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APPLICATION OF THE CASE LAW OF FOREIGN COURTS AND DIALOGUE BETWEEN CONSTITUTIONAL COURTS*

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As the number of constitutional courts, i.e. courts vested with the authority to administer constitutional review, increases, the dialogue between courts and/or the application of the jurisprudence of foreign courts by a domestic court acquires more significance. There is a long distance between those advising against a court's reliance on the case law of foreign tribunals and those advocating extensive cooperation between judiciaries. The present Article¹ aims at unveiling the existing approaches and realities based on diverse sources².

INTRODUCTORY REMARKS

1 – The history of constitutional courts in a nutshell

In a general perspective, every legal system, in accordance with its historical and cultural development, has had courts and tribunals that are competent in civil, criminal and administrative matters in place. However, the history of existence of courts enjoying the authority in constitutional matters i.e. tribunals responsible for ensuring constitutional supremacy within their respective legal orders is, at least in terms of history of law, relatively short.

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* The present article is a revised and competed version of the presentation given at the plenary session of the World Conference of Constitutional Justice organised by the Constitutional Court of South Africa and the Commission for Democracy through Law (Venice Commission) of the Council of Europe on 22-24 January 2009 in Cape Town (South Africa).

¹ In this case, it is not intended to give a comprehensive account of the subject. Moreover, this task would be impossible given the number of courts and different circumstances.

² See, bibliography, annexed.

In traditional European law, in the United Kingdom (Bonham case of 1610)³ and on the continent, it can be said that sovereign courts, notably courts named “Parliament” in France before 1789, could review legal norms or judicial decisions in terms of superior norms or norms of natural law. However, the term “Constitutional Court” (i.e. a court vested with the authority to exercise “constitutional review”) originated and was coined for the first time with the application of the Constitution of the United States of 1787 in the decision of *Marbury v. Madison* case of 1803⁴. This is the most celebrated decision in the entire body of constitutional law and contains the following phrase, written by the quill pen of Chief Justice Marshall, which would adorn the pediment of any constitutional court: “[c]ertainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature repugnant to the constitution is void.” Ever since the judgment, the Supreme Court of the United States is considered a doyenne of constitutional courts.⁵

While 19th century was marked by the development of written constitutions in Europe and Latin America, not all of those documents contained provisions on constitutional courts. In the course of decades in the same century, the decision of the Supreme Court of Norway of 1 November 1866 is notable and considered to be the *Marbury v. Madison judgment of Norwegian law*.⁶ In 1867, the Tribunal of Austro-Hungarian Empire had an express function to guarantee the rights set forth in the Basic Law of 21 December 1867 on the General Rights of Nationals in the Kingdoms and Lands represented in the Council of the Empire. In 1912, the Court of Cassation of Romania also applied the reasoning of *Marbury v. Madison* judgement, having agreed to pronounce itself on the constitutionality of the law necessary for the outcome of the proceedings.⁷

In the course of 20th century, two periods are to be distinguished: the first period covers the first half of the last century. Following the works of Hans Kelsen and the adoption of the Constitution of Austria in 1920, an Austrian-Kelsenian model of autonomous constitutional jurisdiction was established across Europe (Austria, Czechoslovakia, Lichtenstein...). Though the Courts’ efficiency regarding the protection of democracy and human rights marked its start with the admission of failure during World War II, the idea of considering the Constitution to be more than merely a political norm and legally binding as well was becoming less debatable with time.

³ Despite the fact that the impact of the decision and the commentaries of Sir Edward Coke were under extensive discussions, its existence witnesses the possibility to review the acts of parliament within the common law system. It is noteworthy to draw comparison between the aforementioned judgment and the decision of the Supreme Court of India of 1967 (*Golak Nath v. State of Punjab*) where the Court held that “The authority of the Parliament to amend the Constitution is not extended to the amendment of any fundamental right provided therein”, AIR, 1967 S.C. 1643 (1967) 2 SCJ (486).

⁴ *Marbury v. Madison*, 24 February 1803, 5 US (S.Ct) 137 (1803).

⁵ In its decision on *Law Society of Upper Canada v. Skapinker*, the Supreme Court of Canada made an express reference to *Marbury v. Madison*, (1984) 1, RCS, 357.

⁶ Eirik Hoølmøyvik, “Why did the Norwegian Constitution of 1814 Become a Part of Positive Law in the Nineteenth Century?” blogit.helsinki.fi/Holmoyvik-paper-Tartu.doc; Katim M. Bruzelius, “Judicial Review within a Unified Country”, www.venice.coe.int/WCCJ/Papers/.

⁷ The Court of Cassation of Romania, 16 March 1912, #261; See, Gérard Conac, “Une antériorité Roumaine: le contrôle juridictionnel de la constitutionnalité des lois », *Mélanges Slobodan Milacic*, Démocratie et liberté : tension, dialogue, confrontation, Bruylant, Belgique, 2007.

The second period starts from 1945 and can be justifiably characterised as the period of expansion of constitutional courts. In any part of the world, the establishment of a democratic constitution founded on the voters' sovereignty, balanced separation of powers, and respect for rule of law implies the creation of a constitutional court. Germany (1949), Italy (1947), India (1949) – in the form of the Supreme Court- France (1958), Portugal (1976), Spain (1978), most of the countries in central and eastern Europe (except Estonia, where constitutional review is exercised by the State Court), in 1990s, Canada (1982), Botswana (1965), Brazil (1988), Russia (1993), South Africa (1994), Chile (1980, with subsequent changes), Bosnia-Herzegovina (1995), Andorra (1993) and Namibia (1998) experienced either the creation of constitutional jurisdictions or the extension of competences of existing courts, mostly supreme courts, in the constitutional domain of fundamental rights.

While these courts do not enjoy same status, competences or denomination, let alone complete guarantee of independence, the creation of regional and linguistic assemblies of constitutional courts suffices to argue the above development.⁸ Stemming from the abovementioned, there is an important finding that is essential in terms of the topic of the present article: the most recent courts tend to look toward older courts and open dialogue with them. It is true both in terms of institution itself (organisation, competences, procedure etc,) and getting familiar with its jurisprudence if need be.

2. Different types of courts competent to exercise constitutional review

It is universally acknowledged that the courts vested with the power of constitutional review do not fall under certain unique model. The Supreme Court of the United States is defined as a Supreme Court model. The US Supreme Court finds itself on top of the judicial hierarchy and exercises constitutional review only where the case before it, notwithstanding the relevant procedures, involves the assessment of the application of the Constitution or the respect for constitutional provisions and principles by political or legal bodies. The said model *mutatis mutandis* exists in India, Japan, Israel, Australia, Canada, Ireland, Norway and Sweden. The respective statutes of these courts may provide for particular procedures for the cases where constitutional issues are at stake, but those procedures are of secondary character in terms of such courts' general competences.

The European model deriving from Austrian-Kelsenian tradition is characterised by the existence of a court beyond the system of the courts of general jurisdiction and vested with a special competence to review the validity of both legal norms and judicial decisions in terms of a constitution.⁹

⁸ See, the assemblies represented at the Conference (the assemblies of courts of Asian, francophone, Commonwealth, new democracy, European, Iberian-American, Portuguese speaking and Arabian countries).

⁹ See, the work by my late friend and colleague President Louis Favoreu *Les Cours constitutionnelles*, PUF, France, 1986.

In all above cases, apart from constitutional courts, there are also special traditional courts which can either be divided in accordance with the principle “civil court/criminal court” or with more elaborate specifications as civil, criminal, administrative, financial or special courts.¹⁰

Statistically, Special constitutional court model is the most popular. Here is a not so exhaustive list of the countries where this model exists: Chile, Brazil, South Africa, Morocco, Germany, Italy, Spain, Portugal, Belgium, France¹¹, Senegal, Benin, Korea, Russia, Romania, Bulgaria, Andorra, Bosnia-Herzegovina and more generally in countries where the tradition of continental law system is naturally or indirectly present. In this case too, procedures and competences may vary to a great extent from one country to another but eventually the function remains the same: the review of constitutionality of a legal provision or its actual application by a court of general jurisdiction.

The third model, with far less presence, is relevant in terms of countries that do not have an entirely written constitution.¹² The first country to be mentioned in this respect is certainly the United Kingdom. In this case, there is neither a supreme court vested with a power of constitutional review nor a *fortiori*, a constitutional court, despite the fact that the adoption of Constitutional Reform Act of 2005 and creation of the Supreme Court changed the situation to some extent.¹³ In case of countries representing the third model, the number of which is gradually decreasing, the following question arises: despite their denominations, can the highest competent courts at national level, revoke those acts enacted by parliament or established in common law due to their failure to comply with superior norms, be these obligations are of either historical or declaratory character, stemming from covenants of classic contents or being of undefined importance or even international obligations?¹⁴ Similar cases are statistically few but have considerable advantages in terms of flexibility.¹⁵

Finally, the categorisation of constitutional courts is certainly useful for a discussion. However, it may not be automatically considered as such with regard to the subject at stake. The Supreme Court of the US being a prototype of courts enjoying multiple competences is indeed in the centre of the controversy about the recourse to the case law of foreign courts and dialogue between judges.¹⁶

¹⁰ See, with regard to the EU Member States a very useful work *Les Juridictions des États membres de l'Union européenne* published by the European Court of Justice, the Office of Official Publications, 2008.

¹¹ In French context the Constitutional amendment of 23 July 2008 is noteworthy. It enabled the Constitutional Council to exercise after March 1, 2010 *a posteriori* constitutional review of legal provisions.

¹² In fact all of the countries concerned have the elements of written Constitution but they are not finalised in a complete document. In the case of Great Britain, at minimum there are the Parliament Acts of 1911 and 1947 and Scotland Act (1998), Northern Ireland Act (1998), and Wales Act (1998) about the devolution of powers (See, *Erskine May's Treatise on the Law, privileges, Proceedings, and Usage of Parliament*, 23rd edition, LexisNexis, UK, p.3, note 1.). The written Constitution of Australia contains provisions concerning federal and institutional systems but is reticent about fundamental rights. There are written provisions on federal system, rights and freedoms but none about the operation of the federal parliamentary system.

¹³ Jeffrey Jowell & Dawn Oliver, *The Changing Constitution*, 6th edition, Oxford University Press, 2007.

¹⁴ On these and other issues, see, Lech Garlicki, « La légitimité du contrôle de constitutionnalité : problèmes anciens c/ développements récents », the present review #78, 2009.

¹⁵ Mauritius is an illustrative example of the mixed system. Even after its transformation into a republic in 1992 Mauritius retained the Judicial Committee of the Privy Council of the Queen as the highest judicial instance. Article 81 of the Constitution permits in certain cases the appeal of the Supreme Court's decisions before the Judicial Committee.

¹⁶ See, the well-known debate between Justices Scalia and Breyer, (see, Bibliography). The controversy originates in the decision of 1989 adopted on “*Stanford v. Kentucky*”, (492, US 361, 1989) and further elaborated in the decision of 1997 passed on “*Printz v. United States*”, (521 US 898, 1997).

This circumstance places the court in the same dimension with other constitutional courts, be they special or general, new or relatively older institutions.

3 – Supranational Courts

Obviously, constitutional courts are the subject of the present article and discussed within national context. No domestic court has and can have competence to base its proceedings on constitutional provisions of foreign countries or replace competent national courts.

The above situation, quite straightforward both in terms of description and dialogue, was enriched after fifty years of the creation and strengthening of supranational courts. These tribunals based on international agreements are vested with exclusive competences to settle disputes and at the same time review and interpret legal provisions.

It is universally acknowledged that Europe is a privileged geographical area in this regard. Only the European Court of Human rights in Strasbourg is entitled to definitive interpretation of the implication and effect of the rights set forth in the Convention for the Protection of Human Rights and Fundamental freedoms of 1950. Its jurisprudence is binding on 47 Contracting States of the Convention. Also, 27 Member States of the European Union (gradually since 1951) agreed on the creation of a unique legal order which was integrated into their own legal systems, and its interpretation rests with the competence of European Court of Justice in Luxemburg.¹⁷

In Americas, although not all the American States are signatories, the Charter of the Organization of American States recognised the competence of Inter-American Court of Human Rights. Ever since 1978, the latter developed jurisprudence which can be qualified as translational.

The African Court of Human and People's Rights set up in Banjul (Gambia) on 3 July 2006 clearly influences the national jurisdictions of the signatory African States.

It is necessary to differentiate these courts from truly international courts such as International Court of Justice and International Criminal Court, both in The Hague, operating in a very special domain.

It is sufficient to read the titles of the instruments, the respect of which the Courts in Strasbourg, San José (Costa Rica) and Banjul are committed to ensure, in order to understand the constitutional interest of the jurisprudence of these different courts.

On its part, Luxemburg Court also developed case law on human rights within the European Union before the adoption of the Charter of Fundamental Rights of the European Union in Nice

¹⁷ CJCE, *Van Gend en Loos*, CJCE, 5 February 1963, Case # 26/62; *Costa v. ENEL*, CJCE, 15 July 1964, *Handelsgesellschaft*, CJCE, 17 December 1970, # 11/70; Case # 6/64 ; *Simmenthal*, CJCE, 9 March 1978, Case # 70/77.

in 2000, which later formed part of European Constitution of 2004 and subsequently, due to the failure of the treaty, was enforced by the Treaty of Lisbon of 2007.¹⁸

When it comes to the protection of fundamental rights and freedoms, such as respect for human dignity, prohibition of inhuman and degrading treatment, freedom of movement, freedom of expression and religion etc, due to the great resemblance between the texts, there is a natural interest to the activities of a supranational judge.¹⁹

4 – The significance of a dialogue

From a strictly conceptual viewpoint, the notion of dialogue between judges is an object of serious critique. A court typically pronounces itself after extensive deliberation on legal provisions which it should apply in a case filed before it. In no way it implies that the deliberation between dissenting judges is susceptible to lead them to a consensus or a compromise through a public dialogue. It does not prevent judges from exchanging their opinions in order to reduce any disagreement between them and reach consensus or arrive at a unanimous finding. Where court rules enable, an individual opinion of a judge²⁰ annexed to a judgment takes internal dialogue into account and frequently constitutes an essential source for the analysis of recourse to case law of foreign courts.

The term “dialogue of judges” is commonly used to denote a phenomenon which encourages certain courts to take the jurisprudence of foreign or supranational courts into consideration. It concerns the confirmation, elaboration or rejection of the jurisprudence of foreign countries through the decisions of national courts.

Direct dialogue certainly takes place between the representatives of various courts within the framework of numerous bilateral and multilateral meetings²¹ or between the representatives of courts and other bodies. But, it is logically impossible to equate an individual dialogue between judges with the genuine dialogue between courts.

Therefore, from classical viewpoint, there can be horizontal dialogue between courts at the same level, *i.e.* national courts and vertical dialogue where supranational courts are involved which is similar, to a certain degree, to the relations between a federal court and the courts of federal subjects.

¹⁸ By the time of the revision of the present article (April 2009) the Treaty of Lisbon was not yet in force. *Note from the author: It came into force on December 1, 2009.*

¹⁹ See, the conference organised by the European Court of Human Rights in Strasbourg on 9 December 2008 to celebrate 60th anniversary of the Universal Declaration of Human Rights (www.echr.coe.int).

²⁰ The above term is far more preferable than the reference to “dissenting opinions”. Judges being in the majority often express themselves with no less vigour and interest as those in the minority. According to many commentators such opinions constitute the finest source for better understanding dialogues between judges.

²¹ The Cape Town Conference and the conferences of regional and linguistic networks constitute the best examples.

While no national court is able to avoid some form of horizontal dialogue, only the courts of States making up a supranational union can participate in vertical dialogue.

It is also possible to initiate mixed dialogue, e.g., where a court of a country that is not a member of a supranational union is interested in the jurisprudence of the latter and seeks to get familiar with its reasoning and findings. This was the case where the Supreme Courts of Canada and South Africa, always displaying much interest in the case law of other countries, applied the jurisprudence of the European Court of Human Rights at least in terms of the titles of documents.

It is desirable to have more than horizontal dialogue. However, even where it is the most important form of a relation, there is no reason not to be involved in the other two forms of a dialogue.

I – A REGULAR DIALOGUE

Constitutional courts, despite their status and modalities of intervention, maintain real dialogue between each other and each other's jurisprudences. This process is witnessed by many factors, be it references to foreign case law in a court's decisions or the individual opinions attached to a decision or in academic discourse. Hence, the existence of the concept of legitimacy of a dialogue which we shall now turn to study.

A – Legitimacy of a dialogue

There are few constitutions similar to that of South Africa that provide for the reliance by courts and *a fortiori* constitutional courts on foreign law and jurisprudence of foreign courts in their deliberations.²² In terms of textual application of foreign precedents, constitutional nationalism clearly prevails and will dominate for a while.²³ However, despite their subsequent use, the legitimacy of such researches is no more disputed.

The majority of courts and their members justify inquiries into and application of foreign precedents of either foreign or supranational courts with similar arguments. When a court faces a

²² Article 39.1 of the Constitution of South Africa: "Interpretation of Bill of Rights. 1. When interpreting the Bill of Rights, a court, tribunal or forum— (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law."

²³ With a less provocative wording than the South African Constitution, Article 10.2 of the Spanish Constitution of 1978 establishes a link between domestic and foreign laws: "2. Provisions relating to the fundamental rights and liberties recognised by the Constitution shall be construed in conformity with the Universal Declaration of Human Rights and international treaties and agreements thereon ratified by Spain."

serious legal issue, has no relevant precedents of its own and the relevant constitutional provisions to be interpreted are relatively vague, it is in its interest, from intellectual and legal point of view, to get acquainted with the discourse and solution by other courts in analogous situations. In this case intellectual curiosity rapidly adds to strictly documental interest.

Clearly, the legitimacy of such inquiries of any form depends on a number of circumstances. The approach of courts in common law systems, where studies into precedents and their invocation constitute basic culture, is different from the courts of continental law systems where national identity, to the contrary, has always been considered the strongest factor. The linguistic aspect, especially for English speaking countries, is often referred to as a strong factor in terms of judicial influence. Generally, the legitimacy of enquiries of precedents is justified by either cultural proximity or the resemblance of the texts to be applied or by the simple fact of one court having a longer history than another.²⁴

Justice Scalia believes in the interpretation of the US Constitution according to the standards in place when it was adopted (1787). Accordingly, only those precedents of common law should be applied which existed before the adoption of the Constitution. Only a few judges oppose this approach which, in the opinion of Justice Scalia's colleague Justice Breyer, is perfectly natural.²⁵ Certainly, those engaged in the study of precedents or expressing themselves on the issue insist on individual nature of the measure and the degree of caution applied when resorting to foreign precedents. However, it is not disputed that there is some legal benefit in enquiring into the reasoning and approach taken by other competent courts in analogous situations. The said argumentation on a horizontal dialogue is reinforced where there is a vertical dialogue too and the courts, be they constitutional or not, are aware that they are obliged to some extent to make sure that their findings do not run counter to the jurisprudence of competent supranational courts. The case of the States being the High Contracting Parties to the European Convention on Human Rights is the best example in this regard. The application of the jurisprudence of Strasbourg Court by the Contracting States is based on the principle *Pacta sunt servanda* which is complemented with the risk of the supervision on the part of the ECtHR in case of strong divergence from its case law.

For the Member States of the European Union, the inquiry into the legitimacy of the application of precedents is out of question as they are obliged to do so under the integration of their legal system into that of the EU. It is worth mentioning that one of the distinguished members of the Constitutional Council of France used the term the "dialogue of judges" to differentiate it from the "domination of judges" and from the "war of judges".²⁶

²⁴ See, e.g. the influence of German case law in the development of the jurisprudence of Hungary.

²⁵ See, Bibliography.

²⁶ Conclusions *Bruno Genevois*, Conseil d'Etat, 23 December 1978, ministre de l'intérieur *c/Cohn-Bendit*. *Les grands arrêts de la jurisprudence administrative*, Dalloz, France, 2007, 16^e édition, p.644 ; *Recueil Dalloz*, 1979.155.

b – Elements of a dialogue

There obviously is no automatic mechanism governing the enquiry into foreign precedents and judges' dialogue. Every court or judge has a specific method in accordance with the respective Statutes and personal standpoint. Everyone also agrees that it is impossible to collect all relevant precedents due to the lack of access to documents or linguistic barriers. Some of the aspects, however, need to be highlighted in this regard.

There is a clear advantage of the older courts or courts which are close in terms of geography or culture.²⁷ That is the reason why no one wonders about frequent reference to the US Supreme Court in the data on foreign courts' jurisprudence. It is an absolute forerunner which has developed diverse jurisprudence that is considered to be liberal and numerous individual opinions of judges enable better understanding of the approaches taken by the US Supreme Court.²⁸

At the world congress held in Chile, Mr Justice Wolfgang Hoffmann-Riem of the Federal Constitutional Court of Germany pointed out in express terms that while the interpretation of a Constitution is the exclusive competence of a national court, it is possible to apply the approaches taken by foreign countries namely the Supreme Court of the US.²⁹

The members of the Supreme Court of Canada, e.g., justify the application of the case law of the US Supreme Court not only in terms of geographical reasons, but based on the legal proximity in light of the adoption of the Canadian Charter of Rights and Freedoms in 1982.³⁰

Furthermore, of all the European courts of the second half of the 20th century, the Federal Constitutional Court of Germany is clearly distinguished. While it was established following the Basic Law of 1949, the diversity of its jurisprudence, the depth of reasoning, and the most positive image of the Federal Republic at global level furthered this reputation.

Amongst the courts that emerged recently, the jurisprudence of the Constitutional Court of South Africa should be noted especially with regard to capital punishment, on the account of which the Court is often cited and commented upon in other courts' decisions.³¹

When the constitutional courts of the Member States of the European Union pronounce themselves on the compatibility of a new treaty with their national constitutions or about the constitutionality of the Framework Decision on the European Arrest Warrant, it is natural that each

²⁷ To point out the suggestion of Namibia the Supreme Court of which applies not only the jurisprudence of the Constitutional Court of South Africa but also the decisions of the courts of Zimbabwe, Rhodesia and Zambia these countries are close not only in terms of geography but also culture, history, politics and constitutions". (See, the report of *Irene Spingo, Bibliography*).

²⁸ It would be very interesting to have a comprehensive study on: "The Influence of the Jurisprudence of the Supreme Court of the United States on other Courts".

²⁹ "There are not many examples of explicit citation to foreign constitutional decisions in the collected decisions of the German Constitutional Court, but one can identify the influence of other courts nonetheless. This is specially true of the United States Supreme Court...". (See, *Bibliography*).

³⁰ *Claire L'Heureux-Dubé*. See, *Bibliography*.

³¹ *S. v. Makwanyane*, 6 June 1995, case # CCT/3/94 (www.constitutionalcourt.org.za/).

court systematically researches the approaches and decisions taken by other courts. In the case of Spain, Mr. Justice Luis Lopez Guerra did not hesitate to write: “the references to the jurisprudence of the constitutional courts of other countries or to that of the European Court of Human Rights are frequent in the decisions of the Constitutional Tribunal of Spain”.³² It is noteworthy that the adopted judgments are clearly similar.

There is one more aspect related to the language used by courts on one hand and by judges on the other hand. It is often noted that the judges educated in the United States naturally tend to apply the jurisprudence of the US Supreme Court, while those educated in Germany apply the jurisprudence of the Federal Constitutional Court in Karlsruhe.³³ In the case of Botswana, the judges educated in continental law will naturally apply precedents of the relevant countries and those knowledgeable of common law will resort to the case law of the Great Britain and other similar countries.³⁴

To return to the example of American judge Stephen Breyer, the perfect command of French clearly enables him to better understand the peculiarities of the jurisprudence of the Constitutional Council of France.

In light of the well known challenges related to the accurate translation of national courts’ decisions, the efforts of those courts to translate the decisions and the most important acts, upon delivery or after some time, into an international language are welcome.³⁵ It is, however, to be borne in mind that there are numerous challenges to legal translation and decisions can be better understood not only in the original language but also in a national legal context. Serious mistakes made in translation that will eventually be reflected in application, can be consequences of the failure to take these precautions.

The last element is related to the importance of university doctrine. It is obvious that influential legal journals published in the languages of broader use have a great impact in the research of precedents and the judges’ dialogues. The authors try to address the comparisons of decisions and establish similarities and discrepancies with certain caution.

And finally, the existence of various data on constitutional proceedings, e.g. the data of the Venice Commission, is a significant resource which should be applied with caution and is still rarely used.³⁶

³² See, Bibliography.

³³ See, the report of Akiko Jima on Japan (Bibliography).

³⁴ See, the report of Charles Manga Fombad (Bibliography).

³⁵ The Federal Constitutional Court of Germany publishes many of its decisions in the English and French languages on its website (<http://www.bundesverfassungsgericht.de>). The Constitutional Council of France does the same in German, in English and sometimes in Spanish. (www.conseil-constitutionnel.fr/). To the contrary the website of the Supreme Court of the US is only in English.

³⁶ See, in French and in English, *le Bulletin de jurisprudence constitutionnelle et la banque de donnée, CODICES* (www.venise.coe.int/).

II – A LIMITED DIALOGUE

The most interesting aspect of the application of foreign precedents aims at studying how those precedents are invoked by the courts and judges when adjudicating. It is therefore necessary to discuss the reasonableness of precedents and their effects.

A – The reasonableness

All existing analyses point out that during deliberations, a court will not be able to apply any foreign jurisprudence. It is therefore necessary to discuss the criteria of reasonableness of the precedents which should be taken into consideration during the analysis and application of precedents.

In the case of constitutional courts which form the part of a State under the jurisdiction of a supranational entity, the reasonableness is easier to establish. The subordination to some union on the basis of directly applicable treaty *ipso facto* creates due preconditions of reasonableness. The States signatory to the European and American Conventions acknowledge common political and legal values. The Treaty on European Union (1992) confirms Member States' "attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law". The preamble of the European Convention refers to "the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration". The Preamble of American Convention specifies that "[t]he American states signatory to the present Convention, Reaffirming their intention to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man". Accordingly, there can be no doubt as to the constitutionality of the unity of these values, to the respect of which these Courts are committed.

When a competent supranational or constitutional court interprets an international agreement or a constitutional provision, the issue of reasonableness is always at stake. While it does not mean that reasonableness becomes binding, it cannot be ignored that it is necessary to take into account the factual and legal considerations being in the ground of a respective decision.

When national courts directly provide for interpretation in accordance with universal international law, it is difficult to ignore reasonableness. A comparison of national and international texts on basic rights shows the tendency of resemblance with international instruments. Some acts may even refer to international conventions (e.g. the ECHR) as in the case of the Charter of Fundamental Rights, although it does not have a positive legal value. Accordingly, there is reasonableness at stake³⁷

³⁷ In its edition emanated from Lisbon Treaty approved by the European Parliament on 29 July 2007 the Charter of Fundamental Rights states (Article 52, paras. 3-4) on the one hand that "[i]n so far as this Charter contains rights which correspond to rights guaranteed by

In a horizontal dialogue, the criteria of reasonableness should be assessed not only in their entirety but also with regard to particular elements of the case at stake. Certainly, the edition of the texts to be used and national peculiarities they contain is of significance. It is also important to discuss whether foreign precedents are relevant to the case. It does not mean that one or another aspect of the alternative should be ignored. It means that pragmatic solution or abstract discussion should not be given the same doctrinal value. It is common in the field of human rights that national courts apply the decisions adopted under similar texts that are not sufficient for the formation of certain “common law”.³⁸ However, this does not make the subject of the present Article less interesting. To the contrary, it enables better understanding of the application of different decisions and accordingly makes the discussion by a relevant court easier.

There is one particular aspect relevant to the present topic. It is “the complexity of the participation of the supreme courts of development countries in judges dialogue”³⁹. Apart from the dialogue between “the South and the North”, it is concerned with the adequacy of this dialog and the influence of legal heritage, which in most cases is the heritage of “one and the same historical model.”

While the reasonableness criteria are easier to define in terms of basic rights, it is not so straightforward in those cases where national constitutional courts are requested to adjudicate on functioning of national institutions, e. g. where the dispute concerns the division of powers in federal states. In such cases, the decisions of American and German Courts can be applied, but with due respect to the norms of the respective constitutions in order to avoid the misunderstanding of autonomy and the control of federal subjects. It is paradoxical that the Canadian Supreme Court applied British jurisprudence with the view of interpreting the Constitutional provisions of 1867.⁴⁰

It is also possible, e.g., in terms of the division of powers or parliamentary immunity, to enquire of solutions that can be found in other countries that may have a similar constitution. This principle is acknowledged in various States well enough to consider the application of important precedents. To the contrary, it is surprisingly difficult to apply foreign case law to understand the division of powers better within the executive and legislative details as these issues are governed too differently in different countries.

To sum up, each precedent which appears to be of some interest from this, or another perspective, should be an object of deep analysis, which means those involved in the analysis should have a fair knowledge of the peculiarities of a given country.

the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection”; and on the other hand, “[i]nsofar as the Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.”

³⁸ See, *Constitution et éthique biomédicale* (Noëlle Lenoir, Bertrand Mathieu et Didier Maus, dir.), La Documentation Française, France, 1998.

³⁹ See, Bibliography.

⁴⁰ “Specifically, the Privy Council established the principle of interpretation of Canada’s federal structure as a principle of strict literal interpretation, favouring the power of the provinces over those of the federal government”, see, the report of Gianluca Gentili (Bibliography).

B – Precedents effect

THE MOST DEBATABLE ISSUE IS CERTAINLY THE EFFECT OF PRECEDENTS.

On one hand, the supporters of national approach, e.g. Mr. Justice Scalia, do not consider that the fact of adoption of a judgment by a court of acknowledged reputation should influence the deliberations of other courts. To the contrary, the majority of those expressing themselves on the issue consider that the application of foreign precedents is the best means of forming one's opinion. However, a national constitutional court should certainly base its deliberation on the provisions of domestic law, be it the Constitution or other norms having the same effect. Stemming from the above-mentioned, there are three levels of the effects of precedents.

The first level can be qualified as "documental effect". In fact there is no logical reason for a national court to forbid itself the compilation of documental data which will enable it to analyse the new and delicate issue before it better.

a) Documental effect

The Constitutional Council is a body which is particularly cautious when it comes to the application of foreign precedents necessitated by the issue before it. The Council systematically collects documents on foreign jurisprudence, and after the adoption of the respective decision, this documentation is published and made accessible for the public through the Council's website.⁴¹ When the courts need to review the issues falling under bioethics, freedom of religion or inhuman or degrading treatment of punishment, the collection of these documents is absolutely necessary.

The famous judgment on the abolishment of capital punishment by the Constitutional Court of South Africa on 6 June 1995⁴² is a good example. The judgment was written by the president of the Court and it was adopted unanimously. It invokes the precedents of the courts of Canada, England, Australia, New Zealand, the US, India, Tanzania and Hungary, and also on international norms and decisions taken on the basis of Vienna Convention on the Law of Treaties, the European Convention (the Court and the Commission), International Covenant on Civil and Political Rights (and Human Rights Committee of the UN), Inter-American Convention on Human Rights (and the Court) and The International Labour Organization. Although the jurisprudence of American, Canadian and German courts prevail, the reference to other case law is obvious. In total, out of 146 paragraphs, 76 (33-109) are dedicated to the analysis of international and comparative laws. After motivated discussion, the answer to the question on the constitutionality of capital punishment is given with a

⁴¹ See, *Olivier Dutheillet de Lamothé*, Bibliography.

⁴² See, note #31.

finding in paragraphs 144-146, under which “Article 277(1) a of the Criminal Code must be declared unconstitutional in terms of Article 11(2) of the Constitution”.⁴³ At the given stage, foreign precedents assisted judges in forming their opinion.⁴⁴ However, none of them are referred to in the judgement.

b) Convincing effect

The second stage can be qualified as a “convincing effect”. It is frequently used in judges’ communications and academic discourses. In fact, it is concerned with the knowledge of how the right judicial decisions can assist the formation of relevant opinions through confrontation or accommodation. When, e.g., a national court takes a similar decision with regard to a basic right or defines the scopes of similar limitation and constitutional provisions that do not oppose each other, is this not a sufficient argument for the application of these precedents ? Or can they only be the elements of autonomous discussion?

The answer to the question above varies in accordance with national legal traditions, the implication of the precedents used and the intention of the relevant court. Stemming from the communication between common law courts system, the latter, as in the case of Canadian and Indian Courts, believes in convincing effect of the foreign precedents.⁴⁵

With regard to Canada, Cianluca Gentili points out the concept of “legal cosmopolitanism” elaborated by Justice La Foreste, but at the same time remembers the cautious and moderation of Justice Wilson.⁴⁶ The latter particularly stated, “This Court has consistently stated that even though it may undoubtedly benefit from the experience of American and other courts in adjudicating constitutional issues, it is by no means bound by that experience or the jurisprudence it has generated.”⁴⁷ The aforementioned statement may equally be made by judges of other constitutional courts too.

To the contrary, the Hungarian Court applies many German precedents in order to validate its discourse, but prefers to fit them into the national context.⁴⁸ Stemming from this fact, there can be two different situations: one can be “reasonable argument” and the other “legal argument”. A good example is served by Andorran Constitutional Court’s recent decision on the right to reasonable

⁴³ The provisional Constitution of 1993 is implied.

⁴⁴ The following extract from para. 110 is particularly significant: “... the interpretation of section 1 of the Canadian Charter of Rights may be of assistance to our Court, but that there are differences between our Constitution and the Canadian Charter which have a bearing on the way in which section 33 should be dealt with”.

⁴⁵ In her report on the Supreme Court of India, Valentina Rita Scotti wrote: “The Court uses foreign legal doctrine to affirm the definition of some legal institution not well defined after the independence, but also in those cases it quote the doctrine it tries to internalize it putting together with Indian legal tradition” (Bibliography).

⁴⁶ See, Bibliography.

⁴⁷ “This Court has consistently stated that even though it may undoubtedly benefit from the experience of American and other courts in adjudicating constitutional issues, it is by no means bound by that experience or the jurisprudence it has generated.” *Lavigne v. Ontario Public Service Employees Union*, (1991. 2 SCR 2001).

⁴⁸ See, the report by Zoltán Sente (Bibliography).

terms of proceedings. The Court stated that: “According to the jurisprudence of the ECtHR, the Court numerous held that in order to assess the alleged violation of the said right *inter alia* a fair balance should be struck between the complexity of the case, the behaviour of judicial organs and of the parties.”⁴⁹ The wording “according the jurisprudence of the ECtHR” points out the significance of the Court’s practice, but at the same time the possibility to develop the discussion in other or opposite direction.

c) Binding effect

The third consideration concerns the genuine “effect of a decision” which the foreign precedents have. It means that constitutional courts cannot ignore the said fact and if they still do so, they will have to take a risk of limitations. This hypothesis is true where a national constitutional court, e.g. a constitutional or supreme court of a federal subject, is not fully independent and is subject to possible limitations, e.g. in Europe on the part of the ECtHR or Luxembourg Court⁵⁰, Commonwealth country or Judicial Committee of the Privy Council of the Queen.⁵¹

To some extent, a constitutional court is subordinate to the interpretation given by a superior court. The discourse needs to be consolidated with arguments and beyond the scopes of basic negative reaction. It is frequently pointed out that in the countries subject to the jurisdiction of the European Court of Justice and the ECtHR, constitutional courts receive the jurisprudence of the Strasbourg Court more and more intensively where it is applicable, e.g. legislative validations in France or the interpretation of the right to property in Czech Republic.

