it appears that there is a desire to scrutinize the same issue in different committees, by the decision of the Bureau of the Parliament, Members of the Parliament participating in the scrutiny may be joined.<sup>31</sup> At the same time, the Rules of Procedure does not prohibit the MP to be part of thematic inquiry group created within the framework of other committees.

We must differentiate the thematic inquiry group from other temporary commissions of the Parliament. Thematic inquiry is a tool for the committee and the standing parliamentary council, and a temporary commission is formed by the Parliament, and therefore has higher legitimacy. Moreover, their mandate is also diverse. Before the temporary commission, a particular task of national or public importance is presented, which requires a solution and the Parliament is the body that has to decide on this issue. As for the thematic inquiry group, it is formed to study different actual issues that facilitate the development of the discussion on this issue, to identify problems, encounter novelties and elaborate new approaches.<sup>32</sup>

The thematic inquiry group must also be differentiated from the working group of the committee. The committee working group is created to support the work of the committee and prepare legislative issues in advance, as well as to address other ongoing issues. Mostly, its purpose is to support the legislative work of the committee, and the thematic inquiry group is appointed to study an actual issue and represents one of the mechanisms of parliamentary oversight.<sup>33</sup>

the thematic inquiry group, working on the issue, develops plan and schedule for studying the issue, determines the specialist needed to participate in the study, leads the study of the issue, is responsible for processing the issue and preparing a draft decision, studies information presented by interested persons, has a right to request and receive necessary information and explanations from administrative bodies for studying the issue. Documents received in the framework of inquiry are published on the web-page of the Parliament.<sup>34</sup>

29 Official web-page of the Parliament of Georgia, thematic inquiry, 01/06/2020, <http://www.parliament.ge/ge/tematuri-mokvleva>

30 Rules of Procedure of the Parliament (web-page, 14/12/2018), article 155.2, 155.3.

31 Rules of Procedure of the Parliament (web-page, 14/12/2018), article 155.

32 Guideline on the Parliamentary Oversight, USAID Good Governance Initiative (GGI), 2019, p.48.

33 Guideline for Staff of committees of the Parliament of Georgia, EU and UNDP, 2019, p.39.

34 Rules of Procedure of the Parliament (web-page, 14/12/2018), article 155.6.

**Forming and disseminating technical requirements for thematic inquiry.** The thematic inquiry group is obliged to ensure the placement of information regarding the commencement of thematic inquiry on the web-page of the Parliament no later than 5 days after initiation of the inquiry. This information must include the title of the issue and its description, information regarding MP/MPs working on this issue, as well as rules and dates for presenting opinions and respective documentation by interested persons.<sup>35</sup>

Considering international practice, the uniform style for elaborating these requirements was established by the Parliament of Georgia.<sup>36</sup> An important component of technical requirements is the questions prepared by the inquiry group, which derive from the theme of inquiry, and answering these questions represents the main purpose of the inquiry. Hereby, terms and dates are defined for presenting opinions related to these questions by interested persons.

**Receiving and analyzing opinions.** An interested person, in accordance with the rules envisaged by technical conditions for inquiry, presents his/her justified opinions. It is noteworthy that in the British Parliament, the terms witness and evidence are used for indicating an interested person and justified opinion in the framework of thematic inquiry.<sup>37</sup> In Georgian, the direct translation of these words – witness and evidence – creates an association with court proceedings, hence alternative terms were selected to adjust them to the Georgian language.

Interested persons are not required to respond to all questions of thematic inquiry. Presented opinions are published on the web-page of the Parliament.<sup>38</sup>

**Conducting a hearing on the issue.** An oral hearing on the issues represents an important component of thematic inquiry. The thematic inquiry group invites authors of opinions and representatives of respective bodies, and a discussion is held around the topic. During the oral hearing, members of the thematic inquiry group ask questions to the authors of opinions, which gives the possibility to clarify vague issues and receive additional information.<sup>39</sup>

**Preparing a Conclusion.** As a result of studying the issue, the thematic inquiry group prepares a conclusion. The conclusion must be prepared within a two-month period from the start of the thematic inquiry. This period, if necessary, may be extended by not more than 1 month. Based on the conclusion, the Committee or Parliament may elaborate on recommendations or execute other powers envisaged in the Rules of Procedure (for instance, prepare a legislative initiative or use other

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35 Rules of Procedure of the Parliament (web-page, 14/12/2018), article 155.5.