CONCLUSIONS

The development of the recourse to the jurisprudence of foreign courts and the dialogue between constitutional courts are the best indicators not only of the generalisation of constitutional courts, but also the expansion of common constitutional values. It is common knowledge that even the oldest courts, or those most integrated in solid national constitutional identities, are rather open to act in favour of communication through the exchange of constitutional jurisprudence. Eventually, the boundaries naturally follow the values stemming from political decisions, whereas the dialogue and the recourse to jurisprudence exist within a union only.

⁴⁹ The Constitutional Court of Andorra, 12 January 2009, case 2008-26-RE.

⁵⁰ For Italy the Constitutional Court, 24 October 2007, case 349/2007; Constitutional Council (France), 1 July 2004, case 2004-497 DC; See, P. boni et D. Maus, Bibliography, # 92-101.

⁵¹ Judicial Committee is competent with regard to the following independent States: Trinidad and Tobago, Dominica, Kiribati and Mauritius. See, Kenneth Keith, “The Interplay with the Judicial Committee of the Privy Council”, in Louis Blom-Cooper QC, Brice Dickson et Gavin Drewry, *The Judicial House of Lords, 1876-2009*, Oxford University Press, 2009.

This certainly is not an obstacle to a discussion, the first stage of a dialogue, to engage those sharing similar aspirations to know them and understand each other better.

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APPLICATION OF THE EUROPEAN STANDARDS ON HUMAN RIGHTS IN THE GEORGIAN PRACTICE

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The European Convention on Human Rights has become an integral part of Georgian legislation – a legal act on the basis of which judicial (or administrative) lawsuits can be settled. Both the Georgian Constitution¹ and other national legislation, including Georgian Laws ‘on International Treaties’² and ‘on Normative Acts’³ have determined the role that international treaties, *inter alia*, the European Convention on Human Rights, have played in Georgian legislation.

A recent study of Georgian court practice has identified an increase in the application of international acts by Georgian courts. This trend is equally applicable to international treaties, including the European Convention on Human Rights in the administration of justice.

The European Convention on Human Rights is, in fact, the most frequently applied international treaty in the Georgian courts.⁴ An examination of Georgian court practice has identified approximately 120 cases in which European human rights standards have been applied.⁵

¹ See 2nd paragraph of Article 6.

² See Article 6.

³ See 1st paragraph of Article 4 and 1st paragraph of Article 19.

⁴ This has been indicated in a survey conducted among judges of general courts as well as those of the Constitutional Court of Georgia, which showed that the European Convention on Human Rights and the Universal Declaration of Human Rights are the most frequently applied international treaties in Georgian courts. It is noteworthy that the survey shows that the Universal Declaration, which in itself is a recommendation guideline, is more frequently applied in Georgian courts than, for example, the International Pact of Civil and Political Rights, which in Georgia is legally binding. See the survey ‘On the practice of the application of international treaties of human rights and the decisions of the European Court in Georgian courts’ conducted by BCG Research at the request of UNDP. See also International Human Rights Treaties and Georgian Court Practice, Part I, 2006 pp.17.

⁵ Since merely *referring* to all the Georgian court decisions in which European standards have been applied takes up several pages, only those decisions made in the last 5-6 years have been indicated in this work. For more on the practical application of the European standards by Georgian courts in the initial years after the ratification of the Convention, see K. Korkelia, “Application of the European Convention on Human Rights in Georgia,” 2004. These decisions are as follows: #107 Kol Decision, February 9, 2004, The Grand Chamber of the Supreme Court of Georgia ; #111Kol Decision, October 12, 2004, the Grand Chamber of the Supreme Court of Georgia ; Nas-168-465-05 Decision, June 1, 2004, the Civil, Industrial, and Bankruptcy Chamber of the Supreme Court of Georgia ; Nbs-1109-910-k-04 decision, November 5, 2004 ; Nbs-550-473-k-04 decision July 8, 2004, the Chamber of Administrative and Other Cases; Nbs-877-746-k-04 decision, December 3, 2004, the Chamber of Administrative and Other Cases; Nbs-1278-1081-k-04 decision December 17, 2004, the Chamber of Administrative and Other Cases; Nas-322-605-04 decision, July 21, 2004, Civil, Industrial and Bankruptcy Chamber; Nas-993-1248-04 de-

There are a mounting number of court decisions in Georgia which have been applying European standards of human rights. However, this is not fully satisfactory as the practical application of these standards is accompanied by certain problems. There are still quite a number of court decisions made in Georgia which, in terms of the application of European standards, one could evaluate very negatively. Luckily, there have also been decisions which may be evaluated quite positively. To demonstrate this one can refer to two examples from Georgian court practice.

In one of the very first court cases in which the application of European Convention and European Court case law was raised, the general court was completely unaware of how to apply the European Court of Human Rights case law and why the lawyer referred to this case law⁶; the second court not only applied to the European Convention and case law of the European Court but also put an emphasis on the role and significance of applying European Court case law in the administration of justice. The latter, for its interpretation, could be considered a historic decision for its contribution to the development of Georgian court practice as the court referred to European Court of Human Rights case law to 'fill and specify the context of the norms established by the European Convention and by the Georgian Constitution' confirming the necessity of the application of case law of the European Court of Human Rights along with the European Convention.⁷

The analysis of the application of European standards of human rights by case category (civil, criminal and administrative) has demonstrated that these standards are most frequently referred to in administrative cases. However, in the initial years after the ratification of the Convention the practice showed that the European standards were most intensively applied in civil cases. More recently, European standards have been only rarely applied in civil cases. The present practice also shows that in the general courts of Georgia European standards are comparatively rarely applied in criminal cases.

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⁶ Verdict Nas-3k/599, February 22, 2001: Civil, Industrial and Bankruptcy Chamber of the Supreme Court of Georgia.

⁷ Decision N2/a-25-2002, Tbilisi Regional Court Civil and Industrial Board, July 3, 2002; see also Georgian Supreme Court Decision N3k/1240-02, April 24, 2003.

If the practical application of the European Convention is analyzed with regard to court instances, it will clearly demonstrate that the European Convention is most frequently applied by the Supreme Court of Georgia. Unfortunately, however, with due regard to several exceptional cases, the application of the European Convention in Georgia's other courts can be generally considered unsatisfactory.⁸

The effectiveness of application of these European standards of human rights in conducting justice is determined by its positive effect on a court decision; and whether the application of the European standards actually upheld the protection of human rights to the required level. That is why the real effect of the application of European standards of human rights in conducting justice in Georgia must be examined.

As a turning point the following should be noted: the application of European human rights standards in the administration of justice is important only when the court, after its application, makes a decision which it could not have made otherwise.

If a court decision adopted on the basis of a domestic normative act (for example, a law) would be similar to the decision adopted on the basis of the law, as well as to that of the European standard, the application of the latter would be given a negligible role. In such a case, the application of the European standard of human rights will have almost no practical effect on the court decision.

If analyzed, those court cases in which the Georgian general courts have applied European human rights standards will clearly show that their effect on court decisions is mostly negligible. In most cases, the courts apply European human rights standards along with Georgian domestic normative acts. In particular, a Georgian general court examines the norm which has been established by previous domestic acts and only afterwards does it refer to (or, at best, recite) the relevant article of the European Convention.⁹ Afterwards, the Georgian court concludes that the rules of conduct established by Georgian domestic normative acts and the European Convention are similar and court settles the dispute on the grounds of these two acts.¹⁰

It should therefore not be considered that the application of Georgian law together with the European standards had an important – or indeed any – effect on the court's decision since the Georgian court would have arrived at the same decision by applying only the relevant domestic normative act (for example, a law). The court would therefore have reached the same decision without applying the European standards as it would have if it had applied relevant European law along with those standards. The courts by applying domestic normative acts along with the Euro-

⁸ However, there are also some exceptions. See: Decision N2/64, Tchiatura District Court, April 3, 2002.

⁹ For instance, see Decision N3k/1044, March 1, 2002, of the Supreme Court of Georgia on Civil, Industrial and Bankruptcy Cases, #5, 2002, pp.93; Decision N3b-63 Appeals Chamber on Administrative Law and Taxation, May 16, 2000; Verdict N3g-ad-429-k-02 on Administrative and Other Cases, December 18, 2002, N2, 2003, pp.224; and Verdict N3g-ad-405-k-02 on Administrative and Other Cases, February 27, 2003, N4, 2003, p. 847.

¹⁰ For instance, see Decision Nas-593-1241-03 of the Supreme Court of Georgia on Civil, Industrial and Bankruptcy Cases, April 14, 2004. Georgia is not the sole exception with regard to this practice. For instance, the same practice was established in the courts of Germany and then changed over the course of time. (B. Simma, D.E. Khan, M. Zöckler & R. Geiger: "The Role of German Courts in the Enforcement of International Human Rights," in: *Enforcing International Human Rights in Domestic Courts*, B. Conforti & F. Francioni (Eds.), 1997, 73.

pean standards found that the normative act applied by court is in compliance with the European standards and that in making such a decision court was guided not only by domestic normative acts (for example, a law) but also by the European standards of human rights in impartiality of which the parties of a dispute cast, as a rule, no doubt. By applying the European standards in this manner, courts reinforce credibility¹¹ of their decisions and legitimize them.¹²

Bearing in mind all the mentioned one can draw the conclusion that courts of Georgia frequently apply the European standards of human rights in such cases when their application has almost no practical contribution in settling a court dispute.

Georgian court practice has also demonstrated that, regarding court decisions, the court has directly held up the European Convention on Human Rights, but it does not mention in its decision European Court case law. However, the analysis of some Georgian court decisions show that to settle a dispute, the national court has taken into consideration not only specific provisions of the European Convention but also European Court case law, although this has not been directly referred to in court decisions. The manner in which the European Convention on Human Rights is being applied is proof of this, as it does not come out of the specific provision of the Convention but reflects the interpretation and argumentation expressed in European Court case law.¹³ The formulations applied to the decisions of Georgia's courts also provide the basis with which to attest the mentioned which are similar to those applied in cases of the European Court.¹⁴

By analyzing the practice of general courts of Georgia, it was also discovered that, although the European Convention on Human Rights was applied, the general courts did not usually apply European Court case law, so it has not interpreted the Convention in the same spirit or meaning as the European Court of Human Rights.

The case dealt with a complaint filed in Marneuli district court by practitioners of a particular religion against the district mayor and several high-ranking police officers, alleging that the plaintiffs were not given the right to attend a particular religious service.¹⁵ The plaintiffs allege that a rival group (made up of practitioners of a different religion) broke up their service on religious grounds and went on to inflict material damage as well as cause moral offense.

The plaintiffs also alleged that the police officers failed to act to protect their rights thus enabling the rival party to disrupt their meeting and thereby breach their rights. Evidence given by the head of the district police station is noteworthy as it says that "it is beyond the competence of the police to protect the members of different confessions..."

¹¹ H. Schermers, "The European Community and the European Convention on Human Rights: Their Effect on National Law," in: *The Gradual Convergence: Foreign Ideas, Foreign Influences and English Law on the Even of the 21st Century*, B.Markesinis (Ed.), 1994, 171.

¹² For comparison see: ix. Second Report, Committee on International Law in National Courts, International Law Association, 1996, 18.

¹³ Criminal Justice Chamber of the Supreme Court of Georgia, verdict (the right of hearing a case in reasonable time), July 17, 2001; see 'Sample Decisions on Protection of Human Rights' (2001), Tbilisi, 2002, pp.16-19.

¹⁴ Criminal Justice Chamber of the Supreme Court of Georgia, verdict (imposing criminal responsibility on expressed opinion), December 12, 2000; see 'Sample Decisions on the Protection of Human Rights' (2001), Tbilisi, 2002, pp.20-24.

¹⁵ See Marneuli district court Decision #3/9-2002, May 13, 2002 ; See also Verdict #3/413 of the Civil, Industrial and Bankruptcy Chamber of the Supreme Court of Georgia, March 24, 2000; Decisions of the Supreme Court of Georgia, Part I, N8, 2000, pp.373-376.

The defendants considered the suit groundless as the police officers inflicted neither offence nor assault or moral or material damage upon the plaintiffs. A representative of the Ministry of Internal Affairs remarked that the police officers had not dismissed the meeting and that none of the plaintiffs had accused any police officer of offending them or of assisting the rival party in breaking up the meeting.

The Court considered the plaintiffs' demand to be groundless and did not satisfy it. The Court noted that the police did not prevent the faithful of the religion in question from attending the religious meeting. The Court also noted that the rival party confronted and inflicted material damage on the plaintiffs and that the police officers did not assist them in doing these things. The Court also ruled that the existing video footage does not implicate the involvement of any police officers in breaking up a religious meeting.

The Court did not share the plaintiffs' opinion that the police had breached Articles 8, 9, 10, 11, 13, and 14 of the European Convention on Human Rights. The Court also failed to refer to European Human Rights Court case law (particularly the case *Plattform "Ärzte für das Leben" v. Austria*) to identify the context in which these Convention articles were created.¹⁶ Had the Georgian Court done this, it would have helped it to reach a more proper interpretation and application of the spirit of the Convention. There are enough grounds to prove that the Marneuli District Court would have assessed the case differently had it applied the case law of the European Court and accordingly, would have reached a different decision.

1. The Forms of European Standards Applied by General Courts of Georgia

By analyzing Georgian court decisions in which European Human Rights standards are applied, some trends can be identified regarding the forms of their application:

a) Georgian courts, like the courts of other European states, most frequently apply European standards as a means to properly interpret domestic normative acts.¹⁷ The courts of Georgia examine disputed issues on the basis of Georgian domestic normative acts along with existing European standards. However, these standards are applied mainly to reassure the court that it is upholding the proper interpretation of the domestic normative act in question (for example, a law).

One can point to a number of examples to demonstrate how the Georgian court system has applied European human rights standards in order to properly interpret domestic normative acts. The Georgian Supreme Court made a ruling on 4 July, 2002 with regard to a series of newspaper articles

¹⁶ Series A, no. 139.

¹⁷ For instance, see Decision N3k-390-02, Supreme Court of Georgia on Civil, Industrial and Bankruptcy Cases, July 4, 2002, N10, 2002, pp.1758-1767 ; See also Decision N2/a-83-2001 of the regional court, Civil and Industrial Panel Board, December 21, 2001 ; Decision N3g-ad-462-k-02 of the Supreme Court of Georgia on Administrative and Other Cases, November 25, 2002, N1, 2003 year, pp.37; N3k1240/02 Civil, Industrial and Bankruptcy Chamber of the Supreme Court of Georgia, April 24, 2003.

in which the journalist had criticized several high-ranking officials. These officials accused the journalist of libel and called upon the Supreme Court to judge that these articles were indeed libelous.

In the case the Court applied Georgian domestic normative acts (the Constitution, the civil code and the law 'on the Press and Other Media') along with the European Convention on Human Rights and European Court case law through which it interpreted domestic normative acts.¹⁸ In particular, court remarked the following:

"Article 10 of the European Convention on Protecting human rights and fundamental liberties guarantees not only freedom of the press to provide society with information but also the right for society to be adequately informed.

"Freedom of political discussion is the core of a democratic society. Therefore the frame of criticizing politics is wide than it is with private individuals. It is inevitable for politicians and after assuming a position, it is taken for granted, that all of his/her words or actions would fall under permanent and persisted scrutiny of journalists. A politician, on its part, shall display patience, especially when he/she conducts in a way that might spark sharp criticism. State officials shall endure more criticism than it is allowed in debates held in press or by television. Therefore, criticism must be constructive and it should not grow into rancorous criticism that is incompatible with the point of discussion and criticism."¹⁹

By applying the European Convention, the Supreme Court of Georgia assured the proper interpretation of domestic normative acts by the Georgian court system. The contribution of the Convention in helping a court to arrive at a correct decision was expressed by the decree which reads that the frames for criticizing a politician are wider than those for criticizing a private individual. Bearing his/her status in mind, a politician can expect to fall more frequently and openly under the criticism of society (expressed through journalism) and therefore, as a public figure, he/she should prepare him/herself accordingly.

The Supreme Court of Georgia also heard another interesting case regarding defamation and slander in which it applied European Human Rights Court case law to reach a verdict.²⁰

A former deputy Minister of Industry filed suit in the Supreme Court of Georgia against a former Member of Parliament for a statement relating to the plaintiff's professional activity made by the latter during a TV program. The plaintiff requested a negation of the inquiry infringing his "honor, dignity and business reputation" as well as compensation for "moral damages." The Vake-Saburtalo Regional Court of Tbilisi ruled against the plaintiff. The decision was then appealed in Appeals Court

¹⁸ Decision N3k-390-02 of the Civil, Industrial and Bankruptcy Cases of the Supreme Court of Georgia, July 4, 2002, N10, 2002, pp.1758-1767 ; See also Decision N2/a-83-2001 of the regional court, Civil and Industrial Panel Board, December 21, 2001.

¹⁹ See pp. 1762-1763.

²⁰ Decision N3k-376-01 of the Chamber of Civil, Industrial and Bankruptcy Cases of the Supreme Court of Georgia, July 18, 2001, N10, 2002. Disputed issue: Infringing upon honor, dignity and business reputation. See decisions of the Supreme Court of Georgia : Civil, Industrial and Bankruptcy Cases, N10, 2001 year, pp.1172-1177 ; See "Sample Decisions on Protection of Human Rights" (2001 year), Tbilisi, 2002 year, pp.79-82.

which revised the decision made by the regional Court and partly satisfied the plaintiff. The defendant was charged with slander and the defamation of the plaintiff's honor, dignity and business reputation.

Then the defendant, the former Member of Parliament, appealed this new decision in the Supreme Court of Georgia, noting that the expression of his opinion against the former deputy minister on a TV program was in fact a critical expression regarding a public official – the then deputy minister – and an assessment of his activity, not the dissemination of factual information (data) that might infringe upon his “honor, dignity or business reputation.”

The Supreme Court of Georgia finally overturned the Appellate Court decision, and once again favored the former Member of Parliament. Along with Article 18 of the Civil Code of Georgia, the Supreme Court of Georgia also relied on Article 10 (freedom of expression) of the European Convention on Human Rights, which stipulates that freedom of expression encompasses a person's liberty to make suggestions; and to obtain and impart information and ideas. To interpret Article 10 of the Convention, the Supreme Court referred to the European Court's decision in the case *Castells v. Spain*. This case stipulates that, in assessing instances of humiliation against private individuals and government officials, different standards apply. In particular, the permitted frames of criticism are wider for government officials than for private individuals.

The Supreme Court established that the phrases articulated by the former member of parliament towards the former deputy minister pertained to issues of public interest and noted that “politicians and state officials shall withstand criticism more than permitted in debated held in press or TV.” The Court also indicated that the “protection of the interest of reputation (honor, dignity) is balanced with that of the public to freely discuss and obtain necessary information on the country's political, economic and social issues.”

The Supreme Court of Georgia applied European Court case law by which it established that an elected or appointed official may fall under sharp criticism for the sake of public interest and that the scope of that criticism is wider than what could be brought against a private individual.²¹

The 3 July, 2001 decision²² of the Tbilisi Regional Court is also interesting in that it regards the dissemination of information during a TV program on the medical condition of a public official's son.

The Court, in its decision, not only referred to Article 20²³ of the Constitution of Georgia and Article 8²⁴ of the European Convention on Human Rights but also to the case law of the European Court of Human Rights.

²¹ The April 3, 2002, Decision N2/64 of Chiatura District Court is also interesting.

²² See the July 3, 2002, Decision N2/a-25-2002 of the Civil and Industrial Board of the Tbilisi Regional Court; for more on these cases see: Decision N3k/1240-02 of the Supreme Court of Georgia, 24 April, 2003.

²³ 1st paragraph of Article 20 of the Constitution stipulates that the ‘private life of every individual is inviolable.’

²⁴ The 1st paragraph of Article 8 of the Convention stipulates that ‘Every individual has the right for his/her private and family life to be respected’.

The Regional Court relied on the decision of the European Court that directly upholds the confidentiality of individual medical information. The Regional Court referred to the European Court decision on the case *Z v. Finland* which holds the state responsible for not divulging individual health-related issues.²⁵ The Court also noted that the state is obliged not only by *negative* responsibility – that is, not to disclose private and/or family-related information, but also by *positive* responsibility: ‘To preclude third parties from the dissemination of personal health-related information without his/her consent in order to avoid infringement upon the rights of respect of private life envisaged by Part I of Article 8 of the Convention.’²⁶

The Court, based on that analysis, considered that ‘Information disseminated by the defendant in relation to the health condition of the plaintiff’s son represents protected private family material since it is not connected with public life and is aimed at a certain group of individuals. In protecting an individual’s honor, dignity and/or business reputation, the law guarantees that the public segment of any person’s life precludes the dissemination of false information while simultaneously protecting the confidentiality of the individual’s private life. The information describing an individual’s private life might be true but the person is interested in protecting it from disclosure.’ The regional court also inferred that by disseminating information regarding the health condition of the plaintiff’s son to a wider public, the program’s presenter caused irreparable damage to the plaintiff’s family, and to the plaintiff’s son in particular, who was previously unaware of his death diagnosis.

It is clear that by applying European Human Rights Standards the court was given an opportunity to interpret the Georgian legislation using European standards as a guideline and to therefore make a proper decision.²⁷

A case heard by the Supreme Court of Georgia on 14 April, 2004 is similarly interesting.²⁸

In this case the plaintiff requested 70,000 GEL from the weekly newspaper Kviris Palitra and from its journalist as compensation for the moral damage wrought by a headline which read: “Rape attempt with formidable brutality.” All court hearings were closed by request of the plaintiff as the victim.

The Court considered that the facts published in the article were compatible with the truth but reflected inconvenient and unpalatable episodes of the plaintiffs’ private life. The Court also noted that by making the plaintiff’s full name public in the article they had disseminated information which the claimant was reluctant to disclose. In particular, the paper reveal unpleasant facts from the life of the plaintiff and the plaintiff was unable to keep the details of her private life secret.

²⁵ According to the case, the author of the statement was contaminated with AIDS and by disclosing this information, Article 8 of the European Convention was breached.

²⁶ Regarding the positive accountability the regional court referred to the decisions of the European Court on the cases: *Lopez Ostra v. Spain* and *Keegan v. Ireland*.

²⁷ A comparatively new decision by the Supreme Court of Georgia is also interesting in which court on the issue of public interest interpreted the Georgian legislation on the basis of the European standards. See May 16, 2008, Verdict Nas-810-1129-07 of the Civil, Industrial and Bankruptcy Chamber. See also: June 1, 2004 Decision Nas-168-465-5 of the Civil, Industrial and Bankruptcy Chamber of the Supreme Court of Georgia.

²⁸ See: April 14, 2004, Decision Nas-593-1241-03 of the Civil, Industrial and Bankruptcy Chamber of the Supreme Court of Georgia.

The Court also note that the plaintiff's relatives as well as a wider group of her acquaintances learned about rape attempt as a result of the publication of the confidential information about her. The disclosure of confidential information from the plaintiff's private life to the wider public hurt her, and apparently inflicted such damage and psychological trauma that her verbal communication skills were impaired.

To settle the dispute, the Supreme Court of Georgia applied domestic normative acts of Georgia along with Article 8 (the respect of personal and family life) and Article 10 (freedom of expression) of the European Convention on Human Rights and European Court of Human Rights case law and delivered a proper legal assessment fitting the circumstances of the case.

The Court put an emphasis on some issues, among others, noting that "Article 20 of the Constitution of Georgia as well as Article 8 of the European Convention are not only applied in cases protecting an individual from the state, but also when one private individual infringes upon the rights and/or interests of a second private individual." Respectively, the Court noted properly that the state is obligated both by negative and positive responsibility in order to protect a private individual in case of infringement by another individual.

The Court also discussed the contradiction of the private and public interests reflecting assessment criteria of the conflict of interests by the European Court. The Court remarked that "A major problem in deciding a case on the freedom of expression is related to striking a balance between freedom of speech and freedom of respect of the right of private life.

In cases which present a contradiction between the respect for an individual's private life and the public interest, the balance could be in favor of the public interest only in cases in which an excessive threat is posed by the perpetrator to the public safety. In the given case the plaintiff (K.K.) had not committed a crime. On the contrary, she was a victim. The court proceedings were closed at her request which is why the balance between the respect for private life and that of public order was to be decided in favor of the individual rights."

The Court also remarked that the publication, when encountering that interest, was to decide the issue in favor of the plaintiff – uphold the protection of her private life – and was not to mention the victim's name in the article against her will.

Finally, the Supreme Court on the grounds of legislation and the European standards established that "the confidentiality of the private life will not only be breached when the distributor spread out information that is incongruent with truth but also when the person without permission of the bearer of the information spreads information that is congruent with truth but unfolds insulting, inconvenient, unpalatable information against the will of the person protected by that right."

The is undoubtedly one of the more vivid and exemplary decisions and attests to the significance of the application of domestic normative acts along with the European human rights standards in making a proper court decisions.

b) The second example of the application of European standards – their application in cases in which they conflict with domestic normative act – is rare in Georgian court practice. Nevertheless, two cases should be referred to.

On 15 May, 2008 the Supreme Court of Georgia heard a case which, *inter alia*, was related to acknowledging as a co-owner of a person, requested by the plaintiff, as being in an unregistered marriage.²⁹ The plaintiff, living with her spouse (before the death of the person with whom she lived in an unregistered marriage) from 1993 till 2005 claimed disputed real estate and a large sum of money spent for the renovation of the house owned by her spouse's son.

The demand of the plaintiff to be acknowledged as a co-owner of the disputed house was grounded on the circumstance that there was a factual matrimony between her and her spouse. To substantiate her position, the plaintiff referred to the fact that they had been in a church marriage since 1998; although civil legislation is considered to be the registration as the origin of the marriage, Georgia is an orthodox country which acknowledges both state and the church alike; hence, the church marriage should not be of minor legal importance.

The plaintiff also pointed out that Georgia is a part of the European Convention on Human Rights and the established practice stipulates that “marriage has extended the limits of formal relationship and the issue of family co-existence largely depends on the existence of tighter personal relationship.” The plaintiff also referred to the 1994 decision of the European Court on the case *Kroon v. the Netherlands*.³⁰ On the basis of the case the plaintiff remarked that “The notion of a family relationship is not only restrained with a relationship founded in marriage as it might encompass other *de-facto* ties when the parties live together without marriage.”

The plaintiff noted that the defendant did not question the existence of the factual matrimony.

Despite the plaintiff's claim substantiating her position with the Constitutional accord between the state and the Orthodox Church as well as with case law of the European Court of Human Rights, the Supreme Court in its decision did not at all consider the notion of “family relationship” as defined by the European Court and the legal consequences arising from it. It only considered the norm envisaged by the Constitutional accord.

Ultimately, the Supreme Court inferred that the Constitutional accord ruled out the plaintiff's claim on her civil right as a spouse – and on originating co-ownership – on the grounds of the church marriage.

This court decision should be assessed negatively. It is clear that there was a contradiction between Georgian legislation, in particular, with the civil code, and with the European standards of human rights. Despite the plaintiff's arguments that, among others, also referred to case law of the European Court to substantiate how to interpret the notion of family relationship, not only did

²⁹ See: May 15, 2008, Verdict Nas-968-1269-07 of the Civil, Industrial and Bankruptcy Chamber.

³⁰ October 27, 1994, Series A no. 297-C.

Court not share that interpretation established in the European court practice, but it even did not consider the plaintiff's argument based on the European standard.

The October 10, 2007 decision of the Administrative Board of the Tbilisi City Court is also of importance. In this case the plaintiff requested that the Ministry of Justice of Georgia develop such an administrative act that would be in compliance with the demand of Article 8 of the European Convention protecting a prisoner's right as guaranteed by the Convention to meet with family members more often and with longer duration that was established by the law 'on Imprisonment' – i.e. once a month and for an hour.³¹

In the plaintiff's opinion, the prisoner serving his/her term under this strict regime who is given the right to meet only once per month contradicts the context of Article 8 of the European Convention. To support her position, the plaintiff also referred to the decision of the European Court *Nowicka v. Poland* and indicated that the case stipulated that limiting the right to seeing family members only once per month while serving a prison term was considered as a violation of Article 8 of the Convention.³²

The Tbilisi City Court satisfied the plaintiff's claim and indicated:

"The permitted quantity of the meetings assigned to prisoners as defined in the law of Georgia 'on Imprisonment' clearly contradicts the Article 8 of the European Convention; it is evidently few in terms of numbers, impinges upon the right of respect of family life and in given circumstances preponderance shall be granted to the international treaty as to that above the hierarchy level of legal act.

"Article 6 of the Constitution of Georgia stipulates that international treaties or agreements have a higher legal effect over domestic normative acts. Hence, the European Convention is part of the legislation. The said provision is supported by the laws of Georgia on 'Normative Acts'. Article 4 of the mentioned law stipulates that the international treaty of Georgia is a normative act of Georgia.

"The Court considers that since the European Convention on Human Rights is acknowledged as part of legislation of the state, protection of human rights shall be conducted in line with international standards.

"The Court considers that the defendant – the Ministry of Justice – must issue a normative act which will be in compliance with the demands of Article 8 of the European Convention and will take into consideration decisions adopted on a disputed issue by the European Court."

The Tbilisi City Court's decision deserves a positive assessment. Special importance shall be attached to some facets of the court decision:

³¹ See: October 10, 2007, Decision N3/2058 of the Administrative Board of the Tbilisi City Court.

³² December 3, 2002.

1. The Court assessed the case not only on the basis of domestic normative acts ('the law on Imprisonment'), but also on that of the European standards and inferred that the established numbers of meetings as defined by the mentioned law of Georgia clearly contradicts the standards of the European Convention for which it grants preponderance to the European standard;

2. Although the Court did not directly mention the specific case of the European Court there is every indication in place that it shared the plaintiff's argument based on the case – *Nowicka v. Poland*.

The decision once more proves the necessity of applying the case law of the European Court along with the European Convention in making a correct decision. Had there be not been that specific case to which the plaintiff could refer, there would have been a greater likelihood that neither the plaintiff nor the Court would have inferred what it did on the grounds of that case since neither the plaintiff nor the Court would have been able to read such a standard in Article 8 of the Convention that granting the right to meeting with a prisoner once a month was not sufficient;

3. It is also interesting that the City Court tasked the Ministry of Justice to issue the normative act which would be in compliance with the demands of Article 8 of the European Convention taking into consideration the decisions made by the European Court on a disputed issue. By doing so, the Court demanded the defendant bring into compliance its normative act regarding that issue with that of case law of the European Court.

c) It is noteworthy that in court practice of Georgia one case can be traced in relation to the application of the third form of the European standards of human rights which considers application of these standards as the sole legal basis to decide a court case; the Supreme Court of Georgia made a decision on the case on 10 May, 2001 and in its motivation part it referred to the European Convention as to the sole legal basis in settling the court case.³³

2. The Practice of General Courts of Georgia on Initiating the Application of European Standards

The Application of European standards of human rights may be initiated by the parties of the case as well as by the court itself. The parties of the case have the right to found their positions of the grounds of the European standards and maintain that the rights granted to them by the Convention were breached.

As for the application of European standards by the court's initiative, as was noted earlier, the effective involvement of the Court in the application of such a normative act which is not supported by the party of the case differs in a way whether it is a criminal or civil/administrative

³³ See: Verdict May 10, 2001, N8(1) on criminal cases of the Supreme Court of Georgia ; N5, 2001 year, p.268.

case which is at hand. Despite the rather passive role granted to the court on civil/administrative cases, it nevertheless shall apply the European Convention and case law of the European Court if it deems that their application will uphold to establish the truth of a case.

In the vast majority of court decisions, courts initiate the application of the European standards of human rights in which they are applied.³⁴ In other words, in these cases courts apply the European standards in spite of the parties' official position that they do not refer to them to substantiate their positions.³⁵

The active role of the courts of Georgia in relation to civil/administrative cases should be appreciated. Despite the relatively minor role granted to courts on cases of such a category, the courts of Georgia nevertheless apply the European standards.

In Georgian court practice some cases can be traced to cases in which European standards were applied by the Court under the initiative of the party involved in the case.³⁶ In those cases, the party in the process, in order to substantiate his/her position, referred to the European standards, while the Court in order to make a decision, applied the appropriate article of the European Convention (in some cases, case law of the European Court).

Unfortunately, there are some cases of Georgian court practice in which the party in the process, in order to substantiate his/her case, referred to the European standards while the Court absolutely disregarded them in its decision.³⁷

To demonstrate this we may review one particular case. On 6 February, 2003 a case was heard by Kutaisi City Court regarding the Kutaisi vice-mayor's allegation that his honor, dignity and business reputation had been infringed upon by a newspaper article.³⁸ The plaintiff requested that the defendants (a journalist and the editor of the paper) be obliged to retract the information published

³⁴ Due to the large quantity of such decisions, we have only indicated some of them. See the other relevant decisions: Application of the European Convention on Human Rights in Georgia – K.Korkelia, 2004. November 25, 2002, N3g-ad-462-k-02 decision on Administrative and Other Cases, SUSG, N1, 2003, pp.37; December 16, 2002, N3k-1188-02 verdict of Civil, Industrial and Bankruptcy Issues, SUSG, N2, 2003, pp.461; December 18, 2002, N3g-ad-429-k-02 verdict, Administrative and Other Cases, SUSG, N2, 2003, pp.224; April 14, 2004, Nas-593-1241-03, Civil, Industrial and Bankruptcy Chamber of the Supreme Court of Georgia.

³⁵ In any case, nothing is said in this decision about the European Convention referred to by the party in the process to substantiate his position. A different conclusion was drawn in a survey conducted among judges of Georgia which read that judges mainly referred to cases of the European Court only when it was requested by the barrister and, as a rule, the judges did not initiate it. See the survey: "On the application of international treaties of human rights and the decisions of the European Court" conducted by BCG Research under the request of UNDP. See international treaties of human rights and Georgia's court practice, Part I, 2006, pp.43.

³⁶ See February 22, Verdict 2001 N3k/599, Civil, Industrial and Bankruptcy Chamber; July 17, 2001, N22(1) verdict on criminal cases, SUSG, N10, 2001 year, pp/653-655; October 11, 2001, N79 verdict on Criminal Cases, SUSG, N1, 2002 year, pp.42-44; November 13, 2001, N3g/ad-82-k-01 verdict on Administrative and other cases, SUSG, N12, 2001 year, pp.1129, 1131; April 3, 2001, N2/64 decision of Chiatura District Court ; May 13, 2002, N3/9-2002, Marneuli District Court ; June 12, 2002; N3k-606-02 verdict of SUSG on Civil, Industrial and Bankruptcy Cases, N9, 2002 year, pp. 1511-1513 ; June 25, 2002, N3k-337-02, verdict SUSG on Civil, Industrial and Bankruptcy Cases, N9, 2002 year, pp. 1625-1637 ; See also on the case December 18, 2001, N2/a-176 decision of Tbilisi Regional Court, Civil and Industrial Board; July 4, 2002, N3k-390-02 decision SUSG on Civil, Industrial and Bankruptcy Cases, N10, 2002 year, pp. 1758-1767.

³⁷ September 17, 2001, case #2/229 Borjomi District Court decision; See also the complaint and the plaintiff's defensive speech; February 6, 2003, N2/74 decision of Kutaisi City Court ; October 30, 2006 N674-ap verdict of Criminal Cases Chamber of the Supreme Court of Georgia; December 18, 2007, Nbs-536-512-k-07 verdict of Administrative and Cases of Other Categories Chamber of the Supreme Court of Georgia.

³⁸ See: February 6, 2003, N2/74 decision of Kutaisi City Court.

in the article in the paper – ‘P.S’ (with the headline: “One should enjoy the rights of Mayor at least, in order to do business in Kutaisi”). The article stated that the person allegedly enjoying the rights of Mayor was involved in the oil business at the vice-Mayoral level; one of the officials managed to identify the plaintiff. The defendant dismissed the complaint and noted that the article did not disseminate information infringing upon the plaintiff’s honor, dignity and business reputation.

In order to substantiate his position, the defendant referred to domestic normative acts of Georgia and Article 10 of the European Convention (freedom of expression) as well as many cases from the European Court of Human Rights³⁹ providing a rather detailed interpretation the European Court’s position on similar cases. Regrettably, not only did the Court not consider the defendant’s arguments, among them the European Convention and the cases of the European Court, in its decision it didn’t even make any mention of them.

3. The Practice of Supporting General Court of Georgia Decisions with the European Standards

As it has been noted earlier, the court shall hear a case on the basis of arguments supported by the European standards if a party in the process refers to them to support his/her position. The Court shall express its own position in its decision whether application of the European standards is possible or not in relation to the specific dispute. The Court shall found the reasons for applying or not applying these norms in settling a dispute, i.e. whether it supports or discards the arguments of a given party supported by European standards. If the Court discards such arguments it shall found the reasons for which it does not share the party’s position. The Court may refer to that the specific article of the Convention that is not applied in relation to the case as its sphere of regulation is different, or if the party misinterprets the context of the specific article of the European Convention; similarly, the Court shall found their positions if a party refers to European Court case law.⁴⁰

By analyzing decisions of the Georgian courts in which the European standards of human rights are applied one can draw the conclusion that the situation in terms of substantiating the Georgian Courts’ decisions by the European Convention and case law of the European Court is unsatisfactory. In the vast majority of cases court decisions are founded insufficiently specifically in relation to the European standards.

However, an examination of the practice revealed several cases when the Court sufficiently, specifically judged the arguments of a party based on European standards.⁴¹ In those cases the

³⁹ In particular, the defendant referred to the following decisions of the European Court: *Lingens v. Austria*, *Castells v. Spain*, *Jersild v. Denmark*, *Goodwin v. the United Kingdom*, and *Oberschlick v. Austria*.

⁴⁰ See: May 15, 2001, Nas-968-1269-07 verdict of Civil, Industrial and Bankruptcy Chamber.

⁴¹ See: July 17, 2001 N22(1) verdict, SUSG, on Criminal Cases, N10, 2001 year, pp.653-655; April 3, 2002, N2/64 decision of Tchiatura District Court; May 13, 2002, N3/9-2002 decision of Marneuli District Court; June 25, 2002 N3k-337-02 verdict, SUSG, on Civil, Industrial

Court analyzed the case on the arguments of a party based on European standards and founded why it applied or did not apply the relevant norm of the European Convention to settle the dispute. It is unquestionable that such decisions are more conclusive for the parties of the process, including for the party against whom decision was made, than the decision where there is only a 'thin' reference to the European standards.

One of the cases in which the Court deliberated with sufficient specification on the application of European standards in specific circumstances along with the law of Georgia on 'Freedom of Speech and Expression' is related to a lawsuit between the member of the Monitoring Group of the Ministry of Justice of Georgia and the former Minister of Justice. The plaintiff's claim that the TV and press statements made by the defendant infringed upon his honor, dignity and business reputation was considered by the Court on the grounds of the law and the European standards and did not satisfy the complaint since the plaintiff as the person matching to the public official was to burden the commitment of endurance of criticism.⁴²

A case heard by the Supreme Court of Georgia on 22 June, 2001 was related to the complaint of a Member of Parliament (MP) against journalists of the newspaper 'Lanchkhuti Plusi' on infringing upon his honor, dignity and business reputation.⁴³

The grounds for the complaint referred to by the Georgian MP from the Lanchkhuti district was that the article "Hey Roman, Roman", published in the abovementioned newspaper helped circulate rumors, thus insulting him, while his honor and dignity were deliberately disparaged in the eyes of voters and co-citizens. In the article, the MP is mentioned as a man who has 'lost his head'. In the article the following phrases are used to describe and/or refer to him: 'Who are you and how did you happen to be in such a confusion as a Member of Parliament?'; 'How can I believe that you were sleeping during all three hearings?'; 'He chops our legs in Lanchkhuti while he beheads us in Tbilisi'; 'He is maturing so slowly that, alas, Lanchkhuti district is short of time to await the end of this hopeless process'; 'Did Lanchkhuti district elect you to parliament in order for you to process wool?'; 'You even failed to read laws at the level of an amateur'; 'You don't even know how to read a paper'; 'Roman, normally people respond adequately to such whims but, alas, this only won't help your misery'; 'Here every knave aspires to become a nobleman while every lazybones seeks to be a commander.'

The MP demanded a retraction of this information and compensation for moral harm from the authors of the article. In his opinion, the defendants intended to compel him to withdraw his can-

and Bankruptcy Cases, N9, 2002 year, pp. 1625-1637; July 3, 2002, N2/a-25-2002, decision of Civil and Industrial Cases' Board; July 4, 2002N3k-390-02 decision, SUSG on Civil, Industrial and Bankruptcy Cases, N10, 2002 year pp. 1758-1767; April 14, 2004, Nas-593-1241-03 decision of Civil, Industrial and Bankruptcy Chamber of the Supreme Court of Georgia.

This decision of the Supreme Court of Georgia is remarkable. However, it did not consider the European Convention but it considered the cases of the European Court referred to by the party and founded that those cases were not to apply in relation to that specific case. January 23, 2004, N3g-ad-275-k-02 verdict, SUSG, on Administrative and Other Cases, N3 2003 year, pp. 476-479 ; See also April 24, 2003, N3k/1240-02 decision of Civil, Industrial and Bankruptcy Chamber of the Supreme Court of Georgia.

⁴² See May 16, 2008, Nas-810—1129-07 verdict of Civil, Industrial and Bankruptcy Chamber.

⁴³ See June 22, 2001 verdict of Civil, Industrial and Bankruptcy Chamber of the Supreme Court of Georgia. See 'Exemplary Decisions of the Protection of Human Rights' (2001 year), Tbilisi, 2002 year, pp. 76-79.

didacy from the parliamentary elections. In the defendants' opinion, no insulting phrases could be traced in the article in relation to the MP, rather the article evaluated critically the activity of the MP of Lanchkhuti district in the Parliament of Georgia which, in the defendants' conviction, was caused by the inactivity of their MP which he demonstrated in relation to the hearing of the bill that was of vital importance for the district.

The complaint was first considered by Lanchkhuti District Court. It deemed that the defendants deliberately spread unrealistic information infringing upon the plaintiff's honor, dignity and business reputation.

The Chokhatauri District Court applied Article 18 of the Civil Code of Georgia and the law of Georgia on 'Press and Other Means of Media' and partly satisfied the plaintiff's request. According to the Chokhatauri District Court's decision, the journalists were obligated to retract the information in the paper, to publicly apologize and to pay 15,000 GEL in damages.

However, Kutaisi Regional Court satisfied the journalists' appeal. It overturned the Chokhatauri District Court's decision. The plaintiff did not consider the Kutaisi Regional Court's decision well-grounded and filed another appeal, by cassation, in the Supreme Court of Georgia.

The Supreme Court of Georgia did not satisfy the cassation complaint of the MP. It is noteworthy in the decision of the Supreme Court of Georgia that it to the fore held up the first paragraph of Article 24 of the Constitution of Georgia which stipulates that every person has the right to obtain and disseminate information, to express and spread his/her opinion verbally, by written or other means. The Court also held up the first paragraph of article 19 of the law on 'Press and Other Media Means' which stipulates that the citizens of Georgia have the right to effectively obtain information on the activity of state officials, state agencies and public-political entities. Simultaneously, court put emphasis on the necessity of protection of a person's honor, dignity and business reputation on the one hand, while on the other, it indicated to freedom of speech.

Most importantly, the Supreme Court applied case law of the European Court of Human Rights regarding that decision. The Supreme Court of Georgia held up the decision of the European Court on the case *Castells v. Spain* which stipulated that "freedom of expression implies expression of such statements and convictions which are insulting, outrageous and disturbing." By referring to that case, the Supreme Court approved that an opinion expressed by a person, including by a journalist, could be not only positive but also negative. Negative assessment might be insulting, outrageous and even disturbing.

But for the Supreme Court approval of the idea that expressed opinion could be either positive or negative was not enough. Court was to answer the question where to draw the line, on the one hand, between the permitted frames of criticism and on the other, on the infringement of honor, dignity and business reputation.

To that purpose the Supreme Court again referred to case law of the European Court. It applied the European Court's decision on a case – *Lingens v. Austria* – in which the European Court noted that the permitted frames of criticism of a politician are wider than of a private individual. The

Supreme Court also referred to that part of the mentioned case that a politician unlike a private individual is beforehand aware of and necessarily submits his/her actions and gestures under the control of mass media and public alike. On the grounds of the case, the Supreme Court concluded that 'politicians and state officials shall withstand in debates held in press and TV more than permitted criticism if that criticism does not roughly infringe upon their private life and immunity.'

On the grounds of the case the Supreme Court founded that politician or state official being beforehand aware of his/her activity submits his/her behavior under the public control; hence, his/her activity might fall under sharp criticism of public and given his/her position he/she should withstand this. Subordination of his/her activity to public control in which journalists have a greater role, comes out from the fact that a politician's or state official's activity represents the public interest.

It is remarkable that the application of case law of the European Court by the Supreme Court had principal importance in making that decision. It would not have been able to infer by only applying the domestic normative acts of Georgia (the Civil Code and the law on 'Press and Other Mass Media Means') that the permitted frames of criticism of a politician are wider than that of a private individual.

Pavlo Pushkar

THE RIGHT TO A FAIR TRIAL AND USE OF UNLAWFULLY OBTAINED EVIDENCE AND GUILTY PLEAS IN THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

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INTRODUCTION

Article 6 § 1 of the European Convention on Human Rights (hereafter – “Convention”) is one of the document’s most frequently cited provisions establishing “framework” protection in the area of judicial proceedings. The article is probably the best known conventional provision and the one which the European Court of Human Rights (hereafter – “Court”) refers to most often in practice. So, it is not unusual that the focus of this research is related to the right to a fair trial.

The purpose of this research is to define the concept of “fairness” in the context of criminal proceedings, provide specific examples of practices running contrary to principles of fairness (examples of unfair assessments of evidence, including evidence obtained through ill treatment, and simplified trials of criminal cases based on questionable guilty pleas). Another task is to reflect on the most recent case-law related to the fairness of criminal proceedings, reaching conclusions as to how standards of fairness have developed in the Court’s jurisprudence.

The aforementioned practical examples of unfair assessments of evidence in the course of full trials and simplified criminal trials were not chosen by accident. They largely relate to case-law with re-

¹ Disclaimer: The views expressed in this article are solely those of the author and do not represent those of any institution.

gards to countries that have introduced new procedures previously unknown to their legal and criminal justice systems. This concerns countries aiming to strengthen the adversarial context of criminal trials on the domestic level. Thus, the experience from these countries evaluated in the Court's case-law could serve as a useful indicator of the compliance of the current similar domestic judicial practices and the relevant legislation with the requirements of fairness ensuing from Article 6.

THE COMPLEX TASK OF DEFINING FAIRNESS OF CRIMINAL PROCEEDINGS

The well-known wording of Article 6 § 1 reads “in determination of criminal charges ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”. Originally, the establishment of the “fair trial” standard was based on the idea of “drafting a text which held good in international law [as] the Universal Declaration of Human Rights² lacked precision ... and there was a need for elaboration of a text elaborated which should be binding in a legal sense”³. However, as we can see, being unrealistic from the very outset, this idea was not implemented, which leaves a great deal of space for the Court's legal creativity in establishing a standard and further developing its meaning. One might only suggest that this was the original intention of the Convention's drafters, as the reasons behind drafting the aforementioned text of Article 6 using this wording are not clearly shown in the Convention's preparatory works.

Most possibly, one of these reasons was that this provision, like many of the Convention's substantive provisions, established a standard that should have been applied flexibly, thus allowing the Court to define the provision and to develop its definition by means of forthcoming jurisprudence. Another reason worth mentioning might be that this provision was in a certain sense a compromise agreed upon by the drafters, which reflected their differing approaches to the settlement of criminal cases originating from continental and common law traditions⁴. The provision was also a compromise between different understandings of what is fair and what is not in the context of criminal proceedings based on traditions of various European countries.

One has to admit that the concept of fairness cannot be easily defined standing alone. It has an extremely wide and, one might say, deep philosophical and theoretical meaning on its own. There are many meanings that could be given to the notion of fairness. For instance, the dictionary

² See more specifically Article 14 of the International Covenant on Civil and Political Rights, 1966 (999 UNTS 171, 6 ILM 383 (1967)). It states there are many differences between the two provisions.

³ Janis, Kay and Bradley. *European Human Rights Law: Text and Materials*. OUP, 1990, p. 13.

⁴ D.J. Harris, M. O'Boyle, C. Warbrick. *The Law of the European Convention on Human Rights*. London, Dublin, Edinburgh: Butterworths. 1995. p. 164; D.J. Harris, M. O'Boyle, E.P. Bates, C.M. Buckley. *Law of the European Convention on Human Rights*. OUP, 2nd Edition. 2009. p. 203.

definition of fair in the context of a trial is “having qualities of impartiality and honesty being free from prejudice, favouritism, and self-interest; it also defines fair as just equitable; even-handed; equal, as between conflicting interests”⁵.

Fairness in the context of law is frequently related to social justice issues or distributive law. In the United Kingdom, fairness is also associated with the law of equity. It is also frequently raised in the context of natural law doctrine due to the fact that a great deal of influence on the interpretation of fairness can be found having its roots in natural justice theories⁶. However, once again, fairness does gain a legalistic meaning when applied in the context of the administration of justice and more specifically within the context of the administration of justice in criminal cases. A number of attempts have been made to define fairness in this context and to give it a procedural meaning⁷. These attempts were of mere theoretical and philosophical nature and were mostly derived from the main ideologies of the adversarial system⁸. As an example, socialist countries ideologically opposed to the modern system of the administration of justice used the concept for their own purposes, sometimes defining fairness as the social equality of the participants in trial⁹. However, this appeared from the classical pre-Soviet approach of an object of criminal procedure as a process of establishing the State’s right to punish¹⁰.

Looking at the notion of fairness in the context of the administration of justice, one has to ask whether we are talking about so-called *firstly* “substantive fairness” / “fairness of the outcome of the proceedings” (otherwise fairness of the result of the proceedings) or *secondly* of procedural fairness. It is quite obvious that the outcome of a criminal procedure may not always seem fair or just (in particular for certain participants in trial proceedings, such as, for instance, the defendant, who complains about the unfair outcome of the proceedings, i.e. his conviction, or for a civil plaintiff who might consider insufficient and unfair the compensation ordered by the court’s verdict). Thus, fairness may be perceived as a philosophical or moral value¹¹. Therefore, once again, from a theoretical point of view, any kind of “determination of criminal charges” requires that both substantive and procedural aspects of fairness be respected.

The concept of procedural fairness might be said to involve the following elements:

- Fairness of the existing procedure itself, which is centred around a view that the parties are the ones for whom the procedure is established and any procedure giving advantage to one party over the other inevitably leads to an unfair decision;

⁵ Black’s Law Dictionary, 6th Edition. (St. Paul, Minnesota: West Publishing Co.). (1990).

⁶ Gerry Maher. *Natural Justice as Fairness. In The Legal Mind. Essays for Tony Honore*. Ed. Neil MacCormick and Peter Birks. (Clarendon Press: Oxford). (1986). pp. 103-121.

⁷ See, for instance, John Rawls. *Theory of Justice* (Cambridge, Mass.) (2nd Ed.). (1972). pp. .83-89.

⁸ Stephan Trechsel. *Why Must Trials Be Fair?* Israel Law Review. Vol. 31. 1997. p. 98.

⁹ M.S. Strogovych. *On Adversariness and Procedural Functions in the Soviet Criminal Procedure. //Pravovedeniye*. -1962. - № 2. - pp. 106 – 114.

¹⁰ Foynitsky I.Ya. *The Course of Criminal Procedure*. 4th Ed. St. Petersburg, 1912. p. 4.

¹¹ Stephan Trechsel. *Supra*. p. 95.

- “Fairness of the system as a whole”, including a wide understanding of the principle of the *rule of law* basis of the administration of criminal justice by the State, which *inter alia* includes the quality of the criminal procedure legislation regarding the issue on hand and its fair application in practice by the law enforcement authorities and the courts¹².

However, all of the aforementioned theoretical underpinnings do not satisfy the conceptual scope of fairness envisaged in Article 6 as it has gained its own special meaning in this context, becoming a value that is of the common moral, ethical and legal heritage of European states. This approach, which underscores the importance of the right to a fair trial is reflected in the Court’s well-known case-law dating back to the late 1980s. At that very time, the Court highlighted that the right to the fair administration of justice holds such a prominent place in a democratic society that it cannot be sacrificed to expediency, neither can its breach be justified by the need to combat dangerous criminals or to investigate serious criminal acts that endanger the public or society as a whole¹³, disregarding lawful means of gathering evidence.

In one of the more recent cases, *Rowe and Davis v. the United Kingdom*¹⁴, the Court’s Grand Chamber restated the previous jurisprudence and reiterated that the right to a fair trial guarantee, “reads as a whole, guarantees the right of an accused to participate effectively in a criminal trial”. The Court stated that the fundamental aspect of the right to a fair trial is that criminal proceedings, including the elements of such proceedings relating to the procedure, should be adversarial, and there should be equality of arms between the prosecution and the defence. The applicant should not be placed at a serious disadvantage *vis-à-vis* the prosecution in regards to the examination of the case-file or its most important parts, decisive for conviction.¹⁵

However, referring to another case, the Court concluded that to reach a finding on whether there was a breach of the principle of fairness in the course of criminal proceedings one must consider whether the proceedings in their entirety, including the appeal proceedings, as well as the way in which evidence was taken, were fair. Eventually the Court’s only task would be to ascertain whether the proceedings considered as a whole were fair, including the way in which the evidence was taken¹⁶.

Thus, “fairness”, according to the Court’s case-law and in the context of criminal proceedings, can be said to include the following aspects: the equality of arms, the adversarial nature of the procedure¹⁷, the public appearance of the administration of justice, the independent and impar-

¹² Nico Jorg. *Are inquisitorial and adversarial systems converging?* In Harding, Fennel and Jorg. *Criminal Justice in Europe. A Comparative Study*. (Clairdon Press). (1995). pp. 42-43.

¹³ See *Delcourt v. Belgium*, judgment of 17 January 1970, Series A No. 11, p. 15, § 25; *Kostovski v. the Netherlands*, 20 November 1989, § 44, Series A No. 166.

¹⁴ See *Rowe and Davis v. the United Kingdom* [GC], No. 28901/95, § 34, ECHR 2000 II.

¹⁵ See *Mirilashvili v. Russia*, No. 6293/04, §§ 228 - 229, 11 December 2008 (This judgment discusses evidential value of various types of evidence, including evidence resulting from telephone tapping and treatment of expert evidence).

¹⁶ See *Edwards v. the United Kingdom*, 16 December 1992, § 34, Series A No. 247-B.

¹⁷ In pre-revolutionary (pre-1917) theory of criminal procedure, the adversarial nature of the procedure meant the split of the criminal procedural functions into three – prosecutor’s, defence’s and judicial – functions, which theoretically were not supposed to overlap. This

tial judicial examination of the criminal charges, the effective participation in proceedings, including the adequate and proper exercise of the defence's rights, the reasonable period of examining the case, etc¹⁸.

One might conclude that a general approach adopted in the case-law is that the Court rather evaluates what is unfair rather than defines what a fair procedure should resemble¹⁹. However, to apply the principles established above it is necessary to assess specific circumstances in which the Court makes a finding that particular criminal proceedings were unfair. Based on the above, let's contrast the above principles of fairness with certain jurisprudential examples of how the Court assesses criminal cases with complaints that evidence has been obtained unlawfully.

UNFAIRNESS OF CRIMINAL PROCEEDINGS BASED ON THE FAILURE TO PROPERLY ASSESS EVIDENCE

Can criminal proceedings be said to be unfair as a result of an alleged failure to correctly assess evidence? As a general rule – no. Such a conclusion arises from the fact that matters relating to allegations of the improper assessment of evidence, the admissibility of certain evidence and its evidential weight, or matters similar to the incorrect application of the domestic procedural or substantive law, fall outside the Court's scope of review. The Court's case-law does not establish any rules as to how evidence should be assessed, or which evidence should be given more evidential value and should be more favoured. For the Court, these are matters that are clearly inadmissible for further examination on merit and which are generally regarded, if earlier raised in the applications, as matters relating to so-called "fourth instance nature" complaints. In this respect, the Court has stated on a number of occasions that its subsidiary nature does not allow it to take the place of a first instance tribunal and to replace judicial authorities on matters of assessing evidence or fact-finding domestic, which, according to the Court's constant jurisprudence, are better placed for performing these obligations²⁰. An example of how the Court deals with fourth-instance complaints and explanations as to why they are normally declared inadmissible can be seen in a judgment given by the Court upon an application lodged by *Gia Patsuria Against Georgia*²¹.

However, notwithstanding the aforementioned general approach, which is based on its constant case-law, the Court's judicial practice clearly states that it will look into issues of how evi-

theory was supported by Professor D.G. Talberg of Kyiv's St. Volodymyr University in 1889 and such scholars as I.Ya. Foynitsky. The same approach was followed in Soviet criminal procedure; however, only in theory.

¹⁸ Karen Reid. *A Practitioner's Guide to the European Convention on Human Rights*. London: Sweet and Maxwell. 1998, p. 51; Karen Reid. *A Practitioner's Guide to the European Convention on Human Rights*. 3rd Edition. London. 2008, p. 66.

¹⁹ Karen Reid, *supra*, 3rd Ed. p. 67 - 69.

²⁰ See *Koval v. Ukraine*, No. 65550/01, § 118, 19 October 2006.

²¹ See *Patsuria v. Georgia*, No. 30779/04, §§ 86 - 87, 6 November 2007.

dence was obtained, especially if such evidence was obtained by means claimed to be unlawful and more specifically if the evidence constitutes a decisive element of proof in establishing the applicant's guilt. The Court also cautiously approaches incriminating evidence obtained in unclear circumstances, which was the only evidence substantiating a defendant's conviction.

Referring back to the Court's jurisprudence, as a general rule, the case-law states that the right to a fair trial presupposes that all the evidence must normally be produced at a public hearing in the presence of the accused with a view to adversarial argument, with the defendant being given an adequate and proper opportunity to challenge and question a witness against him or her either when the statements were made or at a later stage of the proceedings. The conviction, to be compatible with Article 6 § 1 guarantees, must not rely solely or decisively on the depositions of a witness whom the accused has had no opportunity to examine or more generally on evidence not examined during the investigation or at trial. This includes evidence based on submissions of *agents provocateurs*²² and anonymous witnesses²³, which were not subject to review in trial court.

There were several recent examples of such approaches in the Court's case-law, relating to the countries of the continental and inquisitorial criminal justice tradition.

For instance, in a recent case against Russia lodged by *Vladimir Romanov*²⁴, the applicant's conviction was based on evidence given by a victim who failed to appear at trial, and thus the applicant was not able to challenge his witness' statements, which were of decisive importance for the applicant's conviction. On the basis of these findings the Court concluded that the applicant's trial was unfair. In the same case the Court noted that because other statements given by the co-accused on admitting their guilt were later retracted in the trial stage of the proceedings by the co-defendants who alleged coercion on the part of the investigator, they could not be admitted as evidence at the applicant's trial or did not have evidential value important enough to support the applicant's conviction²⁵. In relation to a guilty plea by the co-accused, the Court noted that such a plea should only be admitted to establish the fact of a commission of a crime by a pleading person, and not the applicant, as a guilty plea raised by the co-accused by itself did not prove that the applicant was involved in that crime.

Another issue arises from the use of evidence obtained by physical coercion used as key evidence for the applicant's conviction. In one of the Court's most recent cases against Germany, *Jalloh v. Germany*²⁶, the Grand Chamber found a breach of Article 6, stating that the proceedings as a whole were unfair on the basis of the applicant's complaint that he had been administered an emetic by force and that the evidence thereby obtained (a package of drugs that he swallowed) –

²² See *Teixeira de Castro v. Portugal*, 9 June 1998, Reports of judgments and Decisions 1998-IV (For some additional considerations on the case. See the dissenting opinion attached to this case).

²³ See *Taxquet v. Belgium*, No. 926/05, § 68, ECHR 2009-... (The case referred to the Grand Chamber).

²⁴ See *Vladimir Romanov v. Russia*, No. 41461/02, 24 July 2008.

²⁵ See case of *M. H. v. the United Kingdom* (No. 28572/95, Commission decision of 17 January 1997), which describes in more detail the test for admitting guilty pleas given by the co-accused as evidence in the trial of other persons.

²⁶ See *Jalloh v. Germany* [GC], No. 54810/00, ECHR 2006-...

in his view, illegally – had been used against him at his trial. The Court found that the authorities had subjected the applicant to a grave interference in his physical and mental integrity against his will. They had forced him to regurgitate, not for therapeutic reasons, but rather in order to retrieve evidence they could equally have obtained by less intrusive methods contrary to the absolute prohibition of ill-treatment arising from Article 3 of the Convention. Thus, the Court further ruled that the evidence was obtained by measures in breach of the core prohibition enshrined in the Convention and this evidence obtained was decisive in securing his conviction. Accordingly, the use as evidence of the drugs obtained by the forcible administration of emetics to the applicant was contrary to public interest and had rendered his trial as a whole unfair.

A similar, probably more straightforward, issue of admitting evidence obtained as a result of ill-treatment was discussed in the case against Ukraine lodged by Oleksandr Yaremenko²⁷, who was arrested on suspicion of being involved in several murders. The applicant complained that he was ill-treated in police custody and that the authorities failed to carry out an adequate investigation into his allegations of ill-treatment. While being detained, on several occasions, the applicant waived his right to be represented by a counsel and confessed of the crimes as charged. However, later, after obtaining legal aid and in the course of the trial, the applicant denied his involvement in the crimes. He changed his position again, admitting his guilt, after his lawyer was disqualified from participating in the proceedings by a decision of the investigator. In the course of the judicial authorities' examination of his case, the applicant's retraction of his confessions and his allegations of ill-treatment were found to be groundless. In this case, the Court concluded that the State authorities had failed to conduct an effective and independent investigation into the applicant's allegations of ill-treatment in violation of Article 3. The Court further ruled that the applicant's lawyer had been dismissed from the case by the investigator after having advised his client to remain silent and not to testify against himself. It further considered that there had been serious reasons to suggest that the statement signed by the applicant had been obtained against the applicant's will²⁸. In regards to findings that there had been no adequate investigation into the applicant's allegations of the confession having been obtained by illicit means, the Court found that its use at the trial impinged on his right to silence and his right not to incriminate himself in violation of Article 6 § 1. It also found a breach of the right to be represented by a lawyer of his own choosing guaranteed by Article 6 § 1(c).

A similar decision in relation to the proceedings' breach of the requirement of fairness was taken by the Court in the case of *Harutyunyan* lodged against Armenia²⁹, where the Court found that the applicant's right not to incriminate himself and his right to a fair trial were breached by the use at his trial of statements obtained by torturing the applicant and two witnesses who testified against him. The Court found that the applicant and the witnesses had been coerced into making confessions and that that fact had been confirmed by domestic courts when the police officers concerned were convicted of ill-treatment.

²⁷ See *Yaremenko v. Ukraine*, No. 32092/02, 12 June 2008.

²⁸ A similar breach of Article 6 § 1 was found in the case of *Shabelnik v. Ukraine* (No. 16404/03, § 59, 19 February 2009), where the Court ruled that the applicant's testimonies were obtained in defiance of his will.

²⁹ See *Harutyunyan v. Armenia*, No. 36549/03, ECHR 2007-VIII.

Judging from the above case-law one might conclude that any use of unlawfully obtained evidence would lead to a breach of Article 6. However, it is not so. The Court's case-law clearly states that, as such, certain unlawfully obtained evidence may be admissible if the proceedings as a whole are fair. In such cases, the Court would look into whether the rights of the defence were respected and more specifically at whether the applicant was given an opportunity to challenge the way this evidence was obtained and whether the applicant opposed its use in the course of the trial³⁰. The Court would normally not find an issue arising under Article 6 § 1 as to the conviction on the basis of available evidence, taken as a whole³¹, especially where the applicant was given the proper opportunity and adequate time and facilities to present submissions on the case and to object to the admissibility of certain available evidence³².

This turns us to the Court's case-law on Article 6 with regard to cases where an applicant waives his rights to a full trial and thus his right to have a full and proper opportunity to defend himself, including a waiver of the right to question the admissibility of certain evidence. These are cases generally related to simplified procedures for settling criminal cases, which recently were given attention in several cases examined by the Court, including the case of *Scoppola v. Italy*³³ examined by the Grand Chamber, which we will discuss below. In its case-law relating to the admission of guilt and in relation to summary trials, as in its jurisprudence on the issues arising from the assessment of evidence, the Court establishes certain tests and standards that should be applied to assess how fair the criminal proceedings were.

UNFAIRNESS OF CRIMINAL PROCEEDINGS ENSUING FROM SIMPLIFIED AND ABRIDGED TRIAL PROCEEDINGS

The absence of full trial does not automatically mean that it has been unfair. We have seen that from the case-law relating to the assessment of evidence in the course of a full trial. The Court's case-law shows that having a "full trial" as such does not always prevent miscarriages of justice, judicial errors, mistakes, etc. Full trial does not always ensure that evidence is examined thoroughly, equality of arms is respected, and, for instance, all relevant witnesses are heard. Nevertheless, it is normally perceived that a full trial procedure in a court of law or tribunal is a place where fair justice in criminal cases is being administered³⁴, as the full procedure before the court has specific inalienable features, which are distinct from other non-judicial procedures for the settlement of criminal cases. In particular, full trial procedures seem to satisfy the substantive and procedural fairness. One of these features, for instance, is trial publicity, i.e. compliance with

³⁰ For instance in the case of *Melnik v. Ukraine* (No. 72286/01, 28 March 2006), the applicant failed to challenge admissibility of evidence obtained through operative purchase of drugs conducted by an undercover police agent.

³¹ See *Schenk v. Switzerland*, 12 July 1988, Series A No. 140 and *Satk v. Turkey* (No. 2), No. 60999/00, 8 July 2008.

³² See *Koval* judgment, cited above, § 117.

³³ See *Scoppola v. Italy* (No. 2) [GC], No. 10249/03, 17 September 2009.

³⁴ Osborn's Concise Dictionary, 8th Edition (Sweet & Maxwell). (1993).

the principle that “justice must be seen to be done”. Thus, one might argue that a full trial cannot be seen as an ultimate solution for ensuring that all criminal charges are determined in a “fair manner”, without breaches of Article 6.

Furthermore, the Court frequently finds in its judgments that unreasonable delay in the settlement of a criminal case means that “justice had been denied” to the applicant, even though we might arguably admit that the proceedings were unreasonably long, but not “unfair” within the meaning of Article 6³⁵. In such cases, the governments frequently argue that the criminal case had been complex and the judicial and law enforcement authorities acted without delays in trying to ensure that the proceedings were conducted in a fair manner. Thus, in such cases, we examine the eternal conflict between the need to ensure that justice in criminal cases is administered sufficiently thoroughly and fairly (the procedural and substantive outcome of the proceedings is fair), but on the other hand efficiently (without undue delays). In this respect, a number of the Council of Europe’s legal instruments encourage the use of simplified and abridged procedures for settling criminal cases mainly by means of setting priorities in the work of the prosecution authorities, who should focus on dealing efficiently with complex and publicly important cases and not with minor offences, which should be examined in a simplified way. For instance, Recommendation No. R(87)18 of the Committee of Ministers on the Simplification of Criminal Justice suggests that criminal cases should be dealt with by means of the maximum possible procedural economy. The recommendation refers to ever-increasing delays and the mounting number of cases that criminal justice systems have to deal with. Taking into account these problems, the Committee of Ministers suggests that the following methods should be encouraged for resolving these problems: the use of discretionary prosecution and alternatives to prosecution, the application of summary procedures and so-called simplified procedures and the simplification of ordinary judicial procedures where necessary. One of the procedures suggested by the recommendation is a simplified procedure for criminal cases by means of the admission of guilt in exchange for certain favours on the part of the prosecution authorities (dropping certain charges, the re-qualification of the offence, offering sentence discounts, etc.). So, let’s look into the simplified procedures for settling criminal cases based on the admission of guilt and discuss their compatibility with the requirements of Article 6, the rights under which may in principle be waived.

One of the first cases on this subject, the judgment in the case of *Deweere v. Belgium*³⁶, concerned the applicant’s friendly settlement agreement with the local prosecutor admitting his guilt and his agreement to be subjected to a fine from the local tax authorities for fixing the selling price on beef and pork. This agreement was based on the choice the applicant had between being subjected to a higher sanction, including the possible closure of his shop, resulting from a full procedure with an unknown outcome, or paying a certain “fine by way of settlement” – “a kind of compensation to the community for his reprehensible conduct”. Referring to the specific

³⁵ Notwithstanding simplification certain cases involving admission of guilt are also not settled within a reasonable time. See for instance, *Nikolova v. Bulgaria* (No. 2), No. 40896/98, 30 September 2004 (Examination of a guilty plea must be conducted within a reasonable time).

³⁶ See *Deweere v. Belgium*, 27 February 1980, §§ 53-54, Series A No. 35.

circumstances of the case, the Court found a violation of Article 6, finding that the waiver of the right to a full trial attended by all the guarantees required in the matter by the Convention was tainted by constraint. This case might be characterised as an instance of psychological pressure to plead guilty, in a certain sense admitting the stressful situation in which the domestic authorities put the applicant. In this case a person was put in a situation where he had no other choice, but to plead guilty. One of the actual examples of such undue pressure was established by the Court in the case of *Rytsarev v. Russia*³⁷. More specifically, the Court established from the records of the applicant's questioning that he had not eaten anything for a certain period of time and had not been given any water before being questioned by the investigator, who had offered to give him food in exchange for a guilty plea. Such an instance of pressure might lead to the conclusion that the plea was involuntary.