36 As an example, see technical conditions for thematic inquiry of the Committee on Environment Protection and Natural resources on the topic “Evaluating pollution of environment by lead in Georgia”;

[http://www.parliament.ge/ge/ajax/downloadFile/136792/TOR-კითხვარი\\_ტექნიკური\\_პირობები\\_დს](http://www.parliament.ge/ge/ajax/downloadFile/136792/TOR-კითხვარი_ტექნიკური_პირობები_დს)

37 Official web-page of the Parliament of the United Kingdom, Guidance on giving evidence to a Select Committee of the House of Commons, 01/06/2020, <https://www.parliament.uk/get-involved/have-your-say/take-part-in-committee-inquiries/commons-witness-guide/>

38 As an example, see opinions presented within the framework of thematic inquiry of the Committee on Sports and Youth Issues (how to increase level of physical and sport activity of the population of Georgia) <http://www.parliament.ge/ge/saparlamento-saqmianoba/komitetebi/sportisa-da-axalgazdul-saqmeta-komiteti-1155/tematuri-mokvleva1/dasabutebuli-mosazrebebi>

39 Guideline on thematic inquiry, prepared and published by initiative of the Parliament, by Westminster’s Foundation for Democracy (WFD), with the support of UNDP and Swedish Government, 2019, p. 36-40.

mechanisms of parliamentary oversight). Developed recommendations and/or tasks are sent to the respective administrative body and is published on the web-page of the Parliament.<sup>40</sup>

The Committee on Environment Protection and Natural Resources, already before the adoption of new Rules of Procedure, with the support of Westminster’s Foundation for Democracy, conducted two pilot thematic inquiries on the topics: “The atmospheric air condition in Tbilisi” and “Conditions existing in the area of municipal waste”.<sup>41</sup> Sharing British experience and their involvement in the process of establishing this mechanism had a particular impact. For example, the report on thematic inquiries prepared in the Parliament of Georgia almost completely repeats the style and components of the inquiry of the UK Parliament.<sup>42</sup>

## THEMATIC RAPPORTEUR

One of the notions of the Parliament’s reform in 2018 is the thematic rapporteur institute. This is a particular analog to the institute of Rapporteurs existing the Parliamentary Assembly of the Council of Europe.<sup>43</sup>

The institute of thematic rapporteur has several important aims: better management of legislative oversight and other activities of the Parliament; ensuring the quality of work by the Parliament and its division among MPs.<sup>44</sup>

Thematic rapporteurs divide among themselves different directions within the committee and are responsible for the implementation of obligations envisaged under the action plan of the committee. This creates a guarantee that there always will be MPs in the Parliament working on diverse areas of government. Therefore, the study of issues in different directions and the identification of problems will be facilitated. Besides acting in the legislative direction, a thematic rapporteur has a significant role in terms of parliamentary oversight. He/she presents initiatives; gets acquainted with news, citizens’ letters or petitions in a certain direction; is constantly interested in the work of respective administrative bodies, etc.<sup>45</sup>

40 Rules of Procedure of the Parliament (web-page, 14/12/2018), article 155.8.

41 Official web-page of the Parliament of Georgia, 01/06/2020, <http://www.parliament.ge/ge/saparlamento-saqmianoba/komitetebi/garemos-dacvisa-da-bunebrivi-resursebis-komiteti/sakomiteto-mokvleva>

42 For comparison see Report of the thematic inquire of the Parliament of Georgia “On the atmospheric air condition in Tbilisi”: [http://www.parliament.ge/ge/ajax/downloadFile/122514/3აერის\\_ანგარიში\\_საბოლოო\\_თგ](http://www.parliament.ge/ge/ajax/downloadFile/122514/3აერის_ანგარიში_საბოლოო_თგ) and Report on thematic inquiry of the UK Parliament for analogous topic <https://publications.parliament.uk/pa/cm201516/cmselect/cmenvfru/479/47902.htm>

43 Rules of Procedure of the Assembly (July 2019), Code of conduct for rapporteurs of the Parliamentary Assembly, <http://assembly.coe.int/nw/xml/RoP/RoP-XML2HTML-EN.asp?id=CHDBFHJD>

44 Rules of Procedure of the Parliament (web-page, 14/12/2018), article 45.

45 Guideline for Committee staff of the Parliament of Georgia, EU and UNDP, 2019, p. 23.

The chairperson for the Committee appoints members of the committee as rapporteurs, considering their initiatives. For each working area/direction prescribed in the action plan of the committee, one thematic rapporteur shall be responsible for the majority and, in case of desire, one thematic rapporteur from the members of faction and independent MPs, who are not part of the majority. For the same working area/direction, the appointment of third and every following rapporteur must be admissible by the decision of the chairperson of the committee. In case no one shows interest in being the thematic rapporteur for the working area/direction prescribed under the committee action plan, the chairperson of the committee determines the name of the thematic rapporteur personally. The unified list of thematic rapporteurs, with indications of respective the working area/direction, is published on the web-page in accordance with the committees.<sup>46</sup>

The practice has shown that for the current stage, the institute of thematic rapporteur had more difficulties solidifying the process of implementing the novelties envisaged under the Rules of Procedure. Reasons for that may be several: the application of this mechanism depends on the activity of certain MPs; the existing practice of involvement by MPs in the routine work of the committee is rather poor; the institute of the thematic rapporteur is more of an organizational change, and it did not appear easy to shift to a new track to the end of the Parliament's authority.