The Court's case-law further states that a tribunal hearing a guilty plea must be independent and impartial³⁸, the person pleading guilty has a right to be represented in the course of simplified or abridged proceedings³⁹ or have an interpreter so as to understand the charges against him and appreciate the consequences of the guilty plea⁴⁰. In any case the Court's constant jurisprudence recognises that any confession must be accurate, factually and legally reliable (based on relevant facts and proper classification of the criminal act in domestic law), voluntary and without the denial of the necessary legal advice⁴¹. Thus, one might conclude that in cases where the guilty plea is the central element of proof, the domestic authorities should take it with caution, checking whether it complies with the requirements of fairness enshrined in the case-law of the Court under Article 6. This includes: intelligence, voluntary nature and the existence of legal and factual grounds for the guilty plea.

In this respect it would be useful to refer to a partly dissenting opinion on the *Meftah* case given by Judge Zagrebelsky⁴², relevant extracts from which can be cited as follows:

"...it is necessary to reassert here that even if a simplified procedure does not offer all the guarantees required by Article 6 it will not necessarily be contrary to the Convention if another form of procedure is available under the system to the appellant that is fully compatible with the requirements of a fair trial and the appellant is able to make a free and informed choice between the two. Otherwise, were it necessary for every alternative procedure to comply with all the requirements of Article 6, such simplified forms of procedure as the Italian summary judgment (*giudizio abbreviato*) or, *a fortiori*, the procedure on a guilty plea would have to be regarded as being contrary to the Convention. As a result, procedures that are essential for the administration

³⁷ See *Rytsarev v. Russia*, No. 63332/00, 21 July 2005 (The Court ruled in this case that the situation was resolved at the domestic level and the applicant was no longer a victim of the violations alleged).

³⁸ See *Findlay v. the United Kingdom*, 25 February 1997, Reports of Judgments and Decisions 1997-I.

³⁹ See *Whitefield and Others v. The United Kingdom* (dec.), nos. 46387/99, 48906/99, 57410/00 and 57419/00, 12 April 2005.

⁴⁰ See *Cuscani c. Royaume-Uni*, n° 32771/96, 24 September 2002.

⁴¹ See *Magee v. the United Kingdom*, No. 28135/95, ECHR 2000-VI.

⁴² See *Meftah and Others v. France* [GC], nos. 32911/96, 35237/97 and 34595/97, ECHR 2002-VII.

of justice could no longer be used. However, the Court has previously found the choice of the summary judgment procedure in Italy to be compatible with Article 6 of the Convention ... and the Commission reached a like conclusion with regard to the procedure on a guilty plea [existing in the United Kingdom] ... For these reasons, I conclude that there has been no violation in respect of either complaint”.

Somewhat similar reasoning to the one proposed by Judge Zagrebelsky was adopted in the recent Grand Chamber case of *Scoppola Against Italy*⁴³, where the Court found a breach of Article 6 by the State’s failure to respect promises given to the applicant in exchange for his request to be tried in the course of summary procedures. The applicant asked to be tried under the summary procedure for murder and other crimes, a simplified process which entailed a reduction of his sentence in the event of a conviction, including the possibility of a 30-year sentence instead of life imprisonment. The judge agreed to his request. However, the legislation changed on the day of his conviction, and the authorities were obliged to consider his offence under the new provisions of the law and their obligation to impose a lighter sentence on the applicant. However, they still followed summary procedures. In the present case, the applicant complained that although he had opted for a simplified trial – the summary procedure – he had been deprived of the most important advantage stemming from that choice under law by force when he made the decision – namely the replacement of life imprisonment with a 30-year sentence. In this particular case, the Court observed that the summary procedure on the issue had undoubted advantages for the defendant, but also a diminution of some of the procedural safeguards inherent in the concept of a fair trial. By requesting the summary procedure, the applicant waived his right to a full public hearing, but the authorities have unilaterally reduced the advantages attached to waiving fair trial safeguards. The Court concluded in this case that there had been a violation of Article 6 on these grounds. Thus, we can see from this case that the fairness of criminal proceedings in the context of summary procedures implies that where simplified procedures have been adopted, the principles of fair trial require that defendants should not be deprived arbitrarily of the advantages attached to these summary procedures.

CONCLUSIONS

It is not doubtful that judgments of the European Court of Human Rights finding a breach of the rights of the accused for effective participation in criminal trials contribute to changes on the domestic level, sometimes leading to the retrial⁴⁴ of victims of fair trial breaches, changes to

⁴³ See *Scoppola v. Italy* (No. 2) [GC], No. 10249/03, 17 September 2009.

⁴⁴ Such a retrial occurred in the aforementioned case of Yaremenko (cited above), where the Supreme Court of Ukraine reviewed the case in light of the European Court’s judgment.

domestic laws⁴⁵, or national courts and law enforcement agency practices⁴⁶. Through the years, the Court has affirmed the importance of the right to a fair trial and reiterated the need to ensure that domestic judicial and law enforcement systems operate in compliance with the requirements of Article 6. With the emergence of new issues and new procedures in the context of settlement of criminal cases, the guarantees developed by Article 6 become more rigid and stronger, requiring the national authorities to observe strictly the requirements that proceedings must be adversarial and that the prosecution authorities are not given any preferences over the accused / defendant. The Court's case-law under Article 6 reaffirmed the important place the Convention holds at the European level in ensuring that the aims of criminal justice are complied with, i.e. that justice is delivered for all, the guilty are convicted and punished and are being helped to stop their offences, victims' rights are restored to the maximum possible extent and the rights of the innocent are protected. The court's case-law under Article 6 continues to serve as a useful indicator of how judicial practice should develop at the domestic level. It also closely follows the most recent tendencies in the practice of the examination of criminal cases by international criminal tribunals, which have incorporated the requirements of fairness of criminal trials into day-to-day practice. As a general conclusion, the Court's practice is useful food for thought, and a source of research for bringing changes to perfect the domestic legal and criminal justice systems – aiming to improve their functioning. It is a useful tool of studies, further research and application at the domestic level, so as to ensure that domestic human rights standards are effective and, as one might suppose, even higher than the ones established in Article 6 and the Court's case-law.

⁴⁵ Such a ruling was made in the case of *Scoppola v. Italy* (cited above), where the Court ruled that the government was obliged to replace the penalty at issue with the one consistent with the principles set out in the Court's judgment.

⁴⁶ See *Gülmez v. Turkey*, No. 16330/02, §§ 60-63, 20 May 2008, where the Court ruled that the government had to deal with systemic and structural issues identified by a finding of a breach of Article 6.

Samuel Issacharoff

FRAGILE DEMOCRACIES¹

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Democratic regimes around the world find themselves besieged by antidemocratic groups that seek to use the electoral arena as a forum to propagandize their causes and rally their supporters. Virtually all democratic countries respond by restricting the participation of groups or political parties deemed to be beyond the range of tolerable conduct or viewpoints. The proscription of certain views raises serious problems for any liberal theory in which legitimacy turns on the democratic consent of the governed. When stripped down to their essentials, all definitions of democracy rest ultimately on the primacy of electoral choice and the presumptive claim of the majority to rule. The removal of certain political views from the electoral arena limits the choices that are permitted to the citizenry and thus calls into question the legitimacy of the entire democratic enterprise.

This Article asks under what circumstances democratic governments may act (or, perhaps, must act) to ensure that their state apparatus not be captured wholesale for socially destructive forms of intolerance. The problem of democratic intolerance takes on special meaning in deeply fractured societies, in which the electoral arena may serve as a parallel or even secondary front for extraparliamentary mobilizations. Such democratic societies are not powerless to respond to the threat of being compromised from within. At the descriptive level, the prime method is the prohibition on extremist participation in the electoral arena, a practice that exists with surprising regularity across the range of democratic societies. Seemingly, the world has learned something since the use of the electoral arena as the springboard for fascist mobilizations to power in Germany and Italy.

This Article's primary concern is the institutional considerations that either do or should govern restrictions on political participation, with particular attention to how these have been assessed by reviewing courts in a variety of countries, including Germany, India, Israel, Turkey, Ukraine,

¹ The article was originally published in April 2007 in Harvard Law Review, Number 6, volume 120.

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and the United States. This Article distinguishes among the types of parties that may be banned or impeded, giving the greatest attention to mass antidemocratic parties that actually seek to win elections. Further lines are drawn among types of prohibitions, ranging from the use of criminal sanctions in the United States to party prohibitions in most European countries to restrictions on electoral speech and conduct in India. Ultimately, the argument is that democratic societies must have weapons of self-preservation available to them, but that strong institutional protections must be in place before they may be deployed.

INTRODUCTION

The 2006 controversy surrounding the Danish cartoons mocking Islam provides an illuminating window into the problem of what may be termed democratic intolerance³ — that is, the intolerance that democratic governments exhibit toward antidemocratic actors in the name of preserving the governments' fundamental democratic character. Although the political maneuverings and machinations surrounding the protests were no doubt multifaceted, the core controversy centered on Islamic fundamentalist demands that Denmark be held responsible for its failure to censor the publication of a series of cartoons perceived to be blasphemous attacks on the prophet Mohammed.⁴ In commenting on the publication of these cartoons, Professor Ronald Dworkin provocatively asserted a right to insult; in so doing, he made a moral and instrumental argument requiring weak or unpopular minorities to tolerate social insult as a condition of making a claim on the majority for protective antidiscrimination legislation: "If we expect bigots to accept the verdict of the majority once the majority has spoken, then we must permit them to express their bigotry in the process whose verdict we ask them to accept."⁵

Professor Dworkin's idea that there is a limit to claims by the intolerant — in this case, the Muslim protesters — for accommodation by a tolerant society resonates with core liberal principles. For John Rawls, for example, "[a] person's right to complain is limited to violations of principles he acknowledges himself. A complaint is a protest addressed to another in good faith."⁶ The intolerant may complain of the insult felt and of the norms of civility that should be honored, but, per Dworkin, the fear of insult cannot be thought to "justify official censorship."⁷ Resisting censorship is part and parcel of ensuring the civil liberties that make robust political exchanges and democratic politics possible.

³ The term is loosely adapted from a major contribution to this debate, Gregory H. Fox & Georg Nolte, *Intolerant Democracies*, 36 HARV. INT'L L.J. 1 (1995).

⁴ See, e.g., *Protesters Burn Consulate over Cartoons*, CNN.COM, Feb. 5, 2006, <http://www.cnn.com/2006/WORLD/asiapcf/02/05/cartoon.protests/index.html> (detailing the Foreign Minister of Denmark's denials of official responsibility for the publication of the cartoons).

⁵ Ronald Dworkin, *The Right to Ridicule*, N.Y. REV. BOOKS, Mar. 23, 2006, at 44.

⁶ JOHN RAWLS, A THEORY OF JUSTICE 217 (1971).

⁷ Dworkin, *supra* note 3.

At bottom, Professor Dworkin's argument is an intriguing rallying call for democracies to stand fast against the demand by intolerant groups that democracies lend their governmental authority to the cause of silencing offending speech. Posed as a question whether democratic regimes should enlist their arsenals of coercion in the suppression of unpopular, discordant, or simply intemperate speech, the civil liberties answer seems inescapable. Just as a liberal democratic state, such as Denmark, would no doubt refuse to engage in such censorship itself, so too no legitimate claim could be made that it should enlist its state resources toward such aims on behalf of others. Simply put, democratically tolerant governments should not succumb to demands for censorship made by the forces of intolerance.

The question for this Article is a variant on the same theme, asking whether democratic governments have a similar duty to resist the use of their electoral arenas as platforms for religious or other socially destructive forms of intolerance. In other words, can democracies act not only to resist having their state authority conscripted to the cause of intolerance, but also, under certain circumstances, to ensure that their state apparatus not be captured wholesale for that purpose?

For purposes of this inquiry, imagine that the Islamic efforts to suppress speech in Denmark took a form different from street protests and the burning of Danish flags in various locations around the world. Imagine instead that the protest took the form of the creation of a political party in Denmark vying for state authority in order to impose speech codes and other forms of repressive legislation in an attempt to root out all traces of blasphemy in Danish society — of which there are, doubtless, quite a few. And imagine further that Denmark chose to respond by using state authority to condition the terms of political participation such that elections could not become the platform for leading an assault on its liberal democratic society.

This is no mere abstract inquiry. Hitler's final push to power occurred within the confines of Weimar democratic processes, something that allowed Joseph Goebbels tauntingly to remark, "This will always remain one of the best jokes of democracy, that it gave its deadly enemies the means by which it was destroyed."⁸ Nor were the Nazis the last antidemocratic force to lay siege from within the confines of the electoral process.⁹ The ability of extremism to find its way into the protective crevices of a liberal democratic order has given rise to what has been termed "militant"¹⁰ or "intolerant"¹¹ democracy, that is, the mobilization of democratic institutions to resist capture by antidemocratic forces. The aim is to resist having the institutions of democracy harnessed to what may be termed "illiberal democracy."¹²

⁸ Fox & Nolte, *supra* note 1, at 1 (quoting Karl Dietrich Bracher et al., *Introduction to NATIONALSOZIALISTISCHE DIKTATUR* 16 (Karl Dietrich Bracher et al. eds., 1983)).

⁹ For a discussion of the capture of a commanding electoral claim by antidemocratic forces in Algeria, see *id.* at 6–9. Algeria witnessed a seizure of power by the military to forestall an elected Islamic party from assuming power and carrying out its program of dismantling multiparty democracy. An interesting recent variant is found in the curious letter sent by Iranian President Mahmoud Ahmadinejad, himself elected in apparently legitimate elections, to President George W. Bush articulating the claim that recent developments in U.S. foreign policy in the Middle East and elsewhere had shown the ultimate failure of "[l]iberalism and Western style democracy" itself. Letter from Mahmoud Ahmadinejad to George W. Bush (May 2006), available at http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/09_05_06ahmadinejadletter.pdf.

¹⁰ Karl Loewenstein, *Militant Democracy and Fundamental Rights* (pts. 1 & 2), 31 AM. POL. SCI. REV. 417, 638 (1937).

¹¹ Fox & Nolte, *supra* note 1, at 6.

¹² FAREED ZAKARIA, *THE FUTURE OF FREEDOM: ILLIBERAL DEMOCRACY AT HOME AND ABROAD* 17 (2003).

The problem of democratic intolerance takes on special meaning in deeply “fractured societies,”¹³ in which the electoral arena may serve as a parallel or even secondary front for extra-parliamentary mobilizations. With regard to the current conflict in the Middle East, for example, Professor Noah Feldman well captures the futility of assuming that democratic politics is the sole or even the primary arena of struggle: “The model of Islamist organizations that combine electoral politics with paramilitary tactics is fast becoming the calling card of the new wave of Arab democratization.”¹⁴ For Professor Feldman, “[t]he fact that Hamas and Hezbollah pursue democratic legitimacy within the state while also employing violence on their own marks a watershed in Middle Eastern politics.”¹⁵

Democracies are not powerless to respond to the threat of being compromised from within. At the descriptive level, the prime method of response is the prohibition on extremist participation in the electoral arena, a practice which exists with surprising regularity across democratic societies. Some states restrict speech within the electoral arena, as India has done with its prohibition on any campaign appeals to religious intolerance or ethnic enmity.¹⁶ Other states forbid the formation of parties hostile to democracy, as Germany has done in banning any successors in interest to the Nazi or Communist parties and in more recently banning an Islamic fundamentalist movement, the Caliphate State.¹⁷ Still others impose content restrictions on the views that parties may hold, as with the requirement in Turkey of fidelity to the principles of secular democracy as a condition of eligibility for elected office.¹⁸ Similarly, Israel, through its Basic Law, excludes from the electoral arena any party that rejects the democratic and Jewish character of the state, as well as any party whose platform is deemed an incitement to racism.¹⁹ Other states specifically ban designated parties, as evidenced by the practice in several of the former Soviet Republics of barring their local communist parties from seeking elected office;²⁰ the United States has taken similar steps.²¹ Finally, some states prohibit parties that are deemed to be fronts for terrorist or paramilitary groups. Thus, Spain has recently banned Batasuna, a political party sharing the objectives of the Basque separatist ETA insurgents, from any participation in Spanish or European parliamentary elections.²²

The list of types of restrictions could go on at some length, and the scope of these restrictions has expanded in the aftermath of September 11 and the press of Islamic militancy.²³ The key point, how-

¹³ Samuel Issacharoff, *Constitutionalizing Democracy in Fractured Societies*, 82 TEX. L. REV. 1861, 1863 (2004) (describing societies riven by ethnic or religious divides, in which political alignments are largely a reflection of prepolitical allegiances based on kinship of some kind).

¹⁴ Noah Feldman, *Ballots and Bullets*, N.Y. TIMES, July 30, 2006, § 6 (Magazine), at 9.

¹⁵ *Id.*

¹⁶ See *infra* pp. 1424–25.

¹⁷ See Peter Niesen, *Anti-Extremism, Negative Republicanism, Civic Society: Three Paradigms for Banning Political Parties* (pts. 1 & 2), 3 GERMAN L.J. No. 7, ¶¶ 4, 8, 46 (2002), <http://www.germanlawjournal.com/article.php?id=164>.

¹⁸ See *infra* pp. 1442–43.

¹⁹ See Basic Law: The Knesset § 7A, translated in ISRAEL’S WRITTEN CONSTITUTION (5th ed. 2006).

²⁰ See *infra* p. 1430.

²¹ See *infra* pp. 1416–17.

²² See Víctor Ferreres Comella, *The New Regulation of Political Parties in Spain, and the Decision to Outlaw Batasuna*, in MILITANT DEMOCRACY 133, 133–34 (Andrés Sajó ed., 2004).

²³ See Patrick Macklem, *Militant Democracy, Legal Pluralism, and the Paradox of Self-Determination*, 4 INT’L J. CONST. L. 488, 493–94 (2006) (giving examples of recent limitations on political party formation).

ever, is not the ubiquity of the prohibitions, but the rationale for them. All these societies recognize that the electoral arena is not simply a forum for the recording of preferences, but a powerful situs for the mobilization of political forces. Elections serve to amplify the ability of all political forces to disseminate their views. They also provide a natural medium for partisans to have their passions raised and to provoke frenzied mob activity. If elected to parliamentary office, even fringe extremist groups typically enjoy parliamentary immunity for incitement from the halls of power. Under most national laws, they can command official resources for their electoral propaganda. And, as with the fascist rise to power in Europe, they can use their positions in parliament to cripple any prospect of effective governance, destabilize the state, and launch themselves as successors to a failing democracy.

Whatever the inherent difficulties in the use of state authority to enforce codes of democratic exchange, the problems are presented most acutely in the electoral arena. Seemingly, the world has learned something from the use of that arena as the springboard for fascist mobilizations to power in Germany and Italy. Perhaps as well, the world has learned that appeals to communal intolerance in countries like India, even if conducted from within the safe harbor of democratic processes, lead almost invariably to communal violence in which election rhetoric is a rostrum from which anti-democratic forces rally the faithful. At some level, all these countries grapple with an intuition that democratic elections require, as a precondition to the right of participation, a commitment to the preservation of the democratic process.²⁴

At the same time, limiting the scope of democratic deliberation necessarily calls into question the legitimacy of the political process. When stripped down to their essentials, all definitions of democracy rest ultimately on the primacy of electoral choice and the presumptive claim of the majority to rule. It is of course true that this thin definition of democracy cannot stand alone, for all electoral systems must assume a background set of rules, institutions, and definitions of eligible citizenship that serve as preconditions to the exercise of any meaningful popular choice.²⁵ Moreover, all democracies of the modern era have constitutional constraints that cabin, through substantive limits and procedural hurdles, what the majority may do at any given point. However, a distinct set of problems emerges whenever a society decides that certain viewpoints may not find expression in the political arena and may never be considered as contenders for popular support.

At a more theoretical level, the need for such restrictions on democratic participation is acknowledged, albeit uncomfortably, even at the core of liberal theory. To return to Rawls, one finds a basic recognition that constraining the freedoms of intolerant groups may be justified when the freedoms of the society as a whole are at risk: “[J]ust citizens should strive to preserve the constitution with all its equal liberties as long as liberty itself and their own freedom are not in danger.”²⁶ Under “strin-

²⁴ An interesting example is the argument by Israeli Justice Aharon Barak that restricting a party’s ability to register is more suspect than banning a party from electoral activity altogether, since the latter is more easily understood as a state-protective move. PCA 7504/95, 7793/95 Yassin & Rochley v. Registrar of the Political Parties & Yemin Israel [1996] IsrSC 50(2) 45, 66–67. I return to this point later.

²⁵ See generally SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY* (2d ed. 2001).

²⁶ RAWLS, *supra* note 4, at 219.

gent” conditions, in which there are “considerable risks to our own legitimate interests,” restrictions on the intolerant may be necessary, even while disfavored.²⁷ Hopefully, in a stable, well-ordered society, this will not often be necessary, for “[t]he liberties of the intolerant may persuade them to a belief in freedom.”²⁸ But where the practical and theoretical benefits of democratic tolerance fail, societies find themselves in “a practical dilemma which philosophy alone cannot resolve.”²⁹

Liberal political theory generally seeks refuge in two arguments, which, though certainly important, are insufficient. The first is the traditional understanding that the best antidote to bad speech is more speech. The core tradition of free expression,³⁰ brought to American law forcefully in the famous opinions of Justices Holmes and Brandeis, is that the good will prevail in the marketplace of ideas.³¹ On this view, suppression of speech is not only ineffective, but likely counterproductive. Only a threat of tremendous immediacy justifies suppression: “If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.”³² The second argument is the quietism that ultimately not much can protect the people from their doom if that is their charted course. This fatalism is found not only in Justice Holmes’s view that judicial invocation of the Constitution cannot thwart a pronounced desire of society to do itself in,³³ but also in a broader claim by the Framers that control of the basic structures of democracy was a matter of democratic entitlement. Hence Alexander Hamilton proclaimed forcefully that a “fundamental principle of republican government” would reserve a right to the people to “alter or abolish the established Constitution whenever they find it inconsistent with their happiness.”³⁴

Even without delving too deeply into the realm of jurisprudence, it bears noting that this risk posed by intolerant groups has not been a major concern of liberal theory of late. By and large, contemporary liberal theory draws its animating principles from the relation of the individual to the state: primarily through the rights-based defenses that the individual may invoke against state authority,³⁵ and secondarily through the claims of justice that individuals may assert for just rewards

²⁷ *Id.* at 218–19.

²⁸ *Id.* at 219.

²⁹ *Id.*

³⁰ The classic account is found in ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948).

³¹ See *Whitney v. California*, 274 U.S. 357, 374–77 (1927) (Brandeis, J., concurring); *Abrams v. United States*, 250 U.S. 616, 627, 630 (1919) (Holmes, J., dissenting).

³² *Whitney*, 274 U.S. at 377 (Brandeis, J., concurring).

³³ The classic expression is found in Justice Holmes’s dissent in *Gitlow v. New York*, 268 U.S. 652 (1925): “If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.” *Id.* at 673 (Holmes, J., dissenting). As Justice Holmes elaborated in claiming that it was not the job of the judiciary to stand in the way of popular sentiment, “if my fellow citizens want to go to Hell I will help them. It’s my job.” Letter from Oliver Wendell Holmes to Harold J. Laski (Mar. 4, 1920), in 1 *HOLMES-LASKI LETTERS* 249 (Mark DeWolfe Howe ed., 1953).

³⁴ See *THE FEDERALIST* NO. 78, at 468 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

³⁵ In Professor Ronald Dworkin’s famous formulation, rights are “political trumps held by individuals” and those “individuals can have rights against the state that are prior to the rights created by explicit legislation.” RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* xi (1977). Indeed, on most accounts, liberal thought “is a heritage which prizes individuality.” JEREMY WALDRON, *LIBERAL RIGHTS* 1 (1993). For a fuller discussion of the role of rights as trumps in liberal theory, see the exchange between Richard H. Pildes, *Dworkin’s Two Conceptions of Rights*, 29 J. LEGAL STUD. 309 (2000), and Jeremy Waldron, *Pildes on Dworkin’s Theory of Rights*, 29 J. LEGAL STUD. 301 (2000).

from — and dignified treatment by — the society as a whole.³⁶ There are, of course, conflicts that emerge when rights claims by some individuals would impose burdens on others.³⁷ But these too are limitations on the rights claims of individuals against the state and are not generally framed as obligations of the state as such. It is not that the question of enforceable terms of societal interaction is unknown to liberal theory. Professor Jeremy Waldron, for example, finds it useful to frame some fundamental dignitary rights claims as a species of “public goods” and concludes that “there should be no difficulty at all in expressing them as human rights, no problem accommodating them to the idiom of that particular discourse.”³⁸ Rather, it is simply that the juxtaposition between state and individual is where the action is and has been. Further, it is clear that the language of human rights has come to embrace an individual right of democratic participation within the core values of political liberty, again placing the individual in opposition to the state in terms of democratic values.³⁹

There are, of course, areas where liberal theorists are eager for the state to restrain democratic freedoms in the name of greater principles of democratic integrity. A particularly salient example in the United States is the area of campaign finance regulation, in which there is widespread support from many liberal quarters for limitations on both contributions and expenditures. Notably, however, the first move in this area is necessarily to deny the rights claim on the other side of the equation, following in one form or another the admonition of Judge Skelly Wright that “*money itself is not speech*.”⁴⁰ Only then is there a demand that the state act to control access to the political process. It is hard to make a comparable move in the area of prohibitions on participation in the electoral arena. No matter how circumscribed one’s view of rights protections might be, there is no higher plane for protection of expression than in the domain of politics pure and in the ability to present ideas about the governance of society and advocate on behalf of candidates committed to those ideas.⁴¹

Nonetheless, my aim here is not to engage directly the jurisprudential foundations for the responsibility to maintain the vitality of the democratic process (at least not initially). In much of my writing in this area, I have been drawn to analogies between the political process and economic markets.⁴² It does not seem too fanciful a notion to imagine that even the night watchman state

See RAWLS, *supra* note 4, at 75–83; see also Frank I. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

³⁷ See, e.g., JOSEPH RAZ, *THE MORALITY OF FREEDOM* 203 (1986) (“It is difficult to imagine a successful argument imposing a duty to provide a collective good on the ground that it will serve the interests of one individual.”).

³⁸ WALDRON, *supra* note 33, at 354. Professor Waldron argues that such communal goods should not be expressed as individual rights, but leaves open the question of whether they should be expressed as rights belonging to a society or government.

³⁹ See, e.g., Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT’L L. 46, 88 (1992) (“States’ nonaggressiveness . . . depends fundamentally on domestic democracy.”).

⁴⁰ J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001, 1019 (1976). For examples of arguments denying this rights claim, see OWEN M. FISS, *THE IRONY OF FREE SPEECH* 5–26 (1996); CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 93–119 (1993); and Ronald Dworkin, *The Curse of American Politics*, N.Y. REV. BOOKS, Oct. 17, 1996, at 19, 23.

⁴¹ See, e.g., Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 26–28 (1971) (defining a limited core of First Amendment rights focused on ideas of self-governance).

⁴² See, e.g., Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593 (2002); Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998).

has an obligation to maintain the openness of the instrumentalities of political competition in much the same way as the state must protect the integrity of economic markets from theft, fraud, and anticompetitive behavior. One could derive from the principle of political competition a robust role for the state as guardian of the vitality of the democratic process as a whole.

If elections are seen as a marketplace for political competition, and if the state does indeed hold a public trust for ensuring the capacity of the citizens to choose their governors, there is still the critical question of what kinds of restrictions may be utilized to protect the viability of democratic competition, as well as what procedural and substantive protections should be put in place to protect against misuse of those restrictions. My concern in this piece, therefore, is with the institutional considerations that either do or should govern restrictions on political participation, with particular attention to how these have been assessed by reviewing courts.

As an initial matter, it will be useful to set out four questions that courts and legislatures have grappled with in trying to set the parameters of democratic participation, from the most general to the most institutionally specific:

(1) May a state draw a boundary around participation in the democratic process, excluding from the right of participation those who fall on the wrong side of the (2) If so, where does that boundary lie? Is it based on the ideological positions of the excluded actors, or must it turn on the immediacy of the danger they present?

(3) If such determinations are to be made, is there an obligation to define legislatively the outer bounds of the right of participation?

(4) If the legislature does so define the boundaries of democratic participation, must there be an independent body to implement exclusion or to avoid the temptation toward political self-dealing or the settling of scores?

To address these questions, this Article looks first to the actual experiences of functioning democracies confronted with antidemocratic challenges from within. First, I turn to the use of the “clear and present danger” test in American law. The rhetorical power of this test, coupled with the salience of American law both here and abroad, compels some accounting for the limitations imposed by any requirement that the suppression of electoral activity be justified on grounds analogous to the bases for criminal prosecutions. Part I therefore shows the distinct context in which American constitutional doctrine arose and its nongeneralizability to more threatened democracies. In Part II, I examine a variety of national settings to identify both the ways in which democracies have sought to protect themselves and the distinct threats posed by different sorts of antidemocratic groups. Surprisingly little attention has been given in the academic literature to the distinct forms that legal restrictions on political activity may take or to the specific threats posed by groups that advocate separatism, insurrection, or clerical rule. Finally, in Part III, the Article considers the substantive and procedural protections necessary to help ensure that suppression of antidemocratic elements does not become simply suppression of political dissent. Ultimately, the Article concludes that the aim of suppressing threats to the existence of embattled democracies must be to secure the prospect of democratic renewal whereby the capacity of citizens to reject their rulers is preserved.

I. AMERICAN EXCEPTIONALISM

The core of this Article will examine the responses of democratic societies to threats from extremist groups and will try to develop some normative principles for assessing the need to suppress antidemocratic mobilizations. Much of this discussion will sound antithetical to core First Amendment principles in American law, and it is likely that American courts would not tolerate most, or perhaps any, of the measures discussed and endorsed later in this Article. One of the points of engagement with American law will be the use of the clear and present danger test that originated in American law to describe how democracies have responded to a subset of the threats they face (as with armed insurrectionist parties and military splinter groups, for example). While the terminology may be similar, it is vital to understand the limits of the parallels between the threats that democracy faces in the United States and in other countries.

As a doctrinal matter, American law governing the prohibition on antidemocratic groups freely espousing their views has settled around the clear and present danger test as expounded in the dissenting and concurring opinions of Justices Holmes and Brandeis,⁴³ a test that received its most comprehensive formulation in *Brandenburg v. Ohio*.⁴⁴ In its per curiam opinion in *Brandenburg*, the Court held that a state may not “forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”⁴⁵

The great Holmes/Brandeis free speech opinions combine rhetorical force with the inescapable sense that their authors had not succumbed to the passions of the times, certainly a tribute to the institutional role that a judiciary is supposed to play in times of panicked assaults on civil liberties. Although rejected in their time, these opinions came to dominate American law, as carefully chronicled by Professor Geoffrey Stone.⁴⁶ Under the *Brandenburg* test, there is a heavy presumption in favor of free expression, a presumption that is overcome only by the imminence of direct harm:

“[T]he mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.” A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments.⁴⁷

⁴³ See *Whitney v. California*, 274 U.S. 357, 374–76 (1927) (Brandeis, J., concurring); *Abrams v. United States*, 250 U.S. 616, 627, 630 (1919) (Holmes, J., dissenting).

⁴⁴ 395 U.S. 444 (1969) (per curiam).

⁴⁵ *Id.* at 447.

⁴⁶ See, e.g., GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME* 395–411 (2004) (describing the centrality of the clear and present danger test in *Dennis v. United States*, 341 U.S. 494 (1951)).

⁴⁷ *Brandenburg*, 395 U.S. at 447–48 (omission in original) (citations omitted) (quoting *Noto v. United States*, 367 U.S. 290, 297–98 (1961)).

Only where the likelihood of harm is established and the prohibitions are carefully tailored to the perceived threat can governmental prohibitions be justified.

On the evolutionary road to *Brandenburg*, a series of cases challenging the Smith Act prosecutions of Communist Party members during the McCarthy era made the Holmes/Brandeis opinions controlling doctrine. Most notable is the leading case of *Dennis v. United States*.⁴⁸ The clear and present danger standard, regardless of whether it was properly applied in *Dennis*, is looked to because it both assigns great value to speech for its own sake and sets up the significant hurdle of proving immediacy of harm before the government may act. In effect, *Dennis* collapsed the distinction between the type of political agitation that could be prohibited and the type that could be criminalized. The assumption in the clear and present danger test is that there should be no margin between the criminal code and state-imposed restrictions on political speech. Thus, for example, in his criticism of *Dennis*, Professor Stone chastises the Court for allowing the Communist Party to be subjected to legal restraints that should not have been permitted under the standards of the criminal code: “[T]o the extent there was criminal conduct, the individuals . . . should have been investigated and prosecuted for their crimes. That is quite different from prosecuting *other* people — the defendants in *Dennis* — for their advocacy of Marxist-Leninist doctrine.”⁴⁹

I do not want to take issue with Professor Stone’s concerns about the relaxing of the standards for criminalizing speech in the United States so much as to address the limitations of the clear and present danger test outside the American context. Not only is the test now controlling doctrine in the United States, but it is looked to by courts in many parts of the world for insight into how they should respond to the threat of antidemocratic incitement. But it would be a mistake for these courts to adopt this test wholesale without understanding the national context in which it arose. In large part, the clear and present danger test is a response to three interesting but largely underappreciated features of American law.

First, the characteristic response to threatening speech in the United States, as with the Palmer raids following World War I and the anticommunist prohibitions following World War II, has been to enforce political prohibitions largely through the criminal code. As a result, freedom of political expression has become inextricably bound up with the standards for criminal prosecution, including burdens of proof and heightened specificity requirements. Critics of American constitutional treatment of free speech have focused on this central feature of American law without fully appreciating how distinct it is on the world stage. For example, Professor Martin Redish declares that *Dennis* “clearly was, as one historian has described it, little more than ‘a trial of ideas,’ something more appropriately associated with a totalitarian society than what is supposedly a constitutional democracy.”⁵⁰ Assuming that electoral regulation must be accomplished primarily through criminal prosecution is a precondition for Professor Redish to assert that “only by assur-

⁴⁸ 341 U.S. 494.

⁴⁹ STONE, *supra* note 44, at 410.

⁵⁰ MARTIN H. REDISH, *THE LOGIC OF PERSECUTION: FREE EXPRESSION AND THE MCCARTHY ERA* 97 (2005) (footnote omitted) (quoting PETER L. STEINBERG, *THE GREAT “RED MENACE”*: UNITED STATES PROSECUTION OF AMERICAN COMMUNISTS, 1947–1952, at 157 (1984)).

ing that all views . . . are protected can a democratic society survive in any meaningful sense of the term.”⁵¹

Before sweeping quite so broadly, it is worth pausing to consider how susceptible to generalization the American cases have been. A great deal of the doctrinal work under the First Amendment’s treatment of political speech stems from the specific question that is typically presented in American courts: whether the speech in question is sufficiently inciteful of criminal conduct to sustain a criminal prosecution. The landmark cases in this area have tended to be criminal cases (such as *Brandenburg v. Ohio* and *Cohen v. California*⁵²), and in civil cases like *New York Times v. Sullivan*,⁵³ the “primary argumentative device” has been “the quick (some would say too quick) analogy to the criminal prosecution.”⁵⁴ For Professors Frederick Schauer and Richard Pildes, “the quick judicial assimilation of all content-based regulations to the criminal law prohibition model”⁵⁵ is ill-advised because “different modes of regulation structure might justify different First Amendment responses.”⁵⁶ When regulations “do not take the form of criminal prohibitions, courts should not deploy doctrines whose purposes are not actually implicated by the particular context of regulation.”⁵⁷

Second, there is a structural dimension to the American response to marginal antidemocratic groups that needs to be weighed in the balance. Over the years, I have resisted the easy claim that proportional representation systems are inherently unstable or were even responsible for the rise of fascism,⁵⁸ a claim that has even made its way into Supreme Court discussions of the extent to which the two major parties may be protected from electoral competition.⁵⁹ Certainly the exceptional characteristics of American democratic practices should dictate some caution before proclaiming these practices superior, let alone preferable. After all, the American system of districted legislative elections and independent presidential selection is not the norm in democratic societies. None of the recent democracies created in the aftermath of the collapse of the Soviet empire has attempted to replicate American-style governance. Nor did the United States try to impose it in seeking to establish democratic governance in regions over which it maintained military control, as in Germany, Japan, and Iraq.

Whatever my reluctance on this score, I have now come to the conclusion that there is indeed something in nonparliamentary, non-proportional representation political systems that provides a

⁵¹ *Id.* at 100.

⁵² 403 U.S. 15 (1971).

⁵³ 376 U.S. 254 (1964).

⁵⁴ Frederick Schauer & Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 TEX. L. REV. 1803, 1832–33 (1999); see also *New York Times*, 376 U.S. at 277 (holding that “[w]hat a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel”).

⁵⁵ Schauer & Pildes, *supra* note 52, at 1833.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ For a discussion of this point, see Richard H. Pildes, *Democracy and Disorder*, 68 U. CHI. L. REV. 695, 716–17 (2001). See also *id.* at 717 n.83 (citing sources).

⁵⁹ See, e.g., *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 367 (1997) (“The Constitution permits the Minnesota Legislature to decide that political stability is best served through a healthy two-party system.”).

buffer against antidemocratic forces, perhaps explaining why American law is decidedly directed to the truly marginal behavior that might rise to the level of a criminal offense. There is a well-trodden path in political theory — running through Harold Hotelling,⁶⁰ Anthony Downs,⁶¹ and Maurice Duverger⁶² — explaining the propensity of single-seat, single-winner elections to produce two and only two relatively stable, relatively centrist parties. Third parties — including fringe parties, to the extent they gain electoral traction — tend to tip the scales to the major party farthest from them, thereby dissuading even the polar supporters of the major parties from joining spoiler efforts. Think of Ross Perot in 1992 and Ralph Nader in 2000 for shorthand, recent versions of the sophisticated political theory underlying this insight.

Because districted elections force the prospective governing coalitions to form *before* the election and to run as political parties, the inclusion of extreme candidates discredits the entire slate and forces such candidates to the margin. As a result, extreme candidates face formidable hurdles to attaining legislative office. This, in turn, means that they do not readily achieve the immunity from criminal prosecution for incitement that comes with parliamentary office, do not have access to state funds for their political crusades, and are denied meaningful access to political debates formed around the question of who should govern. To the extent that extreme parties try to use the electoral arena, the structural barriers to their participation marginalize them. Their contributions to the public debate are duly set off on local public access stations (or their modern substitute, low-traffic political blogs), where they compete for time with the purveyors of the conspiracy trade, who endlessly obsess over fluoridation of the water supply, the latest permutation of the Kennedy assassination, or “proof” that September 11 was an inside job.

A further buffer is created by presidential rather than parliamentary governance. Even were an extremist party to find its way into Congress, its ability to disrupt governance would be limited. Marginal parties in the legislature in a presidential system cannot command a bloc of votes in the parliament that can be used to bring down a shaky coalition government through no-confidence votes or other parliamentary devices. Thus, unlike the National Socialists in Germany, marginal political groups would be unable to wear down the government by disruptive tactics in parliament. Further, unlike fringe parties in many proportional representation systems, Israel being the prime example,⁶³ they would not be able to leverage their small presence in parliament into significant commands on public policy. Presidentialism puts the choice of head of state in the hands of the national electorate, rather than relying on fractured parliamentary leadership to forge a governing coalition and, in turn, to accommodate the last hold-outs necessary to put them over the top. There are many

⁶⁰ Harold Hotelling, *Stability in Competition*, 39 ECON. J. 41 (1929) (introducing the “spatial markets” theory of how firms compete for the center).

⁶¹ ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 115–22 (1957) (applying the spatial market approach to describe competition for the median voter as the key to winning two-party elections).

⁶² MAURICE DUVERGER, POLITICAL PARTIES 217–28 (Barbara North & Robert North trans., rev. ed., Methuen 1964) (1951) (introducing “Duverger’s Law,” which states that in first-past-the-post elections there will be exactly two relatively centrist parties).

⁶³ See Steven G. Calabresi, *The Virtues of Presidential Government: Why Professor Ackerman is Wrong to Prefer the German to the U.S. Constitution*, 18 CONST. COMMENT. 51, 60–61 (2001) (describing leverage of small religious parties under Israeli proportional representation system).

reasons to be wary of presidentialism,⁶⁴ but it does serve as a buffer to the threat posed by marginal parties' ability to insinuate themselves into parliament and disrupt governance from within.

Third, and finally, there is the unmistakable stability of politics in the United States, a stability that perhaps leads Americans to underestimate the need to protect democratic processes elsewhere from real threats, even those masquerading as contenders for democratic election. For the United States, the twentieth century witnessed significant turmoil — two world wars, at least four regional wars, a protracted standoff with a major foreign power, four presidents who died in office (two of whom were assassinated), a major depression followed by a significant overhaul of the administrative state, and a major upheaval in race relations — but through it all, the same two political parties remained in charge. Despite hard-fought elections and periodic social unrest, changes in governance were incremental and the electoral system remained intact at all times. Indeed, perhaps uniquely among democratic states, the United States has held regularly scheduled elections during wartime, even during the Civil War. The short of it is that the United States has been a remarkably stable political system since Reconstruction.

It is possible that the seeming doctrinal attachment to strong protections of political organization in the United States may be attributable to some unique variables, beginning with the comparative political stability of twentieth-century America relative to more embattled, more fragile democracies. That stability is enhanced by the distinct electoral structures in the United States that marginalize minor parties from governance. Further, as a doctrinal matter, it is quite likely that the propensity toward criminal prosecution of political dissidents in the United States has also contributed to the lack of an administrative law of electoral exclusion. All of these features are important, and the uniqueness of our national setting dictates caution in attempting to export the clear and present danger test to the administrative prohibition on political participation in much more fragile institutional settings.

The clear and present danger test aptly captures what is at stake in the criminal prohibition of organizations whose aims are fundamentally antithetical to democracy and who are being charged, in effect, with unlawful conduct. As is developed below, the threat of criminal conduct by marginal groups captures only a subset of the threats faced by democracies, particularly in far less stable national settings. In such circumstances, unfortunately, focusing on the immediacy of the threat of unlawful activity is insufficient to reflect the gravity of the threat.

⁶⁴ For an overview of the propensity in Latin America toward overconcentration of power in the executive, see Matthew Soberg Shugart & Scott Mainwaring, *Presidentialism and Democracy in Latin America: Rethinking the Terms of the Debate*, in *PRESIDENTIALISM AND DEMOCRACY IN LATIN AMERICA* 12 (Scott Mainwaring & Matthew Soberg Shugart eds., 1997). Another leading treatment of this issue is found in Juan J. Linz, *Presidential or Parliamentary Democracy: Does It Make A Difference?*, in *THE FAILURE OF PRESIDENTIAL DEMOCRACY* 3 (Juan J. Linz & Arturo Valenzuela eds., 1994). For advocacy of parliamentarism to replace the independent selection of the President in the United States, see Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 643–44 (2000).

II. TYPOLOGIES OF PROHIBITIONS

Most discussions of restrictions on antidemocratic groups begin (and many of them end) with the question whether a democracy has the right to impose viewpoint constraints on extreme dissident views. Professors Gregory Fox and Georg Nolte, for example, in their important contribution to the debate, primarily focused on the possibility of restricting political participation consistent with international law, particularly the guarantees of the 1966 International Covenant on Civil and Political Rights.⁶⁵ The responses to Professors Fox and Nolte did not question their analytic framework; instead, they simply challenged the capacity of any society to police the boundaries of something as nebulous as “democracy”⁶⁶ and questioned whether the remaining product was worthy of the name:

If one is to say to the people, in essence, “The fundamental principle of democracy dictates that you can have any government except the one the majority of you presently think you want,” there had better be a more compelling argument for democracy than that it enables the people to choose. There is nothing intrinsically valuable about choosing among undesired options.⁶⁷

Although these critiques take a back seat to claims that suppression does not work,⁶⁸ all of these arguments tend to lump together the different sorts of responses that might be deployed against antidemocratic threats.

Rather than starting from the question whether a prohibition of antidemocratic forces is permissible, I prefer to start by asking what kinds of prohibitions are being contemplated. Here, I depart considerably from American case law, which tends to collapse the question of what prohibitions on political parties are acceptable into the debate over what criminal sanctions on political speech are justified. This section therefore considers the forms of political restraint that operate outside the bounds of the criminal justice system. The inquiry concerns the existence of a space between the standards that justify incarceration and those that might suffice to justify a prohibition on electoral participation. Put simply, are there methods to suppress antidemocratic political mobilizations that are distinct from criminally prosecuting their adherents, and can those methods be justified even if we would not tolerate incarceration for those who share the antidemocratic viewpoints?

In rough form, then, we should consider three different approaches to antidemocratic mobilizations in the electoral arena that are distinct from criminal prosecutions of the advocates of the underlying positions: first, an electoral code governing the content of political appeals; second,

⁶⁵ See Fox & Nolte, *supra* note 1.

⁶⁶ See, e.g., Brad R. Roth, Response, *Democratic Intolerance: Observations on Fox and Nolte*, 37 HARV. INT’L L.J. 235, 236 (1996) (“[D]emocracy’ has in recent parlance been transmogrified into a repository of political virtues The consequence of this indeterminacy is that ‘democracy’ becomes identified with whichever choice engages our sympathies.”).

⁶⁷ *Id.* at 237.

⁶⁸ See, e.g., Edip Yuksel, *Cannibal Democracies, Theocratic Secularism: The Turkish Version*, 7 CARDOZO J. INT’L & COMP. L. 423, 458 (1999).

the proscription of political parties that fail to accept some fundamental tenet of the social order; and third, a ban on electoral participation for some political parties, even if they are permitted to maintain a party organization. The first two approaches represent the general range of established responses to antidemocratic agitation, stretching from regulations of electoral conduct to proscriptions on the organization of political parties. The third option — the ban on electoral eligibility but not on party formation — is less established as a form of party regulation. Nonetheless, this intermediate form of regulation offers an intriguing, less restrictive means of addressing the unique problems of antidemocratic mobilization through electoral activity.

A. Content Restrictions on Electoral Speech

Hinduism will triumph in this election and we must become hon'ble recipients of this victory to ward off the danger on Hinduism, elect Ramesh Prabhoo to join with Chhagan Bhujbal who is already there. *You will find Hindu temples underneath if all the mosques are dug out.* Anybody who stands against the Hindus should be showed or worshipped with shoes. A candidate by the name Prabhoo should be led to victory in the name of religioThus runs a typical speech from an extreme Hindu nationalist agitator, Bal Thackeray, made during a campaign appearance on behalf of a local candidate of the extremist Shiv Sena party. That the ideas are coarse is not subject to meaningful debate, even if the cultural significance of being shown shoes does not readily cross all national frontiers. Thackeray is a rather notorious political operative in Bombay, a city that he was instrumental in renaming Mumbai.⁶⁹ Among his sources of political inspiration he counts Adolf Hitler, whom he characterizes as “an artist who wanted Germany to be free from corruption.”⁷⁰

But the speech has a significance that goes beyond the merely distasteful. The image of Muslim shrines sitting on the ruins of Hindu temples is a potent incitement to sectarian violence over contested religious shrines, particularly the Babri mosque in Ayodhya in northern India, a site with religious significance and a violent past that is strikingly reminiscent of the Temple Mount in Jerusalem.⁷¹ Beginning in 1984, shortly before the speech in question, the hard-line World Hindu Council had agitated among Hindu followers to tear down the mosque, which, according to legend, was built on the birthsite of Rama, a major Hindu deity.

In 1992, agitation turned to reality when a Hindu mob destroyed the mosque and then attacked other Muslim sites and homes in Ayodhya. The ensuing ethnic riots left thousands dead in a wave of communal violence not seen since the initial partition of India and Pakistan in 1947.⁷² At the

⁶⁹ See Christopher Beam, *Mumbai? What About Bombay?: How the City Got Renamed*, SLATE, July 12, 2006, <http://www.slate.com/id/2145650/>.

⁷⁰ Larissa MacFarquhar, *The Strongman: Where is Hindu-Nationalist Violence Leading?*, NEW YORKER, May 26, 2003, at 50, 50 (quoting Bal Thackeray) (internal quotation marks omitted).

⁷¹ See Gary Jeffrey Jacobsohn, *The Permeability of Constitutional Borders*, 82 TEX. L. REV. 1763, 1798 & n.169 (2004); Daniel Pipes, *The Temple Mount's Indian Counterpart*, JERUSALEM POST, Jan. 17, 2001, at 8.

⁷² See GARY JEFFREY JACOBSON, *THE WHEEL OF LAW: INDIA'S SECULARISM IN COMPARATIVE CONSTITUTIONAL CONTEXT* 129 (2003).

organizational center of the mob assault were the Hindu nationalist political parties, including the most prominent Hindu nationalist party, the Bharatiya Janata Party (BJP), a party that was to hold the prime ministership in India a decade later. That the 1987 speech by Thackeray did not give rise to a similar conflagration was a matter of happenstance — the ethnic tinderbox was just as much present. Indeed, Thackeray and Shiv Sena did reemerge in 1992 as instigators of the violence in Bombay, the worst carnage following the attack on the mosque in Ayodhya.⁷³

Indian history does not lack for examples of election agitation leading to scores of deaths. The question is what steps may be taken to permit genuine, even if distasteful, political expression while maintaining public order in the face of likely violent outbursts.⁷⁴ As a doctrinal matter, any restriction has to balance the Indian constitutional guarantee of freedom of expression⁷⁵ and the reserved constitutional emergency power to protect public order.⁷⁶

India's response is to narrow the definition of permissible political speech. This is perhaps the least intrusive form of regulation of antidemocratic agitation, but paradoxically it may be the one that raises the most vagueness concerns in the American First Amendment tradition. India couples a strong constitutional commitment to freedom of expression with a rigid electoral code prohibition on seeking electoral support by promoting "enmity or hatred . . . between different classes of" Indian citizens "on grounds of religion, race, caste, [or] community."⁷⁷ The election code proscribes "corrupt practices," which are defined as including an appeal to vote for or against a candidate "on the ground of his religion, race, caste, community or language or the use of, or appeal to, religious symbols."⁷⁸ The power to enforce this prohibition is in turn delegated to an Election Commission which has the authority to identify corrupt practices and seek extraordinary remedies, including the exclusion from office of victorious candidates who relied upon prohibited speech.⁷⁹

The leading Indian case on this topic provides a clear example of an election code in practice. In *Prabhoo v. Kunte*,⁸⁰ the Indian Supreme Court confronted the decision of the Bombay High Court that the election of Ramesh Yeshwant Prabhoo to state legislative office in Maharashtra should be

⁷³ BARBARA D. METCALF & THOMAS R. METCALF, A CONCISE HISTORY OF INDIA 279 (2002).

⁷⁴ This issue is by no means limited to India. Bosnia's fragile ethnic peace was threatened by an inflammation of ethnic tensions during its most recent election campaign. In the words of Christian Schwarz-Schilling, a senior international official in Bosnia: "Inflammatory rhetoric raises tensions, and this in turn can all too easily escalate into violence in a society where weapons are everywhere, alcohol plentiful and the summer long and hot" "The more abusive the campaign rhetoric now, the more difficult it will be to find the necessary partners to create functioning institutions" Nicholas Wood, *Fiery Campaign Imperils Bosnia's Progress, Officials Warn*, N.Y. TIMES, Aug. 27, 2006, at A3 (quoting Christian Schwarz-Schilling). The problems in Bosnia are exacerbated by the formal ethnic divisions of political power emerging from the Dayton Accords. See Anna Morawiec Mansfield, Note, *Ethnic but Equal: The Quest for a New Democratic Order in Bosnia and Herzegovina*, 103 COLUM. L. REV. 2052, 2054–65 (2003).

⁷⁵ INDIA CONST. art. 19, § 1.

⁷⁶ *Id.* art. 19, § 2 ("Nothing . . . shall . . . prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right to free expression in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.").

⁷⁷ The Representation of the People Act, No. 43 of 1951; INDIA A.I.R. MANUAL (1989), v. 41 § 125.

⁷⁸ *Id.* § 123(3).

⁷⁹ *Id.* § 8A.

⁸⁰ A.I.R. 1996 S.C. 1113.

set aside. The High Court had found that Prabhoo's campaign had been organized by Bal Thackeray, the leader of the Shiv Sena party, whose comments above formed only a mild part of his inflammatory arsenal. Consistent with the statutory definition of corrupt practices, the High Court found that the campaign had appealed to Hindus to vote for Prabhoo on the basis of his religion.⁸¹ The appeals to Hindu solidarity were coupled with tirades on the threats that Muslim candidates or candidates urging Muslim appeasement would present. Thackeray's campaign speeches referred to some Muslims as snakes and used other religious imagery⁸² that was understood as a basic call for a Hindu assertion of power to thwart the perceived Muslim threat.

In upholding the High Court's conclusions, including its reversal of the election result, the Supreme Court rejected the claim that only a manifest threat to public safety could justify an electoral prohibition. The narrow basis for the ruling was that the perceived threat to public order allowed for the invocation of the government's reserved constitutional powers to protect domestic order.⁸³ The court found that the statute prohibited any appeal to vote for or against a candidate based on his religion, regardless of whether the appeal was "prejudicial to the public order."⁸⁴ It held the prohibition to be constitutional as a reasonable restriction in the interest of "decency or morality."⁸⁵ It declared that "seeking votes on the ground of the candidate's religion in a secular State is against the norms of decency and the propriety of the society."⁸⁶ The legality of any particular electoral appeal would thus turn on the nature of the speech itself, not on whether it presented a clear and present danger. The court found general guidance in an earlier decision dealing with the aftermath of the chaos in Ayodhya, the *Ayodhya Reference Case*,⁸⁷ which read the constitutional guarantee of equality of religion to be an affirmative commitment to secularism as "one facet of the right to equality woven as the central golden thread in the fabric depicting the pattern of the scheme in our Constitution."⁸⁸ Secularism provided the substantive basis for the *Prabhoo* court to restrict campaign speech that threatened significant public disorder. But the court could not place all invocations of religion outside the bounds of electoral politics — the guarantees of free expression would protect the right to claim discrimination or unequal treatment based upon religion. Instead, the court carefully distinguished appeals made to religious bigotry as implicating conflicting constitutional concerns between public order and freedom of religious expression.⁸⁹

The court resolved the constitutional conflict by making two distinct findings about the constitutional status of the election period. First, the court reiterated an earlier understanding that the Constitution itself expresses a commitment to a democratic political order:

⁸¹ See *id.* at 1117.

⁸² See *id.* at 1119.

⁸³ See INDIA CONST. art. 19, § 2.

⁸⁴ *Prabhoo*, A.I.R. 1996 S.C. at 1121.

⁸⁵ *Id.* at 1126 (quoting INDIA CONST. art. 19, § 2).

⁸⁶ *Id.*

⁸⁷ *Ismail Faruqui v. Union of India*, A.I.R. 1995 S.C. 605.

⁸⁸ *Id.* at 630.

⁸⁹ Thus, in an earlier case involving two Muslim candidates, it was considered permissible to air grievances of the Muslim community, but impermissible for one candidate, in the last stages of the campaign, to charge his opponent with not being a true Muslim. See *Bukhari v. Mehra*, (1975) Supp. S.C.R. 281.

No democratic political and social order, in which the conditions of freedom and their progressive expansion for all make some regulation of all activities imperative, could endure without an agreement on the basic essentials which could unite and hold citizens together despite all the differences of religion, race, caste, community, culture, creed and language. Our political history made it particularly necessary that these differences, which can generate powerful emotions depriving people of their powers of rational thought and action, should not be permitted to be exploited lest the imperative conditions for the preservation of democratic freedoms are disturbed.⁹⁰

Second, the court found it significant that the prohibition on speech was directed only to the election period itself and thus to maintaining the integrity of the democratic process by preventing the incitement of communal hatred: “The restriction is limited only to the appeal for votes to a candidate during the election period and not to the freedom of speech and expression in general or the freedom to profess, practise and propagate religion unconnected with the election campaign.”⁹¹

The Indian approach to antidemocratic appeals has two major limitations. First, in terms of practical effect, it is intended only to address the problem of accentuation of communal antipathies in the crucible of a contested election campaign. Parties can easily organize on antidemocratic platforms outside the electoral arena. To the extent that parties moderate their language for the election campaign itself — a seemingly inevitable problem with election statutes that amount to speech codes — the definition of corrupt practices in India does not regulate their conduct. Thus, for example, the Spanish decision to ban the Basque separatist Batasuna party might have been difficult to enforce as a speech ban on a party that promoted the claimed plight of the Basque people.⁹² Even in India, the Electoral Commission has had to push further, ruling for example that no elections could be held in Gujarat in 2002 after the local BJP government helped instigate anti-Muslim riots that left more than 1000 people dead.⁹³ More aggressive still was the decision of the Indian Supreme Court upholding the dismissal from office of three state governments on grounds of complicity or acquiescence in mob violence in the aftermath of the destruction of the Babri mosque in Ayodhya.⁹⁴

Second, and perhaps more significantly, the Indian approach would require setting aside qualms that many — including many educated in the American First Amendment tradition — might have with governmental speech codes that lack clear guidance and are largely applied after the fact. It is ironic that the least restrictive form of electoral prohibition, one that does not require banning parties or individuals wholesale, is likely to have the most capacity for as-applied abuse. As with all rules governing the electoral process, any departure from prospective application means that the application of a rule will have outcome-determinative effects. In *Prabhoo*, for example, the effect

⁹⁰ *Prabhoo*, A.I.R. 1996 S.C. at 1124 (quoting *Bukhari*, (1975) Supp. S.C.R. at 288).

⁹¹ *Id.* at 1125–26.

⁹² Indeed, the dissolution of Batasuna ultimately turned on the party’s refusal to condemn acts of violence by ETA, an omission that would not have been reached by a speech code. See Thomas Ayres, *Batasuna Banned: The Dissolution of Political Parties Under the European Convention of Human Rights*, 27 B.C. INT’L & COMP. L. REV. 99, 109 (2004).

⁹³ See Edward Luce, *Appeal on Indian Election Ruling*, FIN. TIMES, Aug. 19, 2002, at 6 (detailing the Electoral Commission’s decision to postpone and the legal appeals that followed).

⁹⁴ See *S.R. Bommai v. Union of India*, A.I.R. 1994 S.C. 1918. For a fuller discussion of the political and ethnic dimensions of these decisions, see JACOBSON, *supra* note 71, at 126–32.

was to remove from office a candidate supported by the majority of voters. To the extent that electoral officials and reviewing judges are always at risk of succumbing to political pressures, or at least of being perceived as having done so, any regulatory approach that applies retroactively necessarily raises genuine legitimacy concerns.

The Indian approach not only invites content and viewpoint regulation of speech, but embraces it. In the *Ayodhya Reference Case*, for example, Justice Verma invoked Rawls directly to set the secular contours for limiting the role of religion in the electoral and governmental spheres. For Justice Verma, India is a “pluralist, secular polity” in which “law is perhaps the greatest integrating force.”⁹⁵ His substantive commitment to tamp down religious appeals draws on a “Rawlsian pragmatism of ‘justice as fairness’” that in turn permits an “‘overlapping consensus’ . . . on fundamental questions of [the] basic structure of society for deeper social unity.”⁹⁶

Further, the Indian approach, while committed to maintaining public order during a heated election, exposes uncertainty about voters’ motivations in exercising the franchise. There is a lingering concern in democratic theory that base instincts may come to command voters. For example, James Madison was concerned about the descent into the vice of passion, by which the masses of voters could be swayed by greed or envy of the wealthy to use democratic power for confiscatory aims.⁹⁷ The Indian cases applying the electoral speech code contained in the Corrupt Practices Act follow in this tradition, finding a compelling governmental interest in outlawing appeals to base instincts that might, in heated moments, overwhelm the higher aspirations of republican discourse:

Under the guise of protecting your own religion, culture or creed you cannot embark on personal attacks on those of others or whip up low hard instincts and animosities or irrational fears between groups to secure electoral victories.

. . .
 . . . [O]ur democracy can only survive if those who aspire to become people’s representatives and leaders understand the spirit of secular democracy. That spirit was characterised by *Montesquieu* long ago as one of “virtue.” . . . For such a spirit to prevail, candidates at elections have to try to persuade electors by showing them the light of reason and not by inflaming their blind and disruptive passions. Heresy hunting propaganda on professedly religious grounds directed against a candidate . . . may be permitted in a theocratic state but not in a secular republic like ours.⁹⁸

There is a disturbing quality to regulating speech in order to protect the electorate against the likelihood that it will submit to its base instincts in the heat of electoral debate. Even so, the specter of communal violence, which is never too far from the surface in heated Indian political battles,

⁹⁵ *Ismail Faruqui v. Union of India*, A.I.R. 1995 S.C. 605, 630. Here, the court was quoting from “a paper on ‘Law in a Pluralist Society’ by M.N. Venkatachalia.” *Id.*

⁹⁶ *Id.* at 630–31. This passage is also quoted from Venkatachalia. *Id.* at 630.

⁹⁷ See THE FEDERALIST NO. 10 (James Madison), *supra* note 32, at 73–75; see also THE FEDERALIST NO. 49 (James Madison), *supra* note 32, at 314 (expressing the view that such passions “ought to be controlled and regulated by the government”).

⁹⁸ *Bukhari v. Mehra*, (1975) Supp. S.C.R. 281, 288, 296.

yields a constitutional accommodation between civil liberties and public order. It is hard to contest the claim that fewer people have died as a result of a modicum of caution being imposed on politicians lest they be removed from office. It is also worth noting that the BJP, after being instrumental in the incendiary storming of the mosque in Ayodhya, subsequently tempered its rhetoric in order to preserve its electoral viability. In its mildly gentler form, the BJP managed to prevail in national elections and put together a fragile governing coalition, only to fail in its efforts at governance and lose in a subsequent election to a coalition that would select India's first Sikh prime minister.⁹⁹

B. Party Prohibitions

All constitutions constrain the options available to majoritarian choice. However, they vary in the degree of "obduracy" of their provisions.¹⁰⁰ Some allow change by supermajority; others require that approval be demonstrated over an extended period of time.¹⁰¹ Many also have unamendable provisions that are intended to define the society indefinitely and are not subject to review absent a complete overhaul of the society. Examples of unamendable provisions include the German Basic Law and, presumably, Article V of the U.S. Constitution, as to both the mechanics of amendment and the specific prohibition on any state being denied its representation in the Senate. Other constitutions take the basic form of governance off the table, as with Article 139 of the Italian Constitution, which prohibits any amendment altering the republican form of government, or Article 112 of the Norwegian Constitution, which prohibits amendments that "contradict the principles embodied in the Constitution."¹⁰²

Which provisions are off the table for internal change generally reflects the birth pangs of that particular society.¹⁰³ Whether through the numerous protections of slavery in the original U.S. Constitution, or the tormented recognition of the Nazi period in the postwar German Constitution, such provisions shore up the weak points in the social order that cannot bear direct political conflict. In turn, many countries prohibit political participation by parties that do not share the fundamental aims of the constitutional order. Thus, it is not surprising to find in the West German Constitution

⁹⁹ See David Gardner, *Power Leaks to the Regions*, FIN. TIMES, Nov. 19, 1999, at 2 (detailing BJP victories in 1999 national elections); Editorial, *Massaging the Temple: Not Enough to Cure BJP's Headache*, STATESMAN (Calcutta), Nov. 2, 2004, at 8 (reviewing the BJP's failed attempts at governance); S.M. Hali, *Advani's Volte-Face!*, NATION (Pakistan), June 21, 2005, LEXIS, News Library, NTNPK file (describing the aftermath of the BJP's unexpected defeat in 2004); Soutik Biswas, *India's Architect of Reforms*, BBC News, Oct. 14, 2005, http://news.bbc.co.uk/2/hi/south_asia/3725357.stm (detailing rise of Manmohan Singh, India's first Sikh prime minister).

¹⁰⁰ LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE 81–82 (2004).

¹⁰¹ See, e.g., FIN. CONST. art. 73 (providing that a constitutional amendment introduced in one parliamentary session may only be approved after an intervening parliamentary election); 1958 FR. CONST. art. 89 (requiring that amendments be approved by two successive assemblies and then by a referendum).

¹⁰² See JACOBSON, *supra* note 71, at 138 (quoting ITALY CONST. art. 139; NOR. CONST. art. 112). For a fuller discussion of constitutions as precommitment pacts against current majoritarian preferences, see Samuel Issacharoff, *The Enabling Role of Democratic Constitutionalism: Fixed Rules and Some Implications for Contested Presidential Elections*, 81 TEX. L. REV. 1985 (2003).

¹⁰³ This observation is hardly new. The idea that a constitution is a document directed to the political realities of the society in which it arises goes back at least to Aristotle. See ARISTOTLE, POLITICS § 1296b10, reprinted in ARISTOTLE, *THE POLITICS AND THE CONSTITUTION OF ATHENS* 9, 109 (Stephen Everson ed. 1996) (asserting that constitutions must be measured by what is best in relation to actual conditions).

the foundations for a ban on the descendants of the Nazi and Communist parties,¹⁰⁴ or to see a corresponding early prohibition of Communist parties in Ukraine¹⁰⁵ and other former Soviet-controlled countries. As expressed by the Czechoslovakian Constitutional Court in a 1992 decision upholding that country's lustration law against a constitutional challenge, "A democratic State has not only the right, but also the duty to assert and protect the principles on which it is based."¹⁰⁶

But in many countries, the prohibition goes significantly further, defining the permissible bounds of democratic deliberation and banning outright parties that raise claims outside these limits. Common examples are found in the banning of parties that challenge the country's territorial integrity (resulting in prohibitions on electoral participation by separatist movements) or that seek to reconstitute society along religious lines. Here, the best examples are found in a series of decisions by the Turkish Constitutional Court upholding bans on parties advocating Kurdish independence or fidelity to sharia, campaigns which were deemed violative of the constitutional commitment to the integrity of Turkey as an organic secular state.¹⁰⁷

Most democratic countries appear to draw some form of protective line around the legal status of the political party. This protection means that the constitutional definition of the permissible scope of democratic politics is also the defining boundary for the right to organize a political party. For example, German (formerly West German) constitutional law grants significant protections to the ability of political parties to form and operate effectively in the electoral arena.¹⁰⁸ Nonetheless, that protection is granted only to those parties that are entitled to legal status as proper actors in a democratic society. Article 21(2) of the German Constitution provides: "Parties which, by reason of their aims or the behavior of their adherents, seek to impair or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional. The Federal Constitutional Court shall decide on the question of unconstitutionality."¹⁰⁹ The court, in the early days of the Federal Republic, twice exercised its Article 21 power to declare parties unconstitutional: in 1952, in the *Socialist Reich Party Case*,¹¹⁰ it declared a neo-Nazi party unconstitutional;

¹⁰⁴ See *Socialist Reich Party Case*, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 23, 1952, 2 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 1 (F.R.G.), translated in part in DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 218 (2d ed. 1997); *Communist Party Case*, BVerfG Aug. 17, 1956, 5 BVerfGE 85, translated in part in WALTER F. MURPHY & JOSEPH TANENHAUS, COMPARATIVE CONSTITUTIONAL LAW 621 (1977).

¹⁰⁵ See *infra* pp. 1435–36.

¹⁰⁶ 3 TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES 346, 350 (Neil J. Kritz ed., 1995) (presenting edited translation of Czech and Slovak Federal Republic Constitutional Court Decision on the Screening Law, Nov. 26, 1992). For a discussion of the comparable Hungarian treatment of lustration issues, see Gábor Halmai & Kim Lane Scheppele, *Living Well Is the Best Revenge: The Hungarian Approach to Judging the Past*, in TRANSITIONAL JUSTICE AND THE RULE OF LAW IN NEW DEMOCRACIES 155, 171–78 (A. James McAdams ed., 1997).

¹⁰⁷ See Dicle Kogacioglu, *Dissolution of Political Parties by the Constitutional Court in Turkey: Judicial Delimitation of the Political Domain*, 18 INT'L SOC. 258 (2003).

¹⁰⁸ See *Party Finance Case III*, BVerfG July 19, 1966, 20 BVerfGE 56, translated in part in KOMMERS, *supra* note 103, at 204; *Party Finance Case II*, BVerfG June 24, 1958, 8 BVerfGE 51, translated in part in KOMMERS, *supra* note 103, at 201.

¹⁰⁹ GRUNDGESETZ [GG] [Basic Law] art. 21(2), translated in KOMMERS, *supra* note 103, at 507, 511; see also *id.* art. 9(2), translated in KOMMERS, *supra* note 103, at 507, 509 (prohibiting "[a]ssociations whose purposes or activities . . . are directed against the constitutional order"); *id.* art. 5(3), translated in KOMMERS, *supra* note 103, at 507, 508 (declaring that teaching "shall not absolve [a person] from loyalty to the Constitution").

¹¹⁰ BVerfG Oct. 23, 1952, 2 BVerfGE 1, translated in part in KOMMERS, *supra* note 103, at 218.

and in 1956, in the *Communist Party Case*,¹¹¹ it declared the Communist Party of Germany (KPD) unconstitutional. In each case, the constitutional limitation on the scope of what could properly be put before the electorate also defined the limits on the organization of a legal political party.

While there are different modes of implementation, the basic understanding on which these party prohibitions are based is that parties are either within or without the democratic process.¹¹² If their aims are sufficiently antithetical to core democratic principles, they may be banned. Most bans derive their authority from the constitution directly; France is exceptional in this regard in relying on a 1936 statute regulating the existence of private militias.¹¹³ Some constitutional prohibitions are quite open-textured, as with Article 49 of the Italian Constitution, which enjoins parties from violating the “democratic method.”¹¹⁴ Most are more specific, as with Article 21 of the German Basic Law, which guarantees the right of free formation of political parties but dictates that “[t]heir internal organization must conform to democratic principles” and which flatly prohibits parties that “seek to impair or abolish the free democratic order, or to endanger the existence of the Federal Republic of Germany.”¹¹⁵ Nonetheless, the flip side to the inquiry is that if parties are not banned, they enjoy plenary rights of free expression; according to the German court, “[t]he Basic Law tolerates the dangers inherent in the activities of such a political party until it is declared unconstitutional.”¹¹⁶

Each party prohibition is backed by at least one of three distinct rationales, each of which raises a separate set of concerns. First, there are the prohibitions on parties that appear to operate as legal or propagandistic fronts for terrorist or insurrectionary groups that are independently subject to criminal prosecution or defensive military operations. Second, there are prohibitions on parties that align themselves with regional independence forces, generally premised on religious or ethnic distinctions, that take a political stance opposing the continued territorial integrity of the country. Finally, there are prohibitions on parties that seek a platform for a sustained challenge to the core values of liberal democracy, as espoused in the preexisting constitutional order, but whose objective is (to greater and lesser extents) to claim power through a majority mandate in the elThese categories need not be mutually exclusive. For example, the Hezbollah platform in Lebanon arguably contains elements of all three. The Turkish government has justified its suppression of parties supporting Kurdish nationalism on the ground that they engaged in or supported guerrilla actions against the government. The same could be said of the Batasuna party in Spain; though the organization is devoted to Basque independence, its banning turned on its relations with the outlawed terrorist group ETA.¹¹⁷

¹¹¹ BVerfG Aug. 17, 1956, 5 BVerfGE 85, *translated in part in* MURPHY & TANENHAUS, *supra* note 103, at 621. For a general discussion of the case, see KOMMERS, *supra* note 103, at 222–24.