## CONCLUSION

By the Rules of Procedure of the Parliament of Georgia from 2018, an important step was taken forward in terms of establishing and strengthening parliamentary oversight in the country.

The purpose of this article was to show those extraordinary mechanisms established by the new Rules of Procedure, which, along with relatively familiar and standard oversight mechanisms, must accept a new word into Georgian Parliamentary life.

Currently, a conclusion with regard to the discussed mechanisms (PLS, thematic inquiry and thematic rapporteur) may be presented in three directions – expectations, existing practice and risks.

**Expectations.** All three discussed mechanisms give the possibility to assimilate new action areas, which in the conditions of parliamentary governance, have even more value: a) PLS gives the possibility for the Parliament to check how the adopted normative act works in reality, which is particularly important for the sustainable development of the country. b) Thematic inquiry ensures the clarification of a number of issues and seeks answers to existing questions with the involvement of society. Thematic inquiry may become a course for numerous new discoveries, new approaches or

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<sup>46</sup> Rules of Procedure of the Parliament (web-page, 14/12/2018), article 45.

regulations. c) Institute of thematic rapporteur gives the possibility to systematically have different directions from all spheres of governance on agenda, in terms of legislation, as well as oversight of implementation.

**Lack of existing practice.** Less than a year and a half has passed since the enactment of the new Rules of Procedure of the Parliament. For the effective evaluation of the impacts and results of the discussed mechanisms, this period is quite short. It shall be mentioned that after the enactment of new the Rules of Procedure, other surrounding factors caused a significant obstruction of parliamentary activity. After the events of 20 June 2019, and later the failure to adopt constitutional amendments, resulted in a boycott from the side of the opposition and mass protests, thus the complete functioning of the Parliament was constrained. The spring session of 2020 was affected by the reality of pandemics and a state of emergency. This year is the year of parliamentary elections, and this obviously will reduce the intensity of Parliament's functioning in the pre-election period. Hence, profound deliberation on the weak and strong sides of these mechanisms will be possible within the activity of the Parliament of the next convocation.

**Risks.** The application of these mechanisms mostly depends on the activity and political will of the MPs. Considering the fact that the Parliament of Georgia does not have significant experience in terms of oversight activity, the establishment of new mechanisms has its risks. Therefore, there must be no expectation of fundamental improvement. The Parliament is a political body, which is characterized by freedom of action, consequently, practice and traditions hold an important place in parliamentary life. Legislative regulations alone cannot ensure the effectiveness of these mechanisms and there is a necessity to develop a culture in this direction, which requires some time.

It is probable that in the X convocation (2020-2024), the issue of oversight over the implementation of the new Rules of Procedure will appear on the agenda of the Parliament, and a thorough analysis of the accumulated practice and oversight mechanisms will be improved and modified.

Shota Kobalia\*

# THE ESSENCE OF THE ENTITLING NORM IN THE CONTEXT OF THE TWO CONCEPTS OF LIBERTY AND THE DOGMATIC PECULIARITIES RELATED TO ITS CONSTITUTIONAL CONTROL

## ABSTRACT

The purpose of this paper is to discuss the nature of the entitling norm with respect to the fundamental constitutional principles and the well-established concepts of normative philosophy regarding positive and negative liberty as well as to consider its relevance with the projection of the government's power, and to determine its constitutional and legal features.

This paper affirms the statement, that in case the norm is in substantial connection with the realization of civil and political rights, the core of which is the negative liberty, notwithstanding its formally entitling nature, cannot be considered as entitling, from a dogmatic perspective. The paper criticizes the practice of the Constitutional Court of Georgia and identifies logical, as well as substantive cases of inconsistency in judicial reasonings

**Key words:** *entitling norm, negative freedom, constitutional control*

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## INTRODUCTION

In the modern constitutional framework, the law constitutes an exclusive form of execution of political power<sup>1</sup>. The goal of a liberal constitution is not to “establish” human rights and freedoms, but rather to organize and limit the government so as to realize the rights and freedom – inherent attributes of a human, due simply to the fact that they are humans and do not owe its regulation, positivization and practical execution to the Supreme Law of the State – Constitution.