¹¹² See Paul Franz, *Unconstitutional and Outlawed Political Parties: A German-American Comparison*, 5 B.C. INT’L & COMP. L. REV. 51, 63 (1982) (noting that under German law, parties “are to be free from government discrimination and governmental intervention as long as the Constitutional Court has not found the party to be unconstitutional”).

¹¹³ See Yigal Mersel, *The Dissolution of Political Parties: The Problem of Internal Democracy*, 4 INT’L J. CONST. L. 84, 92 n.41 (2006) (contrasting French statutory authority with constitutional provisions in Croatia, Italy, Germany, Poland, and Spain).

¹¹⁴ Niesen, *supra* note 15, at ¶ 19 (quoting ITALY CONST. art. 49).

¹¹⁵ GG art. 21(1), (2), *translated in* KOMMERS, *supra* note 103, at 507, 511.

¹¹⁶ Radical Groups Case, BVerfG Feb. 14, 1978, 47 BVerfGE 198, *translated in part in* KOMMERS, *supra* note 103, at 224, 227.

¹¹⁷ Comella, *supra* note 20, at 134–35.

Even if the categories cannot be hermetically walled off from each other, they do provide some insight into the changing nature of current antidemocratic political organizations. The first two categories, insurrectionary and regional independence parties, represent minority attacks on the polity. Each seeks to use the electoral arena to erode the will of the broader polity to resist attacks on the core organizational structure of the state. Each poses different problems for democratic societies, particularly since political platforms of the regional independence parties are likely to be heavily infused with legitimate claims concerning discriminatory treatment of national or ethnic minorities within the broader society. But it is the third category that is the most problematic and, I would maintain, the most dangerous. The strategy for gaining power employed by parties in this category was the one used by the Nazis, as reflected in the introductory quotation from Goebbels. And it is this aspect of the clericalist Islamic parties, such as Hamas and Hezbollah, that has been so dispiriting for the hopeful champions of democracy in the Middle East.

1. Insurrectionary Parties. — It is best to begin by setting off a category of parties that may seek to participate in the electoral process for the purpose of propagandizing their views, but without any real prospect of seriously competing for political office. This category describes many minor parties around the world, including all third parties in the United States. Despite their lack of political capital, these parties can cause problems for the political order if they use the electoral arena as an organizing forum for insurrectionary attacks on the state or as an outlet for defending illegal activities. This dangerous subset may include both parties that are funded by criminal enterprises, such as drug cartels,¹¹⁸ and parties acting in service of a hostile foreign power. While both types of parties raise issues about the boundaries of the electoral systems, the best and most troubling examples are drawn not from the electoral efforts of drug cartels, but from the communist parties within various democracies.

Germany here provides the best example, one even clearer than the Smith Act cases in the United States. In reviewing the German party exclusion cases, there is a natural tendency to run together the *Socialist Reich Party* and *Communist Party* cases; both parties had ties to totalitarian ideologies and both emerged at a time of real vulnerability for West Germany. As I explain later, however, the Socialist Reich Party was for all practical purposes a vehicle for destabilizing German democracy in an attempt to recreate Nazi rule.¹¹⁹ The German court dealt with that case quickly and without much hesitation, though not without some analytic difficulties. With regard to the Communist Party, by contrast, the court took six years to issue a complicated, 300-page decision, which focused heavily on the nature of Marxist-Leninist ideology. The aim of this ideology, the court found, was to organize the party's activities under democracy "as a transition stage for easier elimination of the free democratic basic order as such"¹²⁰:

¹¹⁸ In an extreme example, Colombian president Ernesto Samper was charged with accepting \$6 million from the infamous Cali Cartel to fund his 1994 campaign. See Interview by Charles Krause with Ernesto Samper, Former President of Colombia (Mar. 20, 1996), available at http://www.pbs.org/newshour/bb/latin_america/colombia_3-20.html.

¹¹⁹ See *infra* p. 1459.

¹²⁰ Communist Party Case, BVerfG Aug. 17, 1956, 5 BVerfGE 85, translated in part in MURPHY & TANENHAUS, *supra* note 103, at 621, 625.

Therefore the KPD must actually deny all other parties . . . any right to exist in the sense of a lasting partnership with equal rights. But precisely such a lasting partnerships is the prerequisite for the functioning of the multi-party principle — and for the struggle for power between several parties — within a free democracy.

. . . The same is basically true of the KPD's parliamentary activity. In the parliamentary system of liberal democracy, each party participating in forming the popular political will is to be given a chance to come as close as possible to achieving its own goals through its activity in parliament. But no party may pursue material goals that, when reached, would forever exclude existence of other parties. . . . But . . . this is exactly the KPD's goal.¹²¹

The difficulty is that the question before the court was not whether the KPD's embrace of Marxism-Leninism was contrary to or even hostile to liberal democratic values; that much could be said of Marxist university professors or social activists. Rather, the question before the court was the constitutional legitimacy of banning a party that advocated ideas that certainly formed part of Germany's intellectual legacy. The KPD was careful to couch its electoral appeals in terms of a critique of the treatment of class and other political and social issues by Germany and its allies, not in advocacy of military conquest by a foreign power. The court's opinion remains unsatisfying because of its failure to tie the Communist Party directly to the real perceived threat to German democracy: the Warsaw Pact forces assembled within shooting distance of the West German border. The opinion repeatedly returns to the party's efforts to disparage all the institutions of West Germany and to agitate against the country's ties to the United States, leaving unproven the KPD's implicit endorsement of the other side in the Cold War.

Nonetheless, the opinion does include hints of the need to tolerate *ideas* about communism outside the immediately perilous setting. For example, the court added that “[b]anning the KPD is not legally incompatible with reauthorization of a Communist party were elections to be held throughout Germany,”¹²² a clear invitation to revisit the court's holding outside the context of the Cold War — a conflict that seemed neither very distant nor particularly “cold” in Germany in the 1950s. In effect, the court treated the KPD as an organization that was trying to use the electoral system to demoralize and destabilize German politics in order to further the aims of an enemy amassed at the border. The privation that followed World War II and the presence of foreign troops throughout Germany were all too reminiscent of the period following World War I, during which German democracy could not secure its footing. Under these circumstances, the Communist Party became more than an electoral outlier and instead assumed the role of an ally of forces seeking to unwind the German democratic state, not through elections as such, but in conjunction with a real foreign threat.

During the years in which the case was pending, and more so in the following decades, the Communist Party lost its residual appeal stemming from its opposition to Hitler before and during the

¹²¹ *Id.*, translated in part in MURPHY & TANENHAUS, *supra* note 103, at 621, 624 (first and third omissions in original).

¹²² *Id.*, translated in part in MURPHY & TANENHAUS, *supra* note 103, at 621, 626.

war. The fading sense of immediacy is likely one of the reasons the opinion does not stand up to exacting review. Moreover, during the same period, the West German economy flourished and the perceived threat from the East diminished. By 1968, when a new organization known as the German Communist Party (DKP) formed, the government took no steps to dismantle it. Although it is true that the new party had dropped inflammatory invocations of the dictatorship of the proletariat from its official rhetoric, the only genuine difference appeared to be the lack of perceived threat — any semblance of a clear and present danger — from a party identified with East Germany and the Soviet bloc.

Perhaps this attention to a perceived threat is really what the Smith Act cases were ultimately about as well. In each case, the government claimed that the Communist Party was merely a conduit for recruitment, financing, and propaganda on behalf of a powerful military adversary. Although not decided in exactly these terms, the cases tended to ask questions consistent with this understanding. The Court essentially examined either the scope of the danger — defined primarily in military or insurrectionary terms — or the extent to which the party in question was directly tied to an adversarial order.

Another good example is found in Ukraine, where within days of the declaration of independence from the Soviet Union in 1991, a special committee of the new legislature issued a pair of decrees banning the Communist Party of Ukraine and seizing its assets.¹²³ In 1997, after several years of failed legislative attempts to get the ban lifted, the Communist Party challenged the decree before the Ukrainian Constitutional Court. In 2001, a full ten years after the overthrow of Soviet rule, the court finally struck down the ban on the Communist Party.¹²⁴ The court noted that the party's charter had been changed and the party now aspired "to follow the laws and the Constitution."¹²⁵ Most crucial, however, was the finding that the party was a newly constituted, independent organization and not a continuation of the Communist Party of the Soviet Union (CPSU), which the court said was not a regular political party because it "retained its leadership from the Soviet era."¹²⁶ Indeed, the Russian Constitutional Court applied virtually the same approach in upholding the dissolution of the governing apparatus of the CPSU and the Russian Communist Party, while allowing regional communist parties to reconstitute themselves independent of any material or other support directly derived from the former Soviet regime.¹²⁷

Understood in this light, the clear and present danger test makes more sense for such insurrectionary parties. The German court could be seen as searching for a principle that would accommodate the exigency of the early days of the Cold War, but would exclude blanket prohibitions on communist parties as overly broad ideological suppression. The clear and present danger test seems

¹²³ See Alexei Trochev, *Ukraine: Constitutional Court Invalidates Ban on Communist Party*, 1 INT'L J. CONST. L. 534, 535 (2003).

¹²⁴ See *id.* at 536–39 (discussing Rishennia KSU (Konstytutsijnogo Sudu Ukrainy) [Decision of the Constitutional Court of Ukraine], No. 20-RP/2001 of Dec. 27, 2001, Visnyk Konstytutsijnogo Sudu Ukrainy (bimonthly), 2001, No. 6, at 39–45 [hereinafter Decision No. 20-RP/2001]).

¹²⁵ *Id.* at 538 (quoting Decision No. 20-RP/2001, ¶ 7) (internal quotation marks omitted).

¹²⁶ *Id.*

¹²⁷ See Yuri Feofanov, *The Establishment of the Constitutional Court in Russia and the Communist Party Case*, 19 REV. CENT. & E. EUR. L. 623 (1993).

reasonably well suited to measuring the extent to which a party with an ideological affinity for a hostile power does indeed pose a national security threat. In fact, there is little that distinguishes this form of party organization from a conspiracy to engage in criminal or treasonous conduct.

Where the danger to democratic stability posed by a party arises from the threat of extralegal conduct, the clear and present danger test properly directs a court's attention to the imminence and likelihood of the harm.¹²⁸ The imminence requirement serves the same purpose as the requirement that there be an overt act in the law governing criminal conspiracies. And this is how the Smith Act cases began — as criminal inquiries. Yet, returning to the American context, it is this precise feature of *Dennis* that remains disturbing. What had begun as an investigation into the scope of Soviet espionage¹²⁹ was transformed by the time of *Dennis* into a prosecution for conspiracy to advocate the overthrow of the government through force and violence.¹³⁰ Because of the inchoate nature of the charge, *Dennis* does little to elucidate the level of threat a democracy must be able to tolerate before deciding that its core commitment to popular choice is at risk of being subverted — a necessarily difficult question to answer in the abstract. But the nature of the charge in *Dennis* allowed the Court to focus on ideas rather than address the extent to which the Communist Party was for all practical purposes a stalking horse for a military challenge to the United States.

2. Separatist Parties. — On first impression, separatist parties raise much the same problems as insurrectionary parties. Each aligns itself with a movement that seeks to alter the preexisting form of the state; each eschews any realistic prospect of gaining the adherence of a majority of citizens in the broad body politic. Oftentimes the separatist movement will have a paramilitary component that threatens the physical security of the democratic state or its citizens. In such cases, a democratic society can claim a compelling security interest in protecting itself against armed insurrection and may seek to prohibit the nonmilitary political party promoting separatist aims.

However, unlike an insurrectionary party that allies itself with a foreign power or draws from a criminal element within the nation, these separatist parties seem invariably to find their support by opposing the perceived oppression of a distinct regional or ethnic subset of the population. In championing the cause of oppressed groups within the broader polity, these separatist parties frequently develop an uneasy and oftentimes conflicting relationship with armed groups fighting for the same general objectives. Further, and also unlike the insurrectionary parties, they typically do not seek to take control of the entire state through electoral, paramilitary, or any other means. Rather, they seek to challenge the political will of the majority to continue its hold over a distinct region of the country, and they often promote themselves as upholding the claims of a majority of citizens in the contested area to democratic self-determination.¹³¹ Their object is typically independ-

¹²⁸ See Shlomit Wallerstein, *Criminalizing Remote Harm and the Case of Anti-democratic Activity*, 28 CARDOZO L. REV. (forthcoming 2007) (examining application of criminal law principles to antidemocratic incitement).

¹²⁹ See STONE, *supra* note 44, at 367.

¹³⁰ *Id.* at 396.

¹³¹ There are exceptions that complicate the picture. Israeli Arabs can be expected to chafe at the Basic Law's proclamation of the Jewish character of the Israeli state. The unwillingness of Arab parties in Israel to accept this characterization has led to numerous efforts to ban such parties, which have generally been resisted by the courts absent some tie to the PLO or terrorism. For a comprehensive history of the early bans on Arab parties, see Ron Harris, *A Case Study in the Banning of Political Parties: The Pan-Arab Movement El Ard and the*

ence, not conquest of the entire state. Because of their identification with a broader claim for the rights of a regionally defined, generally subordinated section of the nation, separatist parties readily invoke the language of self-determination to claim independent democratic grounds for their right to advocate dissolution of the broader polity.¹³²

Separatist parties are frequent targets for exclusion from the electoral arena for two distinct reasons. First, like insurrectionary parties, they may serve to provide legal cover for attacks on the state through force or violence. This is in effect the story of Batasuna in Spain, as well as that of its affiliated Herritarren Zerrenda party, which sought to present the same platform in European parliamentary elections.¹³³ Various Kurdish nationalist parties in Turkey, Sinn Féin in Northern Ireland, and numerous other examples pose the same issues. Second, any state — France, Turkey, Iraq, Israel, and Spain offer ready examples — can declare that its territorial boundaries are beyond the scope of proper political debate.

Precisely because such regional minorities, particularly if they are set off by linguistic, religious, or ethnic divides, are likely to be the subjects of discrimination in many walks of civic life (not to mention outright police repression, even in relatively tolerant democratic societies), the risk of official misconduct is great. In American constitutional terms, this is where we would hope to see the most exacting judicial solicitude. There is an extraordinary risk of defining politics as closing out the political expression of grievances of the minority. Here, as with the case of insurrectionary parties, we can again turn to the clear and present danger test as an appropriately high screen on governmental efforts to deny political voice to embattled minorities.

The case of Latvia after its achievement of national independence from the Soviet Union presents an extreme example. As part of its newly gained freedom, Latvia decreed that Latvian would be the official language of the polity and that all candidates for national office would have to demonstrate Latvian language proficiency for the ostensible purpose of being able to conduct the business of the country effectively.¹³⁴ The effect was to curtail the ability of the Russian language minority (which constituted forty percent of the population) to participate in government — a particularly problematic issue since the Russian population came to Latvia largely with the Soviet occupation but now was mainly comprised of persons who knew no other homeland. In reviewing the exclusion of a candidate for failing to prove Latvian proficiency, the European Court of Human Rights (ECHR) allowed that requiring “sufficient knowledge of the official language pursues a legitimate aim,”¹³⁵ but nevertheless struck down the application of the language requirement as lacking basic procedural fairness.¹³⁶

Israeli Supreme Court (Aug. 22, 2004) (unpublished manuscript, on file with the Harvard Law School Library).

¹³² For an examination of the relationship between international law norms and claims of self-determination, see Macklem, *supra* note 21, at 504–10 (describing the debate in European law over the scope of claims to self-determination as a core democratic right).

¹³³ See Ayres, *supra* note 91.

¹³⁴ The background legal rules are described in *Podkolzina v. Latvia*, 2002-II Eur. Ct. H.R. 443, 452–56.

¹³⁵ *Id.* at 460.

¹³⁶ *Id.* at 460–61.

Turkey provides the most fertile testing ground for the range of permissible prohibitions on political parties, particularly as it applies to separatist claims. The Turkish Constitution is an extraordinary document, reflecting its origins in the muscular efforts of Kemal Atatürk to compel a rapid Westernization after the collapse of the Ottoman Empire. As a guiding principle, the Turkish Constitution's preamble enshrines the principles of Atatürk, "the immortal leader and the unrivalled hero" of the Republic of Turkey,¹³⁷ and provides an explicit textual commitment to the territorial integrity of the country: "[N]o activity can be protected contrary to Turkish national interests . . . [or] the principle of the indivisibility of the existence of Turkey with its state and territory"¹³⁸

The Turkish Constitution goes on to expressly forbid challenges to "the independence of the State, its indivisible integrity with its territory and nation."¹³⁹ Beyond merely asserting such requirements, though, the constitution requires the Constitutional Court to dissolve permanently any political party that threatens the state in any of the ways enumerated.¹⁴⁰ Guidance is provided by Law No. 2820 on the regulation of political parties, which forbids parties from aiming to "jeopardise the existence of the Turkish State and Republic, abolish fundamental rights and freedoms, introduce discrimination on grounds of . . . religion or membership of a religious sect, or establish . . . a system of government based on any such notion or concept."¹⁴¹ That law was used to uphold a ban on the Turkish Communist Party on the ground that its program "covering support for non-Turkish languages and cultures [was] intended to create minorities, to the detriment of the unity of the Turkish nation,"¹⁴² a prohibition subsequently overturned by the ECHR.¹⁴³

Similar application of the territorial integrity principle led to direct prohibitions on various Kurdish parties. These are difficult cases because the suppression of Kurdish political advocacy comes very close to the outright repression of a disfavored national minority. In 1992, the government accused the Kurdish Halkın Emek Partisi (People's Labor Party or HEP) of promoting Kurdish separatism "with the aim of destroying the 'inseparable unity'" of the Turkish state.¹⁴⁴ In deciding to dissolve the party, the Turkish Constitutional Court¹⁴⁵ attempted to draw a distinction between everyday life, where following a distinct cultural tradition is legitimate, and politics, where invoking that same tradition becomes an illegitimate political claim that threatens state unity and public order.¹⁴⁶ The court found that the use of the Kurdish language in the realm of politics was, like other activities

¹³⁷ TURK. CONST. pmb., *translated in 18 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: TURKEY 1* (Gisbert H. Flanz ed., Ömer Faruk Genckaya trans., 2003) [hereinafter *CONSTITUTIONS OF THE WORLD: TURKEY*].

¹³⁸ *Id.*, *translated in 18 CONSTITUTIONS OF THE WORLD: TURKEY*, *supra* note 136, at 1.

¹³⁹ *Id.* art. 68, *translated in 18 CONSTITUTIONS OF THE WORLD: TURKEY*, *supra* note 136, at 22.

¹⁴⁰ *Id.* art. 69, *translated in 18 CONSTITUTIONS OF THE WORLD: TURKEY*, *supra* note 136, at 22–23.

¹⁴¹ Law No. 2820 has not been translated from Turkish. The relevant provision, § 78, is translated in *Refah Partisi (Welfare Party) v. Turkey*, 35 Eur. H.R. Rep. 56, 74 (2002).

¹⁴² *United Communist Party of Turkey v. Turkey*, 1998-I Eur. Ct. H.R. 1, 10.

¹⁴³ *Id.* at 39.

¹⁴⁴ Kogacioglu, *supra* note 106, at 263.

¹⁴⁵ The decision of the Constitutional Court has not been translated from Turkish. It is thoughtfully discussed by Dicle Kogacioglu. *See id.*

¹⁴⁶ *See id.* at 265.

of HEP, an indication of a forbidden commitment to “separatism” that threatened to compromise the unity of the state.¹⁴⁷

The Turkish court’s rulings in the HEP case were later overturned by the ECHR, which held that dissolving HEP was a violation of the right of free association and fined the Turkish government.¹⁴⁸ However, this was hardly the last word on the issue. The Turkish court again upheld the suppression of Kurdish parties on the grounds that their endorsement of Kurdish national claims and championing of Kurdish grievances violated the territorial integrity of the Turkish state or represented a rejection of democracy as such, decisions that the ECHR overruled in 1999 and 2002.¹⁴⁹

The 2002 case of *Yazar v. Turkey*,¹⁵⁰ again involving HEP, is particularly instructive. The Turkish Constitutional Court had upheld the banning of HEP on the ground that the party’s platform undermined the integrity of the State by “seeking to divide the Turkish nation in two, with Turks on one side and Kurds on the other, with the aim of establishing separate States.”¹⁵¹ A critical underpinning of this finding was HEP’s refusal to denounce the aims of the Partiya Karkerên Kurdistan (PKK), an insurrectionary Kurdish force with a history of terrorist attacks on Turkish targets.¹⁵² According to the Turkish court, HEP referred to the PKK as “freedom fighters” and described the guerrilla fighting as an “international” conflict between distinct national forces. The ECHR overturned the prohibition under Article 11 of the European Convention, which guarantees basic rights of association and assembly, including the right to form political parties.¹⁵³ Article 11 denies states the ability to restrict the right of association except to the extent that such measures “are necessary in a democratic society in the interests of national security or public safety . . . or for the protection of the rights and freedoms of others.”¹⁵⁴ In rejecting Turkey’s claim that HEP’s propaganda lent tacit support to the PKK, the court appeared particularly solicitous of the right of advocacy on behalf of national minorities so long as there was no direct advocacy of the use of force or violence and so long as the political party remained faithful to democratic principles.¹⁵⁵ “In the absence of any calls for the use of violence or any other illegal methods,” the court, in its rendition of the clear and present danger test, decreed:

[I]f merely by advocating those principles [of national self-determination] a political group were held to be supporting acts of terrorism, that would reduce the possibility of dealing with related issues in the context of a democratic debate and would allow armed movements to monopolise support for the principles in question. . . .

¹⁴⁷ *Id.*

¹⁴⁸ *See id.* at 271.

¹⁴⁹ *See Yazar v. Turkey*, 2002-II Eur. Ct. H.R. 395; *Freedom and Democracy Party (ÖZDEP) v. Turkey*, 1999-VIII Eur. Ct. H.R. 293.

¹⁵⁰ 2002-II Eur. Ct. H.R. 395.

¹⁵¹ *Yazar*, 2002-II Eur. Ct. H.R. at 402 (quoting Turkish Constitutional Court) (internal quotation marks omitted).

¹⁵² *Id.*

¹⁵³ The application of Article 11 to political parties originated in *United Communist Party of Turkey v. Turkey*, 1998-I Eur. Ct. H.R. 1.

¹⁵⁴ European Convention for the Protection of Human Rights and Fundamental Freedoms art. 11, ¶ 2, Nov. 4, 1950, 213 U.N.T.S. 221, reprinted in FRANCIS G. JACOBS & ROBIN C.A. WHITE, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 422, 426 (2d ed. 1996).

¹⁵⁵ *Yazar*, 2002-II Eur. Ct. H.R. at 413–14; *see also id.* at 413 (“[T]he HEP did not express any explicit support for or approval of the use of violence for political ends. Furthermore, incitement to ethnic hatred and incitement to insurrection are criminal offences in Turkey. At the material time, however, none of the HEP’s leaders had been convicted of any such offence.”).

Moreover, the Court considers that, even if proposals inspired by such principles are likely to clash with the main strands of government policy or the convictions of the majority of the public, it is necessary for the proper functioning of democracy that political groups should be able to introduce them into public debate in order to help find solutions to general problems concerning politicians of all persuasions¹⁵⁶

The result is that under emerging European law, separatist parties, like insurrectionary parties, are given a broad swath of protection so long as they are not engaged in actual incitement or violent acts against the democratic regime. In the case of separatist parties, the overlay with the claims of an embattled minority should enhance the level of judicial solicitude for these parties and restrict the ambit of permissible state suppression.

3. Antidemocratic Majoritarian Parties. — Ultimately the greatest challenge for a democracy, at least conceptually, comes from the threat of being assaulted not from without but from within. Neither the insurrectionary parties nor the separatist parties have any realistic hope of seizing power from within the national electorate. Thus, for example, the Kurdish parties in Turkey have never seriously intended to command a national majority to unwind either liberal democracy or the territorial integrity of Turkey. It may be necessary to suppress such parties if they resort to unlawful means. But in such cases their prohibition must stand or fall in relation to their commitment to peaceable as opposed to paramilitary forms of struggle for national separation. The same cannot be said of parties that seek to use majoritarian democratic processes to dismantle liberal democracy, as in the case of Islamic parties seeking majority status for purposes of imposing clerical law.

Turkey provides the most dramatic and difficult confrontation with this issue. Returning to the basic principles of Turkish constitutionalism takes us to the prohibition on all expression of religion in the civic arena, a prohibition that the Turkish Constitution's preamble identifies as one of the core principles inherited from Atatürk.¹⁵⁷ The preamble provides an explicit textual commitment to a secular political culture, even at the price of freedom of expression, and it explicitly withdraws protection from contrary opinions:

[N]o activity can be protected contrary to . . . [the] reforms and modernization of Atatürk and . . . , as required by the principle of [secularism], sacred religious feelings can in no way be permitted to interfere with state affairs and politics.¹⁵⁸

Based on the Kemalian vision of Turkey as a "democratic, [secular] . . . state,"¹⁵⁹ the constitution prohibits political parties from interfering with "the principles of the democratic and [secular]

¹⁵⁶ *Id.* at 413–14.

¹⁵⁷ TURK. CONST. pmb., *translated in* 18 CONSTITUTIONS OF THE WORLD: TURKEY, *supra* note 136, at 1 ("[S]acred religious feelings can in no way be permitted to interfere with state affairs and politics.").

¹⁵⁸ *Id.*, *translated in* 18 CONSTITUTIONS OF THE WORLD: TURKEY, *supra* note 136, at 1. There are similar and more specific provisions in the body of the constitution. *See, e.g., id.* art. 14, *translated in* 18 CONSTITUTIONS OF THE WORLD: TURKEY, *supra* note 136, at 4 ("None of the rights and freedoms embodied in the Constitution can be exercised for activities undertaken with the aim of . . . endangering the existence of the democratic and [secular] Republic . . .").

¹⁵⁹ *Id.* art. 2, *translated in* 18 CONSTITUTIONS OF THE WORLD: TURKEY, *supra* note 136, at 2.

republic”; it also mandates that they “can not aim to support or to establish a dictatorship of class or group or dictatorship of any kind, and nor [can] they encourage the commitment of offence.”¹⁶⁰

The history of enforced secularism under the Turkish Constitution is complicated, to say the least. When the state has been threatened by the rise of charismatic Islamic politicians or mass-based Islamic parties, the court and the military have emerged as the two institutions most inclined to prevent any kind of Islamic political mobilization. This history includes military interventions both overt and covert, jailing of opposition leaders, and a host of measures beyond the scope of the democratically tolerable.¹⁶¹ But, particularly since Turkey sought integration into the European Union, the Turkish state’s resistance to Islamic parties has recently taken largely legal forms.

The leading case in Turkey concerns the Refah Partisi (Welfare Party), a mass-based Islamic organization that not only became the largest single party in the Turkish parliament, but also in 1996 formed a coalition government in which it was the dominant player.¹⁶² Despite Refah’s popular support, and in expectation of Refah’s commanding an outright majority of Parliament in the next election, the party was charged with “activities contrary to the principle of secularism.”¹⁶³ The Turkish Constitutional Court ordered the dissolution of the party, the surrender of its assets to the state, and the removal of four Refah members from Parliament, and banned its leaders from elective office for five years.¹⁶⁴

By the time the Welfare Party issue reached the ECHR, however, Islamic political claims had come to dominate Turkish politics. The current history begins in 1970, when Professor Necmettin Erbakan founded the Milli Nizam Partisi (National Order Party or NOP), the first in a sequence of political parties promoting to greater and lesser extents the imposition of Islamic law in Turkey — primarily in the lives of Muslims in the country, but extending to all facets of public life. At the core of the NOP’s platform was a plan for what it termed domestic spiritual overhaul, which included permitting public exercise of religion and closing secular entertainment venues.¹⁶⁵ The Constitutional Court found this set of positions to promote “Revolutionary Religion,” in violation of the constitution, and dissolved the party.¹⁶⁶ A successor party, the Milli Selamet Partisi (National Salvation Party), also founded by Professor Erbakan,¹⁶⁷ met a similar fate, only this time at the hands of a military regime that took power in 1980, dissolved all political parties, and ordered the Islamic political leaders to stand trial.¹⁶⁸

¹⁶⁰ *Id.* art. 68, translated in 18 CONSTITUTIONS OF THE WORLD: TURKEY, *supra* note 136, at 22.

¹⁶¹ For a good overview from the perspective of defending the democratic rights of Islamic parties, see NOAH FELDMAN, AFTER JIHAD: AMERICA AND THE STRUGGLE FOR ISLAMIC DEMOCRACY 105–11 (2003).

¹⁶² See Refah Partisi (Welfare Party) v. Turkey, 2003-II Eur. Ct. H.R. 267, 269.

¹⁶³ *Id.* at 275–76.

¹⁶⁴ The facts are laid out more fully in the earlier opinion of a panel of the ECHR. See Refah Partisi (Welfare Party) v. Turkey, 35 Eur. H.R. Rep. 56, 63–73 (2002).

¹⁶⁵ See Susanna Dokupil, *The Separation of Mosque and State: Islam and Democracy in Modern Turkey*, 105 W. VA. L. REV. 53, 83 (2002).

¹⁶⁶ *Id.* at 84.

¹⁶⁷ See *id.*

¹⁶⁸ See Talip Kucukcan, *State, Islam, and Religious Liberty in Modern Turkey: Reconfiguration of Religion in the Public Sphere*, 2003 BYU L. REV. 475, 492.

Upon the reinstatement of civilian rule, the same minuet resumed. Professor Erbakan founded the Welfare Party, a party little changed from its earlier incarnations. The Welfare Party emerged as the strongest force in Parliament and formed a government with two smaller, more centrist parties. When the time came for the Welfare Party to assume control of the government under its coalition agreement, its coalition partners recoiled and the Constitutional Court dissolved the party, holding that it was a “‘centre’ . . . of activities contrary to the principles of secularism.”¹⁶⁹ Although the Turkish Constitutional Court found some evidence of a threat to public order posed by the Welfare Party’s invocation of jihad in its public messages,¹⁷⁰ the exclusive issue presented on appeal to the ECHR was whether the substantive views of the Welfare Party were compatible with liberal democracy. The first real controversial position taken by the Welfare Party was the proposal to have each religious community in Turkey governed according to the religious laws of its faith, a throwback to the Ottoman practice of allowing broad autonomy over civic life to each of the peoples subsumed in the empire. More controversial yet was the party’s professed commitment to sharia as the source of all basic law, thereby presenting the ECHR straightforwardly with the questions whether a party could be banned because of its commitment to sharia and whether a state’s commitment to secularism could serve as the justification for that prohibition. Although the question whether the charges were true or pretextual remains a disputed issue in Turkey, the concern here is with the ECHR’s treatment of an asserted national interest in suppressing excessive Islamist politics.

The ECHR began with a surprisingly ringing endorsement of secularism as “one of the fundamental principles of the [Turkish] State which are in harmony with the rule of law and respect for human rights and democracy.”¹⁷¹ By contrast, “a plurality of legal systems, as proposed by Refah, cannot be considered to be compatible with the [European] Convention system.”¹⁷² Even more categorical was the court’s blanket conclusion that “sharia is incompatible with the fundamental principles of democracy, as set forth in the Convention.”¹⁷³ This led to the ECHR’s critical reaffirmation of the power inherent in democratic states to take preemptive action against threats to pluralistic democratic rule:

[A] State cannot be required to wait, before intervening, until a political party has seized power and begun to take concrete steps to implement a policy incompatible with the standards of the Convention and democracy, even though the danger of that policy for democracy is sufficiently established and imminent. . . . [W]here the presence of such a danger has been established by the national courts, after detailed scrutiny subjected to rigorous European supervision, a State may

¹⁶⁹ Lance S. Lehnhof, Note, *Freedom of Religious Association: The Right of Religious Organizations To Obtain Legal Entity Status Under the European Convention*, 2002 BYU L. REV. 561, 578 (quoting *Refah Partisi (Welfare Party) v. Turkey*, 2003-II Eur. Ct. H.R. 267, 276) (internal quotation marks omitted).

¹⁷⁰ See *Refah Partisi (Welfare Party) v. Turkey*, 35 Eur. H.R. Rep. 56, 68 (2002) (quoting the following portion of a speech by Erbakan relied upon by the Turkish Court as evidence of the Welfare Party’s anti-secular activities: “Refah will come to power and a just [social] order will be established. The question we must ask ourselves is whether this change will be violent or peaceful; whether it will entail bloodshed.” (alteration in original)).

¹⁷¹ *Refah Partisi*, 2003-II Eur. Ct. H.R. at 302.

¹⁷² *Id.* at 310.

¹⁷³ *Id.* at 312.

“reasonably forestall the execution of such a policy . . . before an attempt is made to implement it through concrete steps that might prejudice civil peace and the country’s democratic regime”¹⁷⁴

At no point did the ECHR demand proof of the imminence of democracy’s demise. The court noted that “Refah had the real potential to seize political power”; however, that was evidence not of the immediacy of the threat posed by its principles, but simply of the fact that the threat could have been realized.¹⁷⁵ There was no suggestion that Refah’s program was sufficiently “clear and present” as to constitute a direct threat of the sort posed by an insurrectionary party. But more to the point, what was undertaken in Turkey was not a criminal prosecution of Refah members or leaders, but a disqualification from organizing an electorally based political party to pursue what the courts perceived to be intolerant aims.

On first impression, the opinion jars many democratic sensibilities, particularly those formed in the free speech environment of the United States. The condemnation of all sharia likely was far too sweeping and almost certainly applied a different standard to Islamic religious belief than would have been applied to any Christian faith. Further, the use of a deferential “reasonableness” standard for the political exclusion of a party with broad popular support gives a great deal of latitude to national determinations that are necessarily problematic. Nonetheless, the effect of the court’s ruling seemed the best that anyone could have hoped for. Under the pressure of prohibitions for its proclaimed aim of imposing clerical rule, the Welfare Party fractured.

Unlike the earlier prohibitions, which simply declared the various incarnations of Professor Erbakan’s movement illegal through either court action or military intervention, the Turkish Constitutional Court decision upheld by the ECHR targeted certain electoral objectives more surgically. The decision left in place a sizeable block of the former Refah Party in Parliament, still with tremendous authority over national politics. Under these circumstances, as with the BJP in India, the prospect of reintegration into Turkish politics remained present subject to a tempering of the perceived threats to continued democratic order.

The result was that a moderate wing led by former Istanbul mayor Recep Tayyip Erdogan, himself a former protégé of Professor Erbakan, broke off to form the Justice and Development Party, a far more moderate Islamic party. In 2002, Erdogan became Prime Minister when Justice and Development emerged as the largest bloc in Parliament. Under his tutelage, Turkey has pursued its efforts at EU integration and remains a bastion of moderation in the Middle East.¹⁷⁶ Far from creating an insuperable barrier to an Islamic voice in Turkish politics, the dissolution of the Welfare Party appears to have sparked a realignment in which committed democratic voices from the self-proclaimed Islamic communities found a means of integration into mainstream Turkish political life. The political aspirations of Islamic parties as electoral forces present, as Professor Nancy Rosenblum argues, an op-

¹⁷⁴ *Id.* at 305 (quoting *Refah Partisi*, 35 Eur. H.R. Rep. at 91).

¹⁷⁵ *Id.* at 307.

¹⁷⁶ See Thomas Patrick Carroll, *Turkey’s Justice and Development Party: A Model for Democratic Islam?*, 6 MIDDLE E. INTELLIGENCE BULL. No. 6–7 (2004), http://www.meib.org/articles/0407_t1.htm.

portunity for democratic integration as “political entrepreneurs come to judge that their ambitions are better served by effectively signaling moderation than by maintaining oppositional poses to preserve ‘base’ support; and perhaps above all by the iteration of elections and political learning.”¹⁷⁷ Undoubtedly, this is not the last word in the struggle between a constitutional commitment to secularism and significant popular support for Islamic politics. But under the circumstances, it is difficult to imagine a better outcome.

C. Party Exclusion from the Electoral Arena

In many countries, the electoral arena appears entitled to greater constitutional protection than parties themselves. For example, the Federal Constitutional Court in Germany in the *Radical Groups Case*¹⁷⁸ struck down a denial of television and radio advertisement time to left-wing parties on the ground that, so long as the political advertisements related to the election, “[r]adio and television stations have no right to refuse broadcasting [time to a party] merely because its election ad contains anticonstitutional ideas.”¹⁷⁹ The controlling idea — one that is familiar to American law — is that democracies require open and robust political debate and that nowhere is the right of expression more important than in matters having to do with self-governance.¹⁸⁰ This principle follows from the basic approach of regulating the legal status of political parties while granting a broad swath of protection from state interference to those entities that are legally entitled to form a political party.

As the Indian example demonstrates, however, it is possible to treat conduct in the electoral arena separately from the question of the legal status of a political party. Indeed, in pursuing less restrictive ways of protecting the democratic process, it is possible to envision a code of electoral administration that not only is more supple than the criminal standards at issue in *Dennis*, but also might establish standards for electoral participation as opposed to party formation.

An interesting variation on this approach comes from Israel. The precipitating event was the effort to bar the Kach movement, whose founder, Rabbi Meir Kahane, had previously been the leader of the Jewish Defense League in the United States. There is little doubt that Kach promoted racial hostility and ventured sufficiently far to the extreme to be labeled a “quasi-fascist movement.”¹⁸¹ Kahane advocated a policy of “*Terror Neged Terror*” (Terror Against Terror) according to which Jew-

¹⁷⁷ Nancy Rosenblum, *Banning Parties*, 1 LAW & ETHICS HUM. RTS. 17, 74 (2007).

¹⁷⁸ BVerfG Feb. 14, 1978, 47 BVerfGE 198, translated in part in KOMMERS, *supra* note 103, at 224.

¹⁷⁹ *Id.*, translated in part in KOMMERS, *supra* note 103, at 224, 226 (second alteration in original).

¹⁸⁰ An interesting twist on this argument is provided by then-Professor Bork, who argues against applying the First Amendment to speech that does not touch on fundamental questions of political self-governance. See Bork, *supra* note 39, at 20.

¹⁸¹ Ehud Sprinzak, *Kach and Meir Kahane: The Emergence of Jewish Quasi-Fascism I: Origins and Development*, PATTERNS OF PREJUDICE, July 1985, at 15, 16, available at http://www.geocities.com/alabasters_archive/kach_and_kahane.html; see also EHUD SPRINZAK, THE ASCENDANCE OF ISRAEL’S RADICAL RIGHT 80–87 (1991).

ish vigilante groups would be able to count on the active support of the Israeli government.¹⁸² While Kach purportedly directed itself only to political organization, there seemed little dispute that Kahane's followers engaged in occasional anti-Arab attacks.¹⁸³ Further, Kach not only praised specific acts of anti-Arab violence committed by non-Kach Israelis, but also made the perpetrators of violence honorary members of Kach and provided funding for their legal defenses.¹⁸⁴

The first effort to ban the Kach party came on the unilateral initiative of the Central Elections Committee (CEC), an administrative body charged with the conduct of elections in Israel, including verification of the eligibility of political party slates for inclusion on the ballot. The CEC disqualified the Kach party — along with a minor Arab party, the Progressive List for Peace — on the grounds that its platform was antidemocratic and advocated racism. In *Neiman v. Chairman of the Central Elections Committee for the Eleventh Knesset*,¹⁸⁵ the Israeli Supreme Court struck down these independent actions of the CEC on the ground that the CEC's statutory mandate was limited to mechanically checking the petition signatures and other technical qualifications of parties and did not include any political assessment of a party's platform. The court rejected the view of Justice Aharon Barak, expressed in a separate concurrence, that the CEC could ban a political party of its own accord so long as there was appropriate judicial review after the fact.¹⁸⁶ Nonetheless, the court agreed that a party that rejected either the existence of the Israeli state or its democratic character could be banned, although the court then split on whether the threat posed by the party had to be a substantial probability, per the lead opinion of President Shamgar of the court,¹⁸⁷ or whether it only had to be a reasonable possibility, as Justice Barak would have had it.¹⁸⁸

In the aftermath of *Neiman*, Israel amended both its Basic Law governing eligibility for the Knesset and its statutory requirements for the registration of political parties. The immediate aim of the reforms was to provide a sound legal basis for banning parties, which then resulted in the banning of the Kach party in 1988 and 1992 and the banning of its related entity, Kahane Is Alive, in 1992.¹⁸⁹ What is particularly intriguing is not so much the application of the new laws to the Kach militants as the apparent efforts of the reformers to create a gap between the conditions for running for Parliament and the conditions for creating a political party. Under amended section 7a of the Basic Law on the Knesset, no party list may stand for office if it meets one of three conditions in its "objectives

182 Ehud Sprinzak, *Kach and Meir Kahane: The Emergence of Jewish Quasi-Fascism II: Ideology and Politics*, PATTERNS OF PREJUDICE, July 1985, at 3, 8, available at http://www.geocities.com/alabasters_archive/kach_and_kahane.html.

183 See Sprinzak, *supra* note 181, at 18–19.

184 See Ehud Sprinzak, *Extremism and Violence in Israel: The Crisis of Messianic Politics*, 555 ANNALS AM. ACAD. POL. & SOC. SCI. 114, 121 (1998).

185 EA 2/84, 3/84 [1985] IsrSC 39(2) 225.

186 See *id.* at 304–05 (Barak, J., concurring).

187 See *id.* at 275 (opinion of Shamgar, C.J.).

188 See *id.* at 315–16 (Barak, J., concurring). The debate on the standard of proof both invoked and was reminiscent of Learned Hand's formulation of the clear and present danger test in the Second Circuit opinion in *Dennis*: "In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." *United States v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950).

189 See Raphael Cohen-Almagor, *Disqualification of Political Parties in Israel: 1988–1996*, 11 EMORY INT'L L. REV. 67, 67 (1997).

or acts.”¹⁹⁰ As most recently amended in 2002, these three conditions are: first, “negation of the existence of the State of Israel as a Jewish and democratic state”; second, “incitement to racism”; and third, “support for armed struggle — by an enemy state or by a terrorist organization — against the State of Israel.”¹⁹¹ The language of the party registration law is quite similar but adds an additional necessary condition: whether “any of its purposes or deeds, implicitly or explicitly, contains . . . reasonable ground to deduce that the party will serve as a cover for illegal actions.”¹⁹² At least in theory, a ban on running for the Knesset is less draconian than outlawing an entire party. Therefore, the focus on the implicit or explicit direct tie to unlawful conduct in the party prohibition laws can be seen as inviting courts to apply a more stringent standard before a party is outlawed altogether, and a less rigorous standard when a party is simply being disqualified from having its members elected to the Knesset.

Both commentators and the Israeli Supreme Court treat these mild differences in formulation — specifically, the introduction of the reasonable basis for tying a party to illegal activity in the Parties Law — as creating a political space in which it is possible to organize a party around ideas, even if reprehensible ones, while at the same time denying such a party the right of representation in the Knesset. Although there has not yet been any case challenging the distinction between political organization and parliamentary candidacy, President Barak’s opinion for the court in *Yassin & Rochley v. Registrar of the Political Parties & Yemin Israel*¹⁹³ provided the rationale for treating the two forms of political activity differently. As summarized by Professor Cohen-Almli in his judgment, President Barak explained that the basis of . . . the Parties Law is the idea of balancing. We need to strike a balance between two conflicting trends. On the one hand, we need to enable every individual to form with other individuals an association through which they may further political and social ends. On the other hand, we should safeguard the character of Israel as a Jewish democratic state that shrinks from racism. President Barak emphasized that the right to elect and to be elected was fundamental, and went on to stress that democracy is entitled to defend itself against those who aim at undermining its existence. This is the essence of the right to democratic self-defence.¹⁹⁴

The prospect of parties that are allowed to exist and recruit members, but are excluded from the electoral arena and by extension from political office, leads directly to the question whether democracies may regulate the political arena on a basis distinct from that underlying the regulation of speech, association, and assembly generally. Should we be less concerned about restricting expression — under the American First Amendment, for example — when a government imposes a civil penalty against a speaker by denying him access to elective office than when a government imposes a criminal penalty against that speaker? Do we think differently of a society that, while not

¹⁹⁰ Basic Law: The Knesset § 7A, *translated in ISRAEL’S WRITTEN CONSTITUTION* (5th ed. 2006).

¹⁹¹ *Id.* I am grateful to Professor Barak Medina for walking me through the amendments to the Israeli laws and for the translation of the 2002 provisions.

¹⁹² Cohen-Almagor, *supra* note 189, at 92 (translating Parties Law, 1992, S.H. 190).

¹⁹³ PCA 7504/95, 7793/95 [1996] IsrSC 50(2) 45.

¹⁹⁴ Cohen-Almagor, *supra* note 189, at 96 (footnotes omitted). There are no English translations of *Yassin & Rochley* available.

incarcerating antidemocratic forces, nonetheless denies them access to the electoral arena as a platform for antidemocratic agitation?¹⁹⁵

Without a clear template in any country's actual experience, we are left to hypothesize about what it would mean to allow a party to exist but to nonetheless restrict its electoral participation. This is likely not to be a stable arrangement. But the experience of the Turkish Welfare Party and the Indian BJP suggests that even strongly religious or nationalistic parties are coalitions and that their more moderate members (or more electorally ambitious leaders) may temper their ideals to the requirements of democratic life.¹⁹⁶

It is, of course, unlikely that a prohibition on electoral participation can forestall mass antidemocratic fervor in the long run. As the Algerian example demonstrates, by the time electoral politics are commandeered by parties with an express commitment to abolishing civil liberties and cancelling elections, little hope remains.¹⁹⁷ A democracy without a corresponding democratic commitment in the broader society will not survive. At the same time, Algeria offers the caution that in the absence of democratic integrity within the ruling government, any repression of even avowedly antidemocratic elements will resonate as simply another corrupt effort to preserve a failed ruling elite.¹⁹⁸ But such failures of cancerous regimes provide no evidence that a relatively healthy democratic society cannot test the antidemocratic mettle of its parties by frustrating the electoral ambitions of some, perhaps in the process emboldening more moderate elements and forestalling the use of the electoral arena for the worst antidemocratic ends.

III. THE SAFEGUARDS OF DEMOCRACY

Extremist groups threaten democracy in terms of both what they might try to do through elections and governmental office and what they might provoke democratic societies to do in order to ward off the perceived danger. The threat is real, from both directions. That there are antidemo-

¹⁹⁵ For the importance of the distinction between prosecuting parties criminally and banning them from the electoral arena, see Comella, *supra* note 20, at 138–39, in which the author argues that, because the incarceration of individual party members is not at stake, the standards for prohibiting parties administratively may be more relaxed than those used in criminal trials.

¹⁹⁶ See Michael S. Kang, *The Hydraulics and Politics of Party Regulation*, 91 IOWA L. REV. 131 (2005) (exploring how different forms of legal regulation empower distinct constituencies in political parties).

¹⁹⁷ In June 1990, the newly formed Front Islamique du Salut (FIS) won a majority of the votes cast in local elections in Algeria. The FIS was an Islamist party that garnered tremendous popular support as an alternative to the corrupt and weak post-independence rulers, the Front de Libération Nationale (FLN). But the relationship of the FIS to democracy was uneasy at best: its second-in-command, Ali Belhadj, was well known for his fiery rhetoric and openly denounced multiparty democracy as a threat to *sharia*. The party went on to win 188 seats out of 430 in the first round of national elections. Although the constitution called for a second round of voting, the leaders of the Algerian military effected a coup d'état and cancelled the planned elections. The leaders of the FIS were jailed and the party was formally dissolved. While some of the more moderate FIS leaders tried to accommodate the government, the bulk of the party split off and began armed resistance, igniting a civil war in which over 100,000 people have been killed. See generally MICHAEL WILLIS, *THE ISLAMIST CHALLENGE IN ALGERIA* 107–392 (1996); Lise Garon, *The Press and Democratic Transition in Arab Societies: The Algerian Case*, in *I POLITICAL LIBERALIZATION AND DEMOCRATIZATION IN THE ARAB WORLD* 149 (Rex Brynen et al. eds., 1995).

¹⁹⁸ For a related claim that expansive constitutional review performs a similar function by allowing political and economic elites to hold illiberal majorities at bay, see RAN HIRSCHL, *TOWARDS JURISTOCRACY* 214 (2004).

cratic groups trying to worm their way into governmental positions so as to undermine tolerant, pluralistic democratic societies is not a new development. What is perhaps new is the increasing likelihood that these groups will be clerically inspired rather than driven by the messianic social visions of communism or fascism. But there is the corresponding threat that, as a result, the ambit of democratic deliberation will be drawn too narrowly and the threat to social peace will increasingly be used to drive out the uncomfortable voices of dissent.

In most circumstances, efforts to silence parties by prohibition are probably ill-advised. As nettlesome as the Quebec independence movement has been for Canada, the national government's ability to channel disputes over Quebec's status through the political process and even the Supreme Court is far preferable to any attempt to drive the party underground.¹⁹⁹ But Canada is not the world, and the relative civility and tolerance of debate there is unfortunately not the norm. So the question becomes what preconditions must exist for the banning of parties or for other restrictions on political expression in the electoral arena. Here I wish to leave to the side the parties alleged to be allied with insurrectionary or regional military forces. With respect to such parties, the directness of the organizational link to unlawful activity and the immediacy of the likely harm serve as workable responses to the problems posed, at least in theory. Thus, the starting point for any discussion of the banning of political parties, political participation, or political speech should be, as set forth in the *Guidelines on the Prohibition and Dissolution of Political Parties and Analogous Measures* issued by the European Commission for Democracy Through Law, that the presumption is in favor of freedom of political expression and association:

The prohibition or dissolution of a political party is an exceptional measure in a democratic society. If relevant state bodies take a decision to seize the judicial body on the question of prohibition of a political party they should have sufficient evidence that there is a real threat to the constitutional order or citizens' fundamental rights and freedoms.²⁰⁰

The more difficult concern is with parties that genuinely vie for governmental office and even majority status in an effort to unwind liberal democracy. It is easy to imagine what may go wrong with party prohibitions. The ability to cordon off certain areas of democratic deliberation from particular kinds of speech invites censorship or suppression of political opposition, a move that can be utilized to insulate incumbents from electoral challenge or as a pretext to impose the ruling majority's own form of orthodoxy on political exchange. But if history is a guide, excessive tolerance is dangerous as well. We can begin to test the range of permissible state responses to antidemocratic mass movements through the familiar categories of procedural limitations on and substantive definitions of prohibited conduct.

I wish to put to the side two technical objections to this exercise. The first is that democratic suppression will not work: that ultimately it will induce greater antidemocratic mobilization than the

¹⁹⁹ See Reference re Secession of Quebec, [1998] 2 S.C.R. 217.

²⁰⁰ European Comm'n for Democracy Through Law (Venice Comm'n), *Guidelines on Prohibition and Dissolution of Political Parties and Analogous Measures*, art. III, § V, 14 (Jan. 10, 2000) [hereinafter *Democracy Through Law Guidelines*], available at [http://www.venice.coe.int/docs/2000/CDL-INF\(2000\)001-e.asp](http://www.venice.coe.int/docs/2000/CDL-INF(2000)001-e.asp).

free ventilation of all viewpoints. I view this as an empirical claim about what actually works. In the stable framework of the United States, it may well be that reactions to suppress political participation have been overwrought and largely unnecessary. I am far less confident that — as an empirical matter — this is universally true. The decision of India, a country forged in fratricidal religious conflict, seeking to suppress election day incitements likely to engender communal violence is not a move so readily discounted. Turkey’s suppression of Islamic extremism, which led its Islamic opposition to mature and develop an appetite for competent governance, is also not so easily cast as unwise or ineffectual.²⁰¹ Even the most extreme cases, such as the Algerian military intervention to prevent a parliament from forming around a platform of eliminating democracy, are not so readily dismissed as simply counterproductive exercises, despite the resulting military confrontation.

The second objection is that electoral prohibitions tend to be either void for vagueness or unacceptably overbroad. These dangers are ever present in the exercise. But if the claim is that all efforts to bar impermissible viewpoints are overbroad or vague, that does not mean that all efforts at suppressing antidemocratic opposition *must*, of necessity, reach beyond acceptable parameters. Thus, such criticism of electoral prohibitions must be grounded in theory, not in an individual attack on a particular law or ruling as having an undemocratic effect.

A. Procedural Protections

Across the range of cases in which democratic regimes have sought to prevent antidemocratic elements from securing the advantages of the electoral arena, three forms of procedural concerns emerge. Although there is no judicial discussion (that I am aware of) setting out these considerations in comprehensive fashion, taken together they highlight some of the primary protections against the potential misuse of viewpoint-based suppression of political activity.

The first and undoubtedly most significant procedural safeguard is the concentration of the power to suppress away from self-interested political actors. In all these cases, the judiciary acts based on the government’s petition or the public prosecutor’s charges,²⁰² but it acts as an independent arbiter of the legitimacy of the government’s professed need to suppress an antidemocratic threat.

Independent judicial review takes on particular significance in parliamentary systems. There is an ever-present risk in democratic systems that the claimed exigencies necessitating the use of

²⁰¹ Although the subject is too broad for this Article, it is important to note that the complex nature of political parties is a factor that interacts with the imposition of legal restraints on certain kinds of activity or expression. Political parties invariably reflect deep internal tensions among their mass bases, their elected officials, and their internal apparatus. This is the basic analysis of political parties developed in the United States, initially in V.O. KEY, JR., *POLITICS, PARTIES, & PRESSURE GROUPS* (5th ed. 1964). See also Nathaniel Persily & Bruce E. Cain, *The Legal Status of Political Parties: A Reassessment of Competing Paradigms*, 100 COLUM. L. REV. 775 (2000). For a broader theoretical account of how parties respond to the incentives created by legal regulation, see Kang, *supra* note 196.

²⁰² “The role of the judiciary is essential in the prohibition or dissolution of political parties. . . . [T]here can be different judicial bodies competent in this field. In some states it lies within the sole competence of Constitutional courts whereas in others it is within the sphere of ordinary courts.” *Democracy Through Law Guidelines*, *supra* note 200, art. III, § VI, 18.

emergency powers, including the power to suppress antagonistic political speech, will become the rule that swallows the exception. Too many putative democracies, particularly in the immediate post-colonial world, have succumbed to one-party rule under the claimed necessity of domestic emergencies for any prescriptive account to ignore this threat. The common feature of fledgling democracies that collapse into strongman regimes is the concentration of unilateral power in the executive, an inherent risk whenever there is a claimed threat to national security.

In the United States, the separation between presidential and legislative election allows the Congress to play a checking role on claims of unilateral presidential authority, even over the nation's response to military threats. Indeed, the role of the courts in American national security cases has largely been to ensure that the executive not act beyond the scope of congressional authorization.²⁰³ Because parliamentary systems vest executive power in representatives of the legislative majority, such separation of powers is not likely to have the same force as in presidential systems. But separation of powers remains a critical protection in preventing the use of extraordinary powers for quotidian political gain.

Requiring that there be an independent source of legislative authority for the prohibition of a political party and that there be a source of review independent of the executive provides a check on the misuse of this dangerous power. Perhaps the clearest example is the use of international tribunals, such as the European Court of Justice, to review party prohibitions. Such crossnational bodies are removed from any immediate accountability to domestic political processes and are unlikely to respond narrowly to partisan or sectional interests. Even at the domestic level, the requirement of independent review of such charged decisions as a ban on a political party may be thought of as a form of "constrained parliamentarianism" that protects democratic integrity by "insulating sensitive functions from political control."²⁰⁴

Germany provides the best example of the role of independent judicial review within a national setting, beginning with the seminal cases after World War II. The German Basic Law accepts both the importance of political parties in a democratic order and the need to ban those that seek to destroy democracy from within, a necessarily perilous line to draw. Under the German constitution, however, an important procedural protection for political parties is that only the Federal Constitutional Court can declare a political party unconstitutional.²⁰⁵ The court addressed this topic in the *Socialist Reich Party Case*, stating that the framers of the German constitution, in deciding to limit the freedom of parties "seeking to abolish democracy by using formal democratic means," had to consider "the danger that the government might be tempted to eliminate troublesome opposition

²⁰³ See, e.g., *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006). For a historical account of the role of the Supreme Court in checking impulses toward executive unilateralism, see Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQUIRIES L. 1 (2004), available at <http://www.bepress.com/til/default/vol5/iss1/art1>.

²⁰⁴ Bruce Ackerman & Susan Rose-Ackerman, Op-Ed., *Britain Needs a New Agency To Fight Corruption*, FIN. TIMES, Feb. 2, 2007, at 13.

²⁰⁵ See GG art. 21(2), translated in KOMMERS, *supra* note 103, at 507, 511 ("The Federal Constitutional Court shall decide on the question of unconstitutionality.").

parties.”²⁰⁶ Therefore, the framers committed the decision on unconstitutionality to the Federal Constitutional Court. The court distinguished Article 9(2), which allows the executive to ban “associations whose purposes or activities . . . are directed against the constitutional order.”²⁰⁷ Precisely “[b]ecause of the special importance of parties in a democratic state,” they could not be banned under the general executive powers of Article 9(2), and could be declared unconstitutional only by the Federal Constitutional Court.²⁰⁸

Later cases confirmed the court’s exclusive jurisdiction to determine the constitutionality of political activity. The reasoning of the German Constitutional Court in the *Radical Groups Case*, which struck down a decision of state radio and television stations denying airtime to radical left-wing parties, is instructive.²⁰⁹ The court held that so long as an advertisement was related to the election, and so long as the party had not been declared illegal by the court, content-based interference with expression was beyond the power of the broadcast media or the government. An organization acquires rights of expression as a political party, and only the court has the authority to rule on the constitutionality of a party: “The jurisdictional monopoly of the Federal Constitutional Court categorically precludes administrative action against the existence of a political party, regardless of how anticonstitutional the party’s program may be.”²¹⁰

A similar form of procedural protection emerged in France after World War II, in the Fifth Republic. By contrast to the concentration of power in the legislature under the Fourth Republic, the post-1958 French constitutional order hewed much more closely to a formal recognition of separation of powers in which judicial oversight emerged as an additional source of power²¹¹ — a surprisingly late development in the land of Montesquieu.²¹² Perhaps the most significant decision of the Conseil Constitutionnel in establishing the principle of independent judicial oversight came in 1971, precisely in the area of the banning of political parties.²¹³ The Conseil declared unconstitutional a law that would have vested in the executive branch the authority to prohibit the formation of a political party, a power it had previously denied to the legislature acting on its own accord.²¹⁴

Russia provides an interesting contrast. In the wake of an unsuccessful military coup in 1991, the Russian president issued a series of decrees banning the Communist Party and confiscating its

²⁰⁶ Socialist Reich Party Case, BVerfG Oct. 23, 1952, 2 BVerfGE 1, translated in part in KOMMERS, *supra* note 103, at 218, 219.

²⁰⁷ GG art. 9(2), translated in KOMMERS, *supra* note 103, at 509.

²⁰⁸ Socialist Reich Party, 2 BVerfGE 1, translated in part in KOMMERS, *supra* note 103, at 218, 220.

²⁰⁹ See Radical Groups Case, BVerfG Feb. 14, 1978, 47 BVerfGE 198, translated in part in KOMMERS, *supra* note 103, at 224.

²¹⁰ *Id.*, translated in part in KOMMERS, *supra* note 103, at 224, 227.

²¹¹ For a discussion of the development of judicial review by the Conseil Constitutionnel, see John Ferejohn & Pasquale Pasquino, *Constitutional Adjudication: Lessons from Europe*, 82 TEX. L. REV. 1671 (2004), which describes the emergence of French judicial review as an “instrument of a ‘moderate,’ or limited government — a mechanism of the liberal tradition, which guards against potentially tyrannical majorities.” *Id.* at 1685 (footnote omitted); see also Burt Neuborne, *Judicial Review and Separation of Powers in France and the United States*, 57 N.Y.U. L. REV. 363, 377–410 (1982).

²¹² On the difficult relationship between Montesquieu’s advocacy of separation of powers, civil codes, and independent judicial review, see Olivier Moréteau, *Codes as Straight-Jackets, Safeguards, and Alibis: The Experience of the French Civil Code*, 20 N.C. J. INT’L L. & COM. REG. 273 (1995).

²¹³ CC decision no. 71-44DC, Jul. 16, 1971, Rec. 29.

²¹⁴ The French cases are discussed at length in Neuborne, *supra* note 211, at 390–93.

property,²¹⁵ which in turn prompted a challenge before the newly formed Russian Constitutional Court.²¹⁶ After a politically charged trial, the court in the *Communist Party Case*²¹⁷ held that the decree banning the party was constitutional, even in the absence of a state of emergency, because it was rooted in a constitutional provision that “prohibits activity by parties, organizations, and movements having the aim or method of action, in particular, of forcible change to the constitutional order and undermining State security.”²¹⁸ The difficulty was that the ban had been imposed through unilateral presidential action and in the absence of any established procedures. Even so, the court found the existence of a right of appeal prior to the execution of the ban to be a sufficient protection of the party’s rights,²¹⁹ and therefore it upheld the ban on the merits.²²⁰

The second procedural protection derives from the form of governmental action to be taken. In none of the cases that have been discussed, with the exception of the American Smith Act cases, did the party face criminal sanctions. The typical sanctions included removing members of proscribed parties from legislative office, compelling the disbanding of parties, and seizing the assets of parties. As discussed earlier, the nature of the available sanctions alone diminishes the proof of immediate threat required by the American clear and present danger test. Even under American constitutional law, the evidentiary requirements for a party to satisfy its burden of proof are directly tied to the interests at stake and the potential severity of the punishment.²²¹

Finally, lurking in discussions of the ability to thwart antidemocratic elements is the sense that democratic governments must employ the least restrictive means to achieve that objective. In the ECHR’s treatment of a Russian-speaking candidate in Latvia and its analysis of the banning of the Refah party in Turkey, for example, there was implicit consideration of whether the government’s conduct was excessive in light of the perceived threat. Thus, in Latvia, where the government’s claimed interest was the ability of the parliament to function in Latvian, the banning of a candidate whose examination in the Latvian language turned into an inquiry into her political views was deemed to threaten the capacity of the Russian-speaking minority to have a voice in the national parliament.²²² In Turkey, on the other hand, the fact that the overwhelming majority of Refah representatives would continue to sit in Parliament seemed to provide ample political representation while at the same time disabling the party’s organizational commitment to the imposition of clerical law.²²³

²¹⁵ See 3 TRANSITIONAL JUSTICE, *supra* note 105, at 432–35 (translating the presidential decrees).

²¹⁶ For more details on the formation and rise of the Russian Constitutional Court and the context surrounding the *Communist Party Case*, see Feofanov, *supra* note 126.

²¹⁷ 3 TRANSITIONAL JUSTICE, *supra* note 105, at 436–55 (translating in part the November 30, 1992, decision of the Russian Constitutional Court).

²¹⁸ *Id.* at 442.

²¹⁹ *Id.* at 443.

²²⁰ *Id.* at 454.

²²¹ This is the basic lesson of *Mathews v. Eldridge*, 424 U.S. 319 (1976), and its progeny.

²²² See *Podkolzina v. Latvia*, 2002-II Eur. Ct. H.R. 443.

²²³ *Refah Partisi (Welfare Party) v. Turkey*, 2003-II Eur. Ct. H.R. 267, 315 (citing *Refah Partisi (Welfare Party) v. Turkey*, 35 Eur. H.R. Rep. 56, 91 (2002)).

A least restrictive means requirement lends considerable support to the Indian and Israeli approaches, which focus on removing certain kinds of agitation from the electoral arena while allowing the political parties that stand behind those views to persist as organized entities. Both of these approaches maintain distinct rules for conduct in the electoral arena, either by regulating speech and agitation in the Indian fashion, or by reserving the right to exclude even legal parties from electoral participation, as under Israeli law. This leaves uncertain “what a democracy should do when it is faced with a party that says it is democratic but in fact looks suspiciously undemocratic.”²²⁴ But the focus on conduct and popular proclamations does facilitate the policing of the electoral process on a basis distinct from speech and political organization outside the electoral arena. It bears emphasizing that the corollary of banning parties is a willingness to use police authority to prevent like-minded individuals from gathering, agitating for common views, or even protesting governmental conduct that they find objectionable. If there is indeed something distinct about the electoral arena that magnifies the dangers presented by extremist groups, it is perhaps best to reserve the use of state authority for policing the integrity of the electoral system without reaching deeper into party organization.

Taken together, the three forms of procedural protection suggest a concept that has thus far been absent, at least as a formal matter, from American law: a distinct electoral arena within which the restraints on the regulatory power of the state over core matters of political speech, assembly, and organization are relaxed. American law has generally resisted treating electoral activity as a separate category, allowing the general First Amendment prohibitions on content and viewpoint discrimination to frame legal oversight of campaigns and political parties. At the same time, even without a deep-seated threat to democracy in this country, there is some hint of a distinct administrative period for elections beginning to appear in American law. In passing the Bipartisan Campaign Reform Act of 2002²²⁵ (BCRA), generally referred to as McCain-Feingold, Congress for the first time introduced the concept of a distinct election period for restrictions on what are termed “electioneering communications.”²²⁶ As upheld by the Supreme Court in *McConnell v. FEC*,²²⁷ BCRA created specific limitations on campaign funding and distinct disclosure requirements for the periods immediately preceding primary and general elections. The administrative powers granted to an entity like India’s Electoral Commission, however, are a far step beyond anything that has been recognized in American law. Nonetheless, it is worth noting that some pressures toward an administrative law of elections are beginning to present themselves here as B. The Substance of Antidemocracy

More challenging than reform in the procedural domain is the effort to define substantively the type of threat to the democratic order that would justify party suppression, an endeavor that will

²²⁴ FELDMAN, *supra* note 161, at 111.

²²⁵ Pub. L. No. 107-155, 116 Stat. 81 (codified primarily in scattered sections of 2 and 47 U.S.C.).

²²⁶ 2 U.S.C. § 434(f)(3) (Supp. III 2003). The definition of “electioneering communication” under BCRA, which, if met, triggers special disclosure and contribution rules, is limited to the period sixty days before a general election or thirty days before a primary election. *Id.* § 434(f)(3)(A)(i).

²²⁷ 540 U.S. 93 (2003).

necessarily require much case-specific analysis. Relatively few parties openly announce their antidemocratic objectives. More typically, especially in the case of parties seeking a mass audience, the antidemocratic nature of the party must be inferred from subtle contextual clues, such as the invocation of the imagery of temples buried beneath mosques in India or the insistent claims of the postwar German Communist Party that the newly installed West German government was a corrupt lackey of the Western powers. Absent a strong mooring in the lived domestic context, it is extraordinarily difficult to formulate broad substantive principles that cover the wide range of potential antidemocratic threats within that context.

The *Socialist Reich Party Case* from Germany is a useful illustration of the difficulty of defining with any precision the nature of an impermissibly antidemocratic party. The Socialist Reich Party (SRP) was as menacing to a democratic order as any party could be. It looked back with unquestioned ardor upon the country's recent Nazi past.²²⁸ It drew its leaders from the ranks of the SS and other notorious forces of the Third Reich, characterized for recruitment purposes as "old fighters" who were "100 percent reliable."²²⁹ Against the backdrop of the disorder and privation of defeated Germany, it looked to tap into the same founts of discontent and hatred as its precursor National Socialist Party had under Weimar.²³⁰

Despite the SRP's clear ties to the Nazis, in order to ban the party the court needed to find, if not an immediate likelihood of overturning democratic governance, at least a concrete intention to realize that objective. A number of considerations were aired, some less convincing than others. For example, the court examined the party's platform and found that "it indulges in platitudes, lays down general demands that are common property of almost all parties or have already become reality, and makes vague, often utopian promises that are hardly compatible with each other."²³¹ One can only imagine how the court might have analyzed slogans like "Put America First" or "Build a Bridge to the Twenty-First Century" or any of the other mindless sound bites that dominate contemporary American campaigns.

A more interesting approach builds on the German constitutional requirement that parties reflect their commitment to democracy in their internal structure.²³² The court translated this provision into a rule that a political party "must be structured from the bottom up, that is, that the members must not be excluded from decision-making processes, and that the basic equality of members as well as freedom to join or to leave must be guaranteed."²³³ Though this principle is grounded in the German Constitution, it is difficult to identify the state's interest in controlling so tightly the internal governance of a political party.

²²⁸ *Socialist Reich Party Case*, BVerfG Oct. 23, 1952, 2 BVerfGE 1, translated in part in MURPHY & TANENHAUS, *supra* note 103, at 602, 604–05.

²²⁹ *Id.*, translated in part in MURPHY & TANENHAUS, *supra* note 103, at 602, 604.

²³⁰ *Id.*, translated in part in MURPHY & TANENHAUS, *supra* note 103, at 602, 605–06.

²³¹ *Id.*, translated in part in MURPHY & TANENHAUS, *supra* note 103, at 602, 604.

²³² GG art. 21(1), translated in KOMMERS, *supra* note 103, at 507, 511.

²³³ *Socialist Reich Party*, 2 BVerfGE 1, translated in part in MURPHY & TANENHAUS, *supra* note 103, at 602, 604.