The similar ideological approach has vital importance for the analysis of the systematic logic of the social order established by the Constitution and for its implementation at all institutional levels. In the legal system based on constitutional values, human freedom, is a so-called “default”<sup>2</sup> statement as the State does not provide freedom. Rather it states only restrictions, with a very specific reason: to balance the interests worthy for protection in conflict. Public authority has the sole instrumental value within these processes. The “default” nature of the individual’s autonomous sphere represents the major value in the abovementioned.

Legal norms can be divided into two categories: entitling and binding (or obligatory), depending on the nature of regulating both, vertical and horizontal relations.

This paper will analyze the forms of political power, exercised by the public authorities, providing individuals with powers, in a substantive sense, as well as the forms that create the illusion of the entitling nature of the norm.

## A CONSTITUTION ON THE EDGE OF THE POSITIVE AND NEGATIVE CONCEPTS OF LIBERTY

Law is a form of social order, where moral imperatives, set out in the society, find reflections. Human rights, in their essence, constitute requests of moral nature, from the part of the individual, containing the moral subject matter of the society and the State<sup>3</sup>. Liberty is one of the moral categories that is the core part of the various rights and forms the basis for an individual’s legal subjectivity. Liberty as a moral and political ideal is systematically discussed in Isaiah Berlin’s famous essay “Two Concepts of Liberty”, through which he distinguishes the notion of negative and positive liberty:

1 Grimm, D. (2012). *Oxford Handbook of Comparative Constitutional Law: Types of Constitutions* (pp.104). Oxford University Press.

2 Primary data that exists until external forces change it  
<https://dictionary.cambridge.org/dictionary/english/default>

3 Dworkin, R. (1977) *Taking rights seriously*, London: Duckworth

„The positive definition of liberty becomes effective when we try to answer to the questions: “Who is governing me?”, “Who should tell me what to do?” or “What should I do and who should I be?”, and not when the questions arise: “What can I do?” and “Who can I be?” Thus, the link between democracy and an individual’s liberty is significantly weaker than many supporters of one or the other may believe. The desire of self-governance or to take part in the process of governance of one’s own life can be as great as the desire to have free field-action, and historically, perhaps even be older. However, in the relevant case, we don’t want the same. Actually, the subjects here are completely different, and it was this circumstance that led us to the great clash of ideologies that subjugated our world. The “positive” idea of freedom implies not freedom “from” (as the negative freedom implies), but freedom “to” – freedom to live according to the rules of life”<sup>4</sup>.

Thus, freedom **from something** is negative, whereas freedom **to something** is positive. Negative freedom focuses on the process of identifying the autonomous sphere – a person is free if he or she does not experience the impact of external power on his or her autonomous sphere, and for positive freedom, the starting point is not the process but the outcome – the extent to which the person has the appropriate conditions for self-realization. Accordingly, negative freedom can be understood as a freedom of “opportunity”, while positive freedom – as freedom of “realizing” one’s rights.

Negative freedom represents the core of civil and political rights. So for example, rights such as: freedom of expression, the right to privacy, the right to physical integrity, the right to life, and so on, contribute to the realization of a specific aspect of the autonomous sphere, the sphere protected by each of these rights is inviolable until it experiences external intervention. On the other hand, positive freedom is the basis of economic, social and cultural rights, the so-called positive rights<sup>5</sup>.

Although the Constitution is the product of traditional liberal thinking, for which the starting point is the negative notion of freedom – the exclusion of external interference in autonomy, in some cases it also includes positive notions, e.g.: The right to work in safe working conditions protected by Article 26 of the Constitution of Georgia, the right to receive a pre-school education guaranteed by Article 27 and the right of a citizen to provide quality health care services protected by Article 28 (1).

A clear manifestation of the boundary between positive and negative notions as of the cores of rights is the right to equality protected under Article 11 of the Constitution of Georgia, according to the first paragraph of which:

*All persons are equal before the law. Any discrimination on the grounds of race, colour, sex, origin, ethnicity, language, religion, political or other views, social affiliation, property or titular status, place of residence, or on any other grounds shall be prohibited.*

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4 Berlin, I. *Two concepts of liberty: an inaugural lecture delivered before the University of Oxford Clarendon Press on 31 October 1958* (pp.131). Oxford

5 Sunstein Cass R. (1993). *Against Positive Rights Feature*. 2<sup>nd</sup> East European Constitutional Review 35

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The Constitutional Court of Georgia, in the interpretation of Article 14 of the edition of the Constitution of Georgia acting before December 16, 2018, stated the following:

“In order to understand the essence of Article 14 of the Constitution of Georgia, it has to be noted that the fundamental significance relies on the difference between equality before the law and the parity. Within the framework of this principle, the parity of people cannot be considered as a main objective and function of the State, since this would contradict with the idea and right of equality itself. The idea of equality ensures equality of opportunity and guarantees equal opportunities for self-realization of people in different fields.”<sup>6</sup>

A new edition of the Constitution of Georgia (Article 11, Paragraph 3) has been supplemented with a provision that differs substantially from the logic of the first paragraph:

*The State shall provide equal rights and opportunities for men and women. The State shall take special measures to ensure the essential equality of men and women and to eliminate inequality.*

Paragraph 2 of Article 11 of the Constitution of Georgia, in comparison to paragraph 1, provides the protection of the equality of results – the State undertakes to ensure the actual parity (and not equality) of women and men in different segments of social relations. The requirement of the first paragraph of Article 11 of the Constitution of Georgia is protected insofar as the legal act does not establish a different legal regime for substantially equal persons. It leaves the possibility for individuals to act in their own autonomous space, albeit this would cause different actual results in substantially equal conditions. As for paragraph 3, the primary importance is not the scope of the autonomous sphere, but the result, even if its realization is caused by factors beyond the autonomy of the individual (ex: the Gender Equality Program implemented by the State). Equalization of individuals implies filling the legal spaces that the autonomy of the individual cannot cover independently. On such occasions, any measure taken by the State at that time can be considered as entitling.

Conditionally, if the first provision of the act issued by the State prohibits the use of freedom of movement for individuals living in point A, the second provision of the same act allows persons between the ages of 18-25 to move before 18:00. It will be dogmatically unjustified if the second provision would be qualified as an entitling norm. On a given occasion, the field of relations concerns the realization of civil-political rights, freedom of movement, which is a benefit protected by the field of individual negative freedom. If we analyze this relationship within the framework of systemic logic, we find that the State can only limit it, regardless of the verbal framework of the norm. Supposing the opposite will lead us to argue that the State can create a person's negative freedom, which is a conceptual and philosophical inaccuracy even when the second provision of the Act, in a formal sense, is entitling. On the other hand, if an act issued by the State allows individuals with disabilities

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<sup>6</sup> See Judgement of the Constitutional Court of Georgia, N2/9/810,927, 7 December, 2018

to access the relevant inventory within the framework of a social program, it will represent an act of substantive entitlement, as the positive notion of freedom has been realized.

## THE PRACTICE OF THE CONSTITUTIONAL COURT OF GEORGIA IN TERMS OF DOGMATIC IMPERFECTION

The approach of the Constitutional Court of Georgia to identify the entitling norm may become of practical importance and, therefore, a subject of a wide theoretical discussion. The Constitutional Court of Georgia is a body, overseeing so-called abstract constitutional control, that determines not the constitutionality of decisions made by common courts, but the constitutionality of the norms restricting fundamental human rights.<sup>7</sup> The Constitutional Court of Georgia represents a negative legislator. It does not elaborate new normative material, but rather abolish the norm/normative content inconsistent with the Constitution.<sup>8</sup> The qualification of the norm as an entitling, in main cases, precludes its constitutional control over it, since constitutional control implies the determination of compliance with the Constitution of the rule of restrictive behavior in the field of fundamental rights and does not define the issue of expanding the scope of the right. (The exception may be the right to equality, for which equal treatment by the State is a cornerstone, regardless of whether the norm limits a person's autonomy or not.)

According to the general standard established by the Constitutional Court of Georgia:

*“The lack of application of the entitling norm on the different legal relation does not constitute a restriction of the right per se.”<sup>9</sup>*

The lawsuit filed by Nodar Gogitashvili, a citizen of Georgia, against the Parliament of Georgia, is a clear demonstration of the issue related to the restriction of the autonomous sphere by the negative freedom and the entitling norm. He considered it absolutely unconstitutional to define the circle of persons enjoying the right of long-term visitation in prison and the impossibility of establishing direct contact with a homosexual partner in relation to the right to free development of the individual. The Constitutional Court did not accept the claim on the following merits:

*“Article 16 of the Constitution of Georgia contains the substantive material right. The constitutionality of the disputed norm in relation to the above-mentioned right can be examined only if*

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<sup>7</sup> See Judgement of the Constitutional Court of Georgia, 1/23/824, II -13, 28 December, 2018

<sup>8</sup> Sweet, S. (2010). *Constitutional Courts* (p.6). New York Press

<sup>9</sup> See Ruling of the Constitutional Court of Georgia N2/11/654 court ruling, II-2-5. 31 July 2015

*the appealed normative rule restricts the scope of the article protected by the Constitution. In order to substantiate the relationship between the appealed norm and the above-mentioned provision of the Constitution, it is necessary to prove that the appealed norm establishes a restriction on the effective use of any component of the substantive law.*

*PACE Code lists the number of persons with whom a convict can exercise the right to a long visit. This norm, substantially is of a restrictive nature and it does not prohibit the use of long-term visitation. Otherwise, the disputed norm does not have the legal nature restricting the material right”<sup>10</sup>.*

The core of a person’s right to free development is the negative notion of freedom, it claims the freedom of the individual as “Default” and protects all aspects of personal life that are not covered by other provisions of the Constitution. The ability to communicate directly with a favored person is one of the components of the right to privacy<sup>11</sup>, imprisonment, with the restriction of the autonomous sphere restricted by negative freedom, leads to the restriction of the sphere protected by the right to privacy. In other words, in a given legal relation, there is a case by imprisonment, the State first limits the autonomous sphere of the individual protected by the free development of the individual, and then “returns” to a certain group of individuals a small volume of the already limited autonomous sphere. To insist that the norms appealed by Nodar Gogitashvili are intitling, and thus, it has nothing to do with the right to free development of the individual, it is tantamount to say that in the area protected by the right to free development of the prisoner’s personality, there is no possibility of establishing communication with the desired person. Under these conditions, the question of the demarcation of the line between internal and external restriction of constitutional right becomes vague<sup>12</sup>. The internal restriction of the constitutional right derives from the structure of the legal sphere protected by the Constitution. An external restriction is legitimately based on the prospect of restricting this area of the legal system. Conditionally, according to Article 24 of the Constitution of Georgia:

“Every citizen of Georgia who has attained the age of 18 shall have the right to participate in referendum or elections of state and self-government bodies”.

This constitutional provision, with reference to category of age, establishes an internal restriction – the right to participate in the elections is not a constitutional right of persons under the age of 18 – such a legal field does not exist at all. The second paragraph of Article 16 of the Constitution of Georgia, which makes the following reservation regarding the restriction of freedom of religion, belief and conscience, can be used as illustrations of external restriction:

<sup>10</sup> See Ruling of the Constitutional Court of Georgia N1/3/1284. 11 May, 2018

<sup>11</sup> Espinosa M. *Privacy* (pp.972). The Oxford Handbook of Comparative Constitutional Law

<sup>12</sup> Stephen, G. (2007). *Limiting Constitutional Rights*,.University of California, Los Angeles

*“The exercise of the rights enumerated in the first and second paragraphs of the present Article may be restricted by law on such conditions which are necessary in a democratic society in the interests of ensuring public safety, health and others rights.”*

In the case under consideration, it is understood that a person has a constitutional right, and interference in it is allowed by imposing external restrictions on the protected area in order to realize legitimate interests.

Imprisonment is a special legal regime that naturally restricts a persons’ access to a number of legal benefits, although this “restriction” should be considered not as an “internal”, but as an “external” restriction of a persons’ right to free development, which requires justification.

In accordance with the abovementioned decision, the Constitutional Court, in fact, imposed an “internal” restriction on the right to free development of a person, and stated that the right to freedom of development of a person deprived of liberty does not include the possibility of establishing communication with the desired person. This reasoning of the court was based on the notion that the appealed norm, in its verbal context, is an entitling norm. I believe that such an approach is formalistic and leaves unanswered the dilemma identified as a case in the first chapter of the paper, when the State first limits the autonomous sphere of negative freedom (in this case the freedom of movement) and then limitedly returns a certain part of this autonomous sphere. In such a case, the norm is formally binding, but at the substantive level, it is restrictive in nature which creates a legitimate basis for the implementation of normative control over it.

I believe that the court should be guided by the following test to determine the substance of a formally entitling norm and to determine the appropriateness of exercising constitutional control over it:

- Is the legal good provided by the formally entitling norm covered by the constitutional provision that does not have a direct link with this good?
- Does the formally entitling norm exclusively regulate the issue of access to legal good considered within it?

Conditionally, if the norm is formulated as follows:

*“Citizens of Georgia have the right to own property.”*

The verbal context of the norm, at first glance, indicates its entitling nature, however, it would be restrictive to a non-citizen of Georgia, if it would have exclusively regulated access to the legal good in it – the right to own real estate. Thus, both of the above two-step test criteria would be met. (1) The right to own real estate is an integral part of the sphere protected by the constitutional right of a non-citizen of Georgia and he does not have access to this right. (2) Access to the legal good is exclusively regulated by the formally entitling norm.

Such a norm is, of course, formally entitling, but in systemic terms, it is restrictive in nature to those who do not have access to the appropriate legal good. It would be logical to conclude that at

such times, the norm has a normative content that does not give a non-citizen of Georgia the right to own real estate. Constitutional control over this type of legal regulation should be considered as an action within the competence of a negative legislator.

A similar problem is found in the ruling of the Constitutional Court of Georgia on July 27, 2018<sup>13</sup>. The plaintiff challenged Article 81<sup>1</sup> of the Civil Procedure Code of Georgia regarding the constitutional right of a fair court, according to which, in the cases provided by the legislation of Georgia, a minor under the age of 14, has the right to address to the court to protect his or her rights and legitimate interests. The plaintiff appealed that the norm restricted the rights of a minor under the age of 14 to appeal to the court and, thus, restricted the right of a minor to a fair trial under the age of 14. The Constitutional Court qualified the appealed norm as entitling, but did not accept the appeal on the following merits:

“The Constitutional Court cannot read the restrictive rule in the words of the disputed entitling norm, just because the legislature passed Article 81<sup>1</sup> of the Civil Procedure Code without those words, it would have been broader. Thus, the disputed norm, as well as the first sentence of Article 81<sup>1</sup> of the Civil Procedure Code of Georgia, does not limit the first paragraph of Article 42 of the Constitution of Georgia. Consequently, the constitutional claim in the part of the claim for unconstitutional recognition of a disputed norm with respect to the right to a fair trial is unfounded”.

For the purposes of this paper, it is irrelevant to consider whether it was appropriate for the plaintiff to appeal not the normative content of the norm, but individual words. However, what deserves attention within the framework of the issue under consideration is the qualification of the appealed norm as an entitling norm by the Constitutional Court without the submission of any systematic arguments. In this case, the court clearly ignores the fact, that interference with the constitutional right can occur not only in a negative way- by excluding and limiting the normative aspects covered by the protected area, but in a positive way as well – by limiting the exhaustive the normative aspects covered by the protected area.

The first paragraph of Article 42 of the current version of the Constitution of Georgia of December 16, 2018 has no internal restrictions:

“Everyone has the right to a fair trial to protect his rights and freedoms.”

This means that any kind of legal barrier to the right to appeal to the court (whether it is based on subjects or age category) constitutes an external restriction and, thus, an interference with the constitutional right. Conditionally, if there was a negative record in the Code of Procedure: “Persons under the age of 14 do not have the right to address the court.” – the court would not have qualified the norm presented by such wording as an entitling norm and most likely would have stated the wording as an intervention in the right to a fair trial, while the restriction presented by a positive sentence – “Minors have the right to appeal to the court from the age of 14 (which is substantially

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<sup>13</sup> Court ruling of Constitutional Court, 27 July, 2018, N2/17/1301

identical to negative restriction) qualified as entitling and from the very beginning, the interference in the sphere protected by the constitutional right was excluded". Because of the fact that the right to appeal to a court falls within the scope of the constitutional right of persons under 14 (in general), and the appealed norm refers exclusively to the access of minors to the mentioned legal good, both of the above two-step test criteria are met – the norm, despite its formally entitling nature, is not entitling in a substantive sense.

The decision of the Constitutional Court of Georgia of December 28, 2017 is also noteworthy. The plaintiff disputed Article 106, part 10 of the Criminal Procedure Code of Georgia, in relation to the right to liberty, which provided for the possibility of filing a motion with the court on the selection of imprisonment as a measure of restraint against the accused in the event of the concealment of accused. In such a case, no later than 48 hours after the arrest of the accused, the magistrate shall be obliged to appear before the judge according to the place of investigation. According to the Tbilisi City Court, the guarantee established by the disputed norm applies only to those wanted accused, which were extradited at the pre-trial stage and not at trial. The plaintiff was a person extradited at the trial stage; a person who had not been brought before a court within 48 hours of arrest. He argued that the failure to appear before the court on the expediency of using detention as a measure of restraint for 48 hours unjustifiably restricted the constitutional right to liberty (Habeas Corpus).

In accordance with the Constitutional Court:

"The appealed norm does not apply to the cases of extradition after the investigation of the accused. However, the non-application of certain norms in the different relations, of course, does not restrict any right. The disputed norm has an entitling effect on the persons to whom it applies."

Like the examples discussed above, the Constitutional Court, in this case as well, without presenting any systematic arguments, based solely on the sentence structure and its verbal context, qualified the norm as entitling, thus precluding interference with the constitutional rights. It is worth noting that, the dogmatic problem of the qualification of the norm as entitling by the Constitutional Court has not been leveled. Judge Lali Papiashvili and Merab Turava presented a different opinion on the issue:

"The disputed norm in the case under consideration constitutes a regulation of a special nature, within which the plaintiff's legal problem is also addressed, and due to the fact that there is no other legislative norm to regulate this issue more directly, we consider that the implementation of the instructions by the Constitutional Court in the mentioned conditions – to find a norm of a special nature or to apply the general grounds of detention, which in turn, is not in relation with the subject matter of the dispute, and does not have the normative nature by the plaintiff, does not serve the purposes of constitutional justice."

"Based on all of the above, we consider the factors in the case under consideration, on one hand – the lack of a special norm regulating the legal problem and, on the other hand, the

interpretation of the appealed norm by the court in such a way as it is identified in the constitutional claim, indicates the restrictive nature of the mentioned norm”<sup>14</sup>.

According to the authors of different opinions, the formally entitling character of the norm is not sufficient to prove that it does not have a restrictive nature, because of the fact that “...there is no legislative norm to regulate this issue more directly,...”. However, to the axis of this argument, which is essentially related to the second criterion of the two-step test, the first criteria of the test should be added as well – access to the good regulated by a norm that substantially, should enter within the scope of the constitutional rights.

In order to identify the entitling norm and to delineate a formally and substantially entitling nature and to maintain systematic logic within its constitutional control, its is fundamental

To distinguish between negative and positive liability of the State for the realization of negative, civil/political right on one hand, and positive right on the other hand. The State has a positive obligation to regulate the restriction of the legal sphere confined by negative freedom, imposing various formal or procedural guarantees. However imposing similar guarantees, by itself, does not mean equipping a person with the right. On the contrary, it is a measure taken by the State in the process of restricting the area of rights restricted by negative freedom.

Habea Corpus – the right to freedom, a protected right under Article 13 of the Constitution of Georgia, is essentially linked to the individual’s rights protected by negative freedom. The State has a positive obligation to reflect the conditions of restriction of the mentioned right and related procedural guarantees in the legislation. Saying that a measure taken by the State in relation to this type is of an entitling nature is tantamount to proving that the State can create an area protected by negative freedom. This dogmatic problem was not only not overcome, but not even identified in the above practice of the Constitutional Court.

Cases of inconsistency of the Constitutional Court of Georgia with the constitutional control of the formally entitling norm are the cases, when the court has ruled substantially differently cases of restriction of the right to equality with a formally enforceable norm. For example, the Constitutional Court of Georgia, in its decision of July 3, 2018 held that the tax law, which imposed tax benefits on the Georgian Apostolic Autocephalous Orthodox Church, unjustifiably violated the right of religious minorities to equality. Thus, in the present case, the Court has rightly excluded from the norm the normative content which provided for the non-proliferation of tax privileges on religious minorities. Although the norm was formally unjustifiable, it essentially exclusively regulated the issue of imposing tax benefits on specific cases, and thus, even in the area of legal equality, had a restrictive character to specific entities.

Lali Lazarashvili, a citizen of Georgia, opposed the decision of the Constitutional Court of Georgia on November 10, 2017, against the Parliament of Georgia, where the plaintiff argued that the norm, which assigned a certain category of judges to the Supreme Court to be compensated 1200

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<sup>14</sup> The decision of Constitutional Court, 28 December 2017, III 14-15

GEL as soon as they reach retirement age, was unconstitutional in relation with the right of equality. Despite the fact that this norm exclusively regulated the compensation of judges of the Supreme Court, the court did not satisfy the constitutional claim and noted:

*“The disputed norm does not have any content, which can be considered as depriving the plaintiff the right to receive compensation. Therefore, the cancellation of any part of the disputed norm/normative content will not lead to the appointment of compensation for the plaintiff.”*

If the Constitutional Court was guided by the mentioned standard, the lawsuit would most likely not be satisfied, as the appealed norm was formally entitling and did not in itself preclude the distribution of tax privileges to religious minorities. The inconsistency of the decision from the Constitutional Court in relation to constitutional control leads us to think that the Court did not fully define the dogmatic framework on this issue and in some cases, limited itself to a formal analysis of the verbal context of the norm.

## CONCLUSION

Constitutional control requires an in-depth analysis of the nature of the government’s power expressed in legal norms. The legal norm expresses the relationship between the individual and the government. This relationship should be in harmony with the dogmatic aspects of the legal system. The default nature of individual freedom (in the negative sense), its primacy, and the secondary, instrumental value of public authority are an integral part of the dogmatic of the legal system. Within the framework of the relationship directed by the government to the restriction of individual freedom, the formalization of a formally normative norm as a substantive normative norm contradicts the systematic logic of law and does not correspond to its fundamental dogmatic characteristics.

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