The attempt to impose a distinct internal structure on political parties raises paradoxical concerns about the relationship between political parties and the state. As the German court observed in the *Socialist Reich Party Case*, one of the telltale antidemocratic signposts of the SRP was its desire to impose its own organizational structure on the state.²³⁴ Indeed, this ambition is characteristic of totalitarian and even authoritarian regimes of the twentieth century. Almost invariably, these oppressive regimes use a disciplined party structure as the basis for governance and seek to collapse any wall between party and state. Thus, for example, several commentators have looked to the role of political parties in forming a democratic polity to argue that the parties themselves must reflect a commitment to just such democratic politics, something that authoritarian parties consistently reject.²³⁵ Yigal Mersel takes this argument one step further and claims that because political parties are indispensable to a modern democracy, the parties themselves must be held to the core conditions of democracy.²³⁶

Premising the right to participate in the electoral arena on internal party organization, however, brings the force of state authority deep into the heart of all political organizations. One reason the banning of political parties is so problematic for liberal democratic thought is precisely that parties are critical intermediary organizations that allow meaningful popular mobilization outside of and against state authority. It is for this reason that the right to organize and maintain political parties is a keystone of modern constitutionalism.²³⁷ Imposing the pluralist values of a democratic society on the internal life of all political parties, however, threatens to compromise parties' political integrity and organizational independence from the state. Under American constitutional law, for example, the state is held to a standard of neutrality on matters of religion, as is indeed the case in many but not all democracies.²³⁸ Does this mean that a Christian Democratic party would have to be banned for violating the state's obligation of neutrality? Clearly not, but the example illustrates the importance of applying different standards to the state than to political parties, even parties that are vying for a position in government.

The problem goes beyond the restrictions on ideological commitments of a democratic state. Political parties play a key role in providing a mechanism for informed popular participation in a democracy precisely because they are organizationally independent of the state. Not only do most modern constitutions grant significant autonomy rights to political parties,²³⁹ but even in the United

²³⁴ *Id.*, translated in part in MURPHY & TANENHAUS, *supra* note 103, at 602, 604.

²³⁵ See Mersel, *supra* note 112, at 97 (arguing that "[l]ack of internal democracy may be seen as evidence of external nondemocracy"); see also James A. Gardner, *Can Party Politics Be Virtuous?*, 100 COLUM. L. REV. 667, 683–85 (2000) (arguing that "broadly inclusive internal procedures" can alleviate democratic concerns arising from party leaders' control over party positions and candidate selection).

²³⁶ See Mersel, *supra* note 112, at 96–98 (claiming, as one of several justifications for requiring internal party democracy, that because individuals in a democratic state enjoy rights to equality and liberty, and because political parties are important components of a democratic regime, individuals should enjoy the same rights within the parties).

²³⁷ For an argument that the U.S. Constitution shows its age in its inattention to political parties, see Issacharoff & Pildes, *supra* note 40, at 712–16. Indeed, the Constitution was supposed to create a political structure without parties, see *id.* at 713–14 — an idea that collapsed by the contested election of 1800. See JOHN FERLING, *ADAMS VS. JEFFERSON* (2004); see also Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006).

²³⁸ For a comparison of democracies with and without established churches, see Richard Albert, *American Separationism and Liberal Democracy: The Establishment Clause in Historical and Comparative Perspective*, 88 MARQ. L. REV. 867, 901–23 (2005).

²³⁹ See ISSACHAROFF, KARLAN, & PILDES, *supra* note 23, at 346 note a; Issacharoff & Pildes, *supra* note 40, at 691; Richard H. Pildes, *The*

States a large body of constitutional law has emerged to protect the independence of political parties from the state, despite the absence of any textual commitment to such a principle. Thus, for example, the Supreme Court struck down as a violation of the First Amendment right to freedom of association a requirement that all voters be able to select the candidates of a party regardless of prior fidelity to the party or its program.²⁴⁰ Moreover, the grounds for striking down such requirements raise questions about the constitutional validity of even more modest attempts to impose the general principle of full democratic accountability on internal party structure — for example, the requirement that parties select their general election candidates through primaries rather than by executive committee.²⁴¹

Any requirement that parties have open and democratic internal structures would put at risk ideological and religious parties that may be organized around certain fixed principles not amenable to internal majoritarian override. Also at risk would be parties formed around popular leaders, which might or might not evolve into true mass parties. Historical examples include early Peronism in Argentina and the creation of Kadima in Israel largely around the personal authority of then–Prime Minister Ariel Sharon. Precisely because parties are not the state, membership exit or electoral defeat is a perfectly appropriate response to the hoarding of power by an unrepresentative central cadre.²⁴² Furthermore, because parties are not the state, the need for pluralist competition in a democratic society does not necessarily require the same pluralist competition within all of the contending parties. By analogy, we may find a perfectly diverse and competitive set of offerings across a city’s restaurant row, even if each restaurant restricts itself to one particular cuisine. There appears to be no compelling reason why we should demand that all parties adhere to the same internal structure so long as the ultimate objective is meaningful voter voice and the capacity to vote politicians out of office, a point I will address shortly.

To return for the moment to the most famous adjudication of a political party ban, the *Socialist Reich Party Case* in Germany: Ultimately, what determined the outcome in that case was neither the SRP’s lack of internal democracy nor the platitudinous propensities of its rhetoric. Rather, the key element was the most obvious one: the SRP’s direct ties to the country’s Nazi past. The court found that the party modeled its uniforms on those of the Hitler Youth and that “[f]ormer Nazis [held] key positions in the party to such an extent as to determine its political and intellectual image, and no decision [could] be made against their will.”²⁴³ The logical conclusion was that dissolution was proper given the party’s aim “to transplant its own organizational structure onto the nation as soon

Supreme Court, 2003 Term—Foreword: *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 31–34 (2004).

²⁴⁰ See *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000). At issue in *Jones* was the use of a “blanket primary” in which voters were free to vote among Democratic or Republican candidates on a line-by-line basis — choosing, for example, among Democrats for Governor and among Republicans for Senator — regardless of prior identification or enrollment in a particular party. *Id.* at 570. The effect was to dampen the distinct identity of each party by allowing the broad electorate to select the party’s standard-bearer. *Id.* at 581–82.

²⁴¹ This argument is more fully developed in Samuel Issacharoff, *Private Parties With Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition*, 101 COLUM. L. REV. 274 (2001).

²⁴² The basic argument here draws from ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY* (1970).

²⁴³ *Socialist Reich Party Case*, BVerfG Oct. 23, 1952, 2 BVerfGE 1, translated in part in MURPHY & TANENHAUS, *supra* note 103, at 602, 604.

as it has come into power and thus eliminate the free democratic basic order.”²⁴⁴ At the end of the day, the simple, compelling fact was that this was a party of Nazis, complete with a heroic worship of the “Reich,” serious elements of anti-Semitism, and a conspicuous refusal to disavow any link to the Hitler government.²⁴⁵ It was these specifics, in the context of postwar Germany, that placed the SRP outside the bounds of democratic tolerance.

If there were a model for a party that should be banned, it would be a political mobilization of unrepentant Nazi combatants seeking to destabilize and overturn the fledgling German democracy right after World War II. With its worship of the “Führer” and the “Reich,” the challenge to democracy posed by the SRP could not have been more clear. Yet the German court’s difficulty in crafting principles of general application even in this context should serve as a caution regarding the difficulty of defining with precision the substantive requirements for inclusion in the democratic electoral arena.

C. Preservation of Pluralist Competition

Unlike the situation facing the German court a half century ago, there are now many examples of democratic governments’ acting to protect the viability of threatened democracies. The general contours of how such bans may be implemented are suggested by democratic countries’ experiences prohibiting extremist parties. But these examples also indicate the high level of abstraction needed to describe the exact criteria that justify a prohibition. It is instructive that the efforts of the European Commission yielded rather broad commands focusing on the extent to which parties are organized around a commitment to overthrow constitutional democracy, with some secondary sense of the immediacy of the perceived threat:

[T]he competent bodies should have sufficient evidence that the political party in question is advocating violence (including such specific demonstrations of it . . . as racism, xenophobia and intolerance), or is clearly involved in terrorist or other subversive activities. State authorities should also evaluate the level of threat to the democratic order in the country and whether other measures, such as fines, other administrative measures or bringing individual members of the political party involved in such activities to justice, could remedy the situation.²⁴⁶

Obviously, the general situation in the country is an important factor in such an evaluation.

Typically, the national laws implementing party prohibitions follow the broad outlines suggested by the European Commission. These laws combine a concern about potential violence, which takes into account the immediacy of the perceived threat, with a broad hostility toward those who would

²⁴⁴ *Id.*, translated in part in MURPHY & TANENHAUS, *supra* note 103, at 602, 604.

²⁴⁵ *Id.*, translated in part in MURPHY & TANENHAUS, *supra* note 103, at 602, 605–06.

²⁴⁶ *Democracy Through Law Guidelines*, *supra* note 200, art. III, § V, 15.

foment hatred along religious or ethnic lines.²⁴⁷ Almost all of these prohibitions have a heavy dose of the “I know it when I see it”²⁴⁸ principle that is understandably disquieting to First Amendment sensibilities.

Ultimately, I must qualify the opening definition of democracy. The issue is not really the ability of a temporally defined majority to select governors. The real definition of democracy must turn on the ability of majorities to be formed and re-formed over time and to remove from office those exercising governmental power.²⁴⁹ Many deeply antidemocratic groups are willing to vie for power through the electoral arena; few, if any, are willing to give up power that way. The definition of groups that are tolerable within a democratic order must turn, at the very least, on such groups’ willingness to be voted out of office should they come to hold power. The Indian court’s decision, for example, would turn not on the BJP’s record of promoting ethnic enmity, but on whether it had matured into a political party that could be removed from office, as indeed it had. The same inquiry would guide Ukraine through its assessment of the reconstituted Communist Party, Turkey through its evaluation of the realigned Justice and Development Party, and so forth.

On this view, elections play a central role in democratic theory not because they ensure predetermined substantive outcomes but because they prove to be the best (and likely the only) mechanism for ensuring the consent of the governed. In order for elections to serve this function, however, there must be renewability of consent,²⁵⁰ which requires periodic elections in which the governors place their continued officeholding in the hands of the governed. Recent events in Iraq and Afghanistan, for example, have shown that holding an election is not the same as creating an enduring system of democratic governance. Our collective experience with “one man, one vote, one time” in post-colonial regimes dictates great caution in assuming that elections and stable democratic governance are necessarily coterminous.²⁵¹

²⁴⁷ As noted in the Venice Commission Report of 1998:

In *France* parties may be banned for fostering discrimination, hatred or violence towards a person or group of persons because of their origins or the fact that they do not belong to a particular ethnic group, nation, race or religion, or for spreading ideas or theories which justify or encourage such discrimination, hatred or violence. The situation in *Spain* is similar, but, in addition to race and creed, sex, sexual leaning, family situation, illness and disabilities are also taken into consideration. Political parties which foster *racial hatred* are also prohibited, for example, by the constitutions of *Belarus* and *Ukraine*, while in *Azerbaijan* the legislation highlights racial, national and religious conflict. Under *Bulgarian* law parties may be prohibited both for pursuing fascist ideals and for fomenting racial, national, religious or ethnic unrest. The *Russian* constitution prohibits the creation and activities of social associations whose aims or deeds stir up social, racial, ethnic and religious discord.
Id. at app. I, § I.B.b, 5.

²⁴⁸ *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

²⁴⁹ This controversial claim roots democratic legitimacy in competition among contending groups for the support of the governed. This view is most notably associated with Joseph Schumpeter’s arguments, which define the core of democracy as “that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people’s vote.” JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* 269 (3d ed. 1950). The concept of competition inheres in most accounts of democratic legitimacy, even ones infused with substantive content. See, e.g., Robert A. Dahl, *Polyarchy, Pluralism, and Scale*, 7 *SCANDINAVIAN POL. STUD.* 225, 230 (1984) (suggesting that democracy can be understood as “a system of control by competition”), quoted in Michael P. McDonald & John Samples, *The Marketplace of Democracy: Normative and Empirical Issues*, in *THE MARKETPLACE OF DEMOCRACY* 1, 1 (Michael P. McDonald & John Samples eds., 2006).

²⁵⁰ I am grateful to Bernard Menin for suggesting this formulation.

²⁵¹ The phrase “one man, one vote, one time” was coined by former Assistant Secretary of State and U.S. Ambassador to Syria and Egypt Edward Djerejian. See Ali Khan, *A Theory of Universal Democracy*, 16 *WIS. INT’L L.J.* 61, 106 n.130 (1997). The phrase refers to the many countries whose first election after the end of colonial rule turned out to be a referendum on who would acquire state authority to

Emphasizing the renewability of consent also illuminates the substantive constraints that guide courts through messy disputes over the boundaries of democratic participation. In order for consent to be meaningfully renewed, the decisions of a majority-supported government bearing on the structure of the political process must be capable of being reversed by subsequent majorities. Hence, a decision to expand the role of religion in the public sphere (as with support to church schools) remains within the realm of a reversible political decision, while a removal of nonbelievers from the political process does not. In this sense, the strongest justification for the holding of the *Refah Partisi* case turned on the party's efforts to restore a version of the Ottoman millet system, in which each religious community would minister to its own affairs while the dominant Sunni majority alone would attend to the affairs of state. Making political power unaccountable to large segments of the population is just the sort of impediment to reversibility that threatens ongoing democratic governance.

Another result of focusing on renewability of consent is to encourage consideration of a broader range of initial constitutional arrangements, particularly in deeply divided societies. Viewing constitutions as documents that facilitate reversible democratic decisionmaking, rather than as fixed arrays of rights, allows more flexibility in constitutional design. As difficult as the inquiry may be, a procedural concern for the renewability of consent allows fragile democracies to attend more to the institutional arrangements that best police the borders of democratic participation than to the no-less-contested terrain of which rights must be available in a democratic society.

In order to assess potential threats to subsequent democratic accountability, however, democratic countries need latitude to police the electoral arena in a manner distinct from both the prohibition of particular parties, on one hand, and the imposition of criminal sanctions, on the other. At a minimum, such an approach requires an administrative law of elections, an independent body capable of responding to claims of political retaliation against a disfavored group,²⁵² and sufficient alternative means of expression to avoid excessively dampening political debate. In several countries, including India, that process of independent administrative review followed by judicial oversight appears to have taken hold successfully. Even in Mexico, a country just emerging from a lengthy period of one-party rule, an administrative body overseeing a tightly contested presidential election has maintained an aura of independence and legitimacy.²⁵³ One reason this approach appears antithetical to the American tradition is that there has been little or no experience here with neutral administration of elections; a complete dearth of administrative review, except for the woefully ineffectual Federal Election Commission; and virtually no experience with political agitation's be-

settle scores with religious or tribal rivals. In such cases, the first multiparty election was generally the last. See DONALD L. HOROWITZ, *A DEMOCRATIC SOUTH AFRICA?* 239–40 (1991) (noting that power did not change hands through peaceful elections in Africa between 1967 and 1991).

²⁵² For an insightful account of the different forms of administrative oversight of elections and their relative efficacy, see Christopher S. Elmendorf, *Representation Reinforcement Through Advisory Commissions: The Case of Election Law*, 80 N.Y.U. L. REV. 1366 (2005).

²⁵³ See JULIA PRESTON & SAMUEL DILLON, *OPENING MEXICO* 496–99 (2004); see also Jamin Raskin, *A Right-To-Vote Amendment for the U.S. Constitution: Confronting America's Structural Democracy Deficit*, 3 ELECTION L.J. 559, 564 (2004) (describing the key role an independent electoral commission could play in making political change possible and citing Mexico's commission as a successful example).

ing a serious threat to domestic order.²⁵⁴ Far from being universal, that experience appears to be a distinct outlier on the world stage.

CONCLUSION

It is by now well established that all constitutional orders retain emergency powers, either formally or informally. Justice Jackson's firm admonition that the Constitution is not "a suicide pact"²⁵⁵ well sums up the sense that even a tolerant democratic society must be able to police its fragile borders. The discussion in this Article rests on many premises that are, thus far, largely alien to the American experience, or at least the last hundred years of it. The Article begins by noting that some democratic societies are more fragile, and have political structures more porous to antidemocratic elements, than the United States. That porousness requires an ability to restrict the capture of governmental authority by those who would subvert democracy altogether. The next step is to envision a realm of electoral politics with rules of conduct distinct from the rules that apply to broader constitutional rights of assembly, petition, and speech. In order to manage the unique threats that arise from that distinct political realm, fragile democracies need the ability to discipline electoral activity without regard to the imminence of criminal or insurrectionary conduct, the accepted standard for the criminalization of political speech. Finally, independent oversight of the political process is required to prevent the dangerous powers here argued for from being deployed in the name of the self-serving preservation of incumbent political power.

As an empirical matter, it is entirely possible that democracy faces greater dangers from the promiscuous use of police powers than from domestic enemies. With respect to more stable democracies, I am willing to concede that this is likely the case and that the main task of legal oversight may very well be the preservation of civil liberties. That reality does little to address the problems faced by societies that are more menaced by the indisputable emergence from time to time of mass-based movements seeking to destroy democratic life.

The international experience also cautions against readily assuming that any restraints in the political process necessarily lead to a collapse of democratic rights or a fundamental compromising of democratic legitimacy. Virtually all democratic societies define some extremist elements as beyond the bounds of democratic tolerance. Despite errors of overreaching, likely inevitable in human affairs, it appears that this power is largely used with restraint and hesitation. With the benefit of hindsight, therefore, the question that needs to be addressed is whether Weimar Germany could have assembled the tools necessary to fight off the Hitlerian challenge within the bounds of democratic legitimacy. One certainly must hope so.

²⁵⁴ For an exception, see *Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1869), in which the Court refused, on jurisdictional grounds, to grant a writ of habeas corpus to the author of incendiary articles.

²⁵⁵ *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

Otar Gamkrelidze

REGARDING A DECISION OF THE SECOND BOARD OF THE SUPREME COURT OF GEORGIA

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On April 6, 2009, the Second Board of the Supreme Court of Georgia took (N2/1/1415) another decision on the grounds of the Public Defender's Constitutional complaint. Members of Parliament (MPs) were defendants in the lawsuit. The disputed issue was the compatibility of paragraph "f", part 1, article 142 of the Criminal Code of Practice of Georgia with article 18 of the Constitution of Georgia. It should be noted that it was not the first complaint regarding article 142 filed in the Supreme Court. With the January 29, 2003 (2/3/182, 185, 191) decision, the Second Board of the Supreme Court abrogated part 2 of article 142 due to incompatibility with article 18 of the Constitution. By doing so, article 142 seemed to fully fit requirements of the Constitutional framework. Several years later, however, the constitutionality of the article became disputable again. The fact of the matter is that the December 29, 2006 Law amended part 1, article 142 by adding to it paragraph "f" which said: "A person may go into hiding". It was precisely these words that the claimant considered unconstitutional, more specifically, incompatible with article 18. This time, however, the Second Board of the Constitutional Court did not satisfy the claim by the above mentioned April 6, 2009 decision.

As already said, the subject of dispute in both above mentioned decisions of the Second Board of the Constitutional Court is one and the same article of the Criminal Code of Practice. Before going into details of the April 6, 2009 decision I would like to briefly touch upon the January 29, 2003 decision of the Constitutional Court. This decision invalidated part 2, article 142 of the Criminal Code of Practice of Georgia, which said that a suspect could be detained "if there is other evidence providing the ground to suspect a person of committing a crime. This person may be detained only if he/she has tried to flee or he/she has no permanent residence or his/her identity is not established".

This norm in part 2 of article 142 became disputable at that time because it could, in practice, encourage arbitrariness and breach of human rights. The Constitutional Board, therefore, emphasized in its January 29, 2003 decision that "provisions of the Criminal Code of Practice of Georgia must be clear-cut and understandable in order to avoid ambiguous interpretation". The righteousness

of these words is proved by the first part of article 142 which clearly provides for instances when a suspect may be detained : a) a person is caught red-handed or immediately after committing a misdemeanor; b) eye-witnesses, including victims, directly point to a person as to the perpetrator of the crime; c) a clear trace of a crime is found on or near a person or on his/her clothes; d) A person ran away after committing a crime but was later identified by the victim; e) ruling (decision) is made on conducting the search of a person”.

What was the reason behind providing this exact list of instances in the Law when the second part of article 142 contained such a vague provision as “if there is other evidence...” and this very phrase allowed for arbitrariness in practice and undermined the Constitutional guarantee of protecting freedom of a person?! It was precisely for this consideration that the Second Board of the Constitutional Court abrogated part 2 of article 142 by its January 29, 2003 decision. In this regard, the April 6, 2009 decision of the Second Board of the Constitutional Court, which is a key topic of our discussion, is very interesting. The decision reads: “46. The opinion of the Board also fully complies with another view formulated in N2/3/182, 185, 191 January 29, 2003 decision that “the Constitution of Georgia does not recognize the possibility of detaining a person on the grounds of “other evidence”. This evidence may become a cause for suspicion but not for deprivation of a person’s liberty” (see April 6, 2009 decision, p.22).

While the Board agrees with the January 29, 2003 decision of the Constitutional Court in this part, it is unclear why it did not satisfy the Public Defender’s complaint about the incompatibility of paragraph ‘f’, part 1 of article 142 with article 18 of the Constitution? In his complaint Public Defender claimed that “by its content, the disputed norm repeats the content of part 2, article 142 of Criminal Code of Practice which was recognized as unconstitutional. Under part 2 of article 142, a person may be detained on the grounds of other evidence if he/she “has tried to flee...”

Thus, at times of taking the January 29, 2003 decision the subject of dispute was the wording that a person could be detained on the basis “of other evidence” when “he/she tried to flee”. As regards the April 6, 2006 decision, the subject of dispute was the words in paragraph “f”: “a person may go into hiding”.

Considering the content of the phrase “person may go into hiding” one can see that this phrase provides more room for arbitrariness in investigation practice than “when he/she has tried to flee”. “Has tried to flee” is more specific in its sense than “a person may go into hiding”. Here the word “may” provides an ample room for arbitrariness. “May” is a very abstract notion and provides an ample possibility for a biased handling of the issue.

One can arrive at the similar conclusion when comparing “person may go into hiding” with the subject of dispute of the Constitutional Court’s January 29, 2003 decision, i.e. “if there is other evidence”, from a different angle. The meaning of this phrase is as broad and unspecific as that of the phrase “a person may go into hiding”. The word “other”, in this respect, is no different from “may”. It is therefore unclear what was the view held by the Constitutional Courts’ Second Board when it, on the one hand, recognized that “The opinion of the Board fully complies also with another view formulated in N2/3/182, 185, 191 January 29, 2003 decision that “the Constitution of Georgia

does not recognize the possibility of detaining a person on the grounds of “other evidence”. Such evidence may become a cause for suspicion but not deprivation of a person’s liberty”, while on the other hand, it did not consider the wording “a person may go into hiding ” unconstitutional. If the detention of a person on the basis of “other evidence” “may become a cause for suspicion and not deprivation of a person’s liberty “ why then the same cannot be true for the wording “a person may go into hiding”? Why cannot these words also become “a cause for suspicion and not for the deprivation of a person’s liberty”? How come that in assessing the constitutionality of paragraph “f”, part 1, article 142 of the Criminal Code of Practice of Georgia the Constitutional Court’s Board overlooked other paragraphs of part 1 of article 142 where, as already said, the instances for the detention of a suspect are formulated precisely, unambiguously and explicitly! How come a person having read the first part of this article overlooked a clear difference of paragraph “f” with other paragraphs?

Most importantly, in its decision the Constitutional Board disregarded a rather essential issue raised in the Constitutional complaint and did not make it a subject of special consideration. Our discussion has clearly proved the conclusion that was made in the Constitutional complaint: “by its content, the disputed norm repeats the content of part 2, article 142 of the Criminal Code of Practice which was recognized as unconstitutional” (see the Constitutional complaint, p.5)

In its decision, the Constitutional Board did not provide direct, decisive answer on that issue. It did not try to substantiate whether the subject of the January 29, 2003 decision substantially differed from the subject under its consideration. Moreover, in its consideration the Board clearly contradicts itself. As we have noted above “the opinion of the Board fully complies“ with the view stated in the January 29, 2003 decision that “the Constitution of Georgia does not recognize the possibility of detention of a person on the grounds of “other evidence” and that this evidence may become a cause for suspicion and not for the deprivation of a person’s liberty” (see April 6, 2009 decision, p.22). Thus, the Board agreed with the January 20, 2003 decision of the Constitutional Court that the wording “other evidence” of part 2, article 142 of the Code of Practice contradicted article 18 of the Constitution and that “other evidence” might only serve as the ground for suspicion.

But mere suspicion cannot serve as a ground to detain a person as a suspect. That is why the Constitutional Board believes “there must be a well-founded and reasonable suspicion“ that a person has committed a crime. In this part the Board agrees with the constitutional complaint which repeatedly notes that a person cannot be detained unless a suspicion about his/her involvement in crime is “well-founded”. The disputed decision reads that “suspicion is a subjective attitude and the interference in a person’s freedom cannot be based on the suspicion which rests on a subjective attitude alone”. Consequently, the Board concludes that “the suspicion must be well-founded” (see the decision, p.15).

Let us now look at the assessment of the disputed norm, i.e. paragraph “f”, part 1 of article 142 – “a person may go into hiding”. In assessing this norm the Board spares no efforts to evade the essence of the issue. In its deliberation the Board limits itself only to general phrases without even mentioning the question as to what extent this norm facilitates the establishment of “a well-founded

suspicion". The decision reads: "22. If the disputed norm allows the detention of a person in breach of the requirements which have been emphasized above, it does not serve the legitimate purpose, is not subject to the **commensurate test** and infringes upon the inviolability of a fundamental right" (p. 16).

At a glance it seems from the text that the disputed norm - "a person may go into hiding" - gives rise to a "well-founded suspicion". The norm must not allow the detention of a person in the absence of "well-founded" suspicion, as noted in the decision. This is what should be implied in the following wording that the disputed norm must not allow the detention of a person "in breach of the requirements emphasized above". It was exactly the "well-founded suspicion" that was discussed above.

But quite an opposite statement appears lower in the decision that "it is beyond the capacity of the legislation to provide an exhaustive list of the instances and the evidences which may serve as grounds for suspicion. How any evidence provides grounds for a reasonable suspicion should be established on a case by case basis. What is important is that the legislator sets out general criteria which serve as basis for consideration and assessment of each particular case" (See decision, p.22).

One can conclude that as the identification of the exhaustive list of instances of "reasonable suspicion" is beyond the capacity of legislator and legislator establishes "general criteria" alone, it is up to a police officer or any other authorized officer to define whether a particular case can be qualified as "reasonable suspicion". Any other conclusion cannot be drawn from this opinion of the Board. This is where the essence of the disputed issue lies. If this is so, then why the Board agreed with the January 29, 2003 decision which invalidated the wording of part 2, article 142 of the Criminal Code of Practice - "if there is no other evidence". The Constitutional Courts' Board declared that wording null and void then because it might encourage arbitrariness and breach of Constitutional rights of a person in investigation practice. We have provided above a detailed analysis that there is no essential difference between the disputed norm "a person may go into hiding" and the norm invalidated under the January 29, 2003 decision of the Second Board of the Constitutional Court.

Let us revisit the quote from the decision under consideration: "it is beyond the capacity of the legislation to provide an exhaustive list of the instances and the evidences which may serve as grounds for suspicion". The Board reiterates this opinion somewhere else in the decision. The page 19 reads: "the Board does not share the view that the Criminal Code of Practice envisages a specific list of instances of reasonable grounds for suspicion and that in other instances grounds for reasonable and well-founded suspicion cannot emerge. "Suspicion" is not a category which is exhaustively definable by the legislator and whether it emerges or not depends on a set of objective and subjective circumstances in a particular case".

By doing so, the Board seems to try to convince us that while recognizing the Constitutional principle of "well-founded suspicion", it is concerned about the fact that "well-founded suspicion" is such a phenomenon that cannot be specified exhaustively by the legislator in the law as it is impossible or unattainable to do so.

First, who has demanded that the legislator identify altogether and specify in the Code all the instances of "reasonable suspicions" that might emerge in life. I have never read or heard about such an opinion anywhere. "Exhaustive list" implies an absolutely different idea. For example, it is well-known that the Criminal Code provides the exhaustive list of crimes. Consequently, no action can be regarded as crime, which is not included in the Code. But this does not necessarily mean that no action can emerge in future, which may need to be included in the Code and qualified as a crime. Under the technical progress of modern times, the social life develops and advances at such a high speed that such a possibility cannot be ruled out.

Similar approach should also be exercised to instances of "reasonable (well-founded) suspicion" and the opinion adopted that the Criminal Code of Practice must provide an exhaustive list of such cases. Although, it does not mean that the legislator may not overlook some instances of "well-founded suspicion". But the legislation can be supplemented over time and further improved. Such an approach to the issue stems from the Constitutional requirements of the protection of freedom of a person; if we ignore the need of an exhaustive list of cases of "reasonable suspicion" in the Criminal Code of Practice, we will endanger the Constitutional principle of the freedom of a person. Who can be guaranteed that a police officer or an investigative service officer will not make a mistake and regard a mere suspicion as "well-founded suspicion"? Nor should it be ruled out that the absence of exhaustive list of instances of "reasonable suspicion" in the law may be abused by an investigative service officer. This may especially be the case in Georgia where the level of legal life is rather low for the time being.

Second, let alone all the above said, I would like to draw the reader's attention to one important issue. It is noted in the Constitutional complaint that "a well-founded suspicion" is needed to detain a person. The complaint relies on article 5 of the European Convention on Human Rights and Fundamental Freedoms which also states that "the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority" is only possible when there is "well-founded suspicion" of wrongdoing.

The Constitutional Board itself agrees with the idea. In a decision under consideration, the Board, notes that "suspicion must be well-founded" and "there must be well-founded and reasonable suspicion that a person who is detained has committed the mentioned crime" (see the decision, p.15).

At the same time the Board declares in the decision that "the Board does not share the view that the Criminal Code of Practice envisages a specific list of instances of reasonable grounds for suspicion and that in other instances grounds for reasonable and well-founded suspicion cannot emerge" (see the decision, p.19)

Let us take a look at the first sentence of part 3, article 18 of the Constitution of Georgia, which says: "An arrest of an individual shall be permissible by a specially authorized official in the cases determined by law". The Constitution refers to the law which serves as a basis for the detention of a person. It is primarily article 142 of the Criminal Code of Practice that is implied here. Normally, the Constitution regulates an issue in general terms and each issue is further specified and detailed

in a special legislation. Should the Constitution comprehensively reflect all aspects of life, there would be no need for special legislation. In other words, if article 42 had not had an exhaustive list of cases for the detention of a person, which were not provided in article 18 of the Constitution, article 142 would have lost any sense and article 18 of the Constitution would have been enough to detain a person. Article 18 of the Constitution makes a general reference to the law and says that detention of a person is possible “in cases determined by the law”. Consequently, the law, in this particular case article 142 of Criminal Code of Practice, shall list those cases when a person may be detained although the list of the cases that makes detention of a person possible must be exhaustive. Otherwise, the reference in article 18 of the Constitution would make no sense, as already mentioned above.

I would like to draw a reader’s attention to another essential issue. To prove the constitutionality of the disputed norm the Board, on the one hand, should have underlined and substantiated in its decision an essential difference between this norm and that norm (“other evidence”) which it abrogated by the January 29, 2003 decision, while on the other hand, it should have identified essential features in common with other paragraphs of part 1 of article 142. We have discussed in detail above that there is no essential difference between the disputed norm (“a person may go into hiding”) and the norm abrogated by the Constitutional Court (“if there is other evidence”). We will not therefore carry on the discussion on this matter. I will only briefly touch upon the difference between paragraph “f”, part 1 of article 142 and other paragraphs of this part.

According to paragraph “f” a person can be detained as suspect if “he/she may go into hiding ”. Let us now compare these words with paragraph “a”, part I of article 142 “a person is caught red-handed or immediately after committing a misdemeanor”. Can anyone claim that this text does not show a “well-founded suspicion” that a person has committed a crime? No, of course. But this cannot be said about paragraph “f” – “a person may go into hiding”. This text is very abstract and lacks precision. We do not know what he/she has done and why he/she is trying to go into hiding. Moreover, the intention to hide is dubious as well, not clear from the text. He/she “may” hide but how can it be confirmed that he/she intends to hide?

Let us proceed further. We will see the same situation if we compare content of paragraphs “f” and “b” of article 142. For example, the paragraph “b” has the following content: “ eye-witnesses, including victims, directly point to a person as to the perpetrator of the crime”. This text is as clear and differs from the text of paragraph “f” in terms of precision of the provision as sky differs from the earth. I will therefore say nothing about this difference. The same holds true for subsequent paragraphs the contents of which are as follows: “c) a clear trace of a crime is found on or near a person or on his/her clothes; d) A person ran away after committing a crime but was later identified by the victim; e) ruling (decision) is made on conducting the search of a person”. As can be seen paragraph “f” is somewhat artificially inserted in this list and it is clear that it does not fit there. Nevertheless, as said above, the Board keeps silent on this issue.

Instead, the Constitutional Board in its decision analyzes paragraph “f”, part 1, article 142 of the Code of Practice in connection with such paragraphs that have nothing to do with the identification

of the genuine content of the disputed norm. For illustration purposes I'll quote some examples. The 17th page of the decision reads: "the content of the disputed norm makes it clear that a person who is being detained is suspected of 'committing a crime' and not of doing something else. In this regard, other norms of the Criminal Code of Practice further specify the requirements, which should also be envisaged in detaining a person".

Then the decision refers to part 1, article 141 of the Code of Practice which, as put, "further narrows the circle of crimes and permits the detention in case of such a crime for which the law envisions the deprivation of liberty as punishment". Part 2, article 12 of the Code of Practice is also referred to in the decision, which in the Board's opinion "imperatively demands that a detained person be immediately informed about the crime which he/she is suspected of having committed". Then the decision refers to article 145 which deals with some other rights of the detainee. On the 18th page, the Constitutional Board reiterates what it already said above and explains at length that a general provision for the detention in part 1 of article 141 is the case when "there is enough ground to suspect a person of committing such a crime that is punishable by the deprivation of liberty under the law. The Board puts emphasis on part 23 of article 44 of the Code of Practice which defines the term "suspect". According to this definition the suspect is a person about whom "there is the ground for a reasonable suspicion that he/she has committed a crime envisaged by Criminal Code of Practice of Georgia".

But the decision says nothing about what these articles have in common with the constitutionality of the disputed norm. The impression one can finally get from this consideration of the Board is that it is impossible to substantiate the constitutionality of the disputed norm. Although a reasonable, well-founded suspicion must serve as the ground for detention. But since the law does not and cannot provide an exhaustive list of reasonable and well-founded suspicion, as the Board tries to maintain, the suspicion should be defined by a police officer on case by case basis. With this the April 6, 2009 decision of the Constitutional Court directly contradicts the January 29, 2003 decision of the same Court which we have already discussed in detail above. But the fact that these two decisions of the Constitutional Court are conflicting ones, naturally gives rise to a new issue which is underlined in the Constitutional complaint and therefore cannot be avoided.

The mentioned complaint reads: according to paragraph 4, article 25 of the Organic law on the Constitutional Court of Georgia: "After the Constitutional Court recognizes a normative act or a part thereof as unconstitutional it shall be impermissible to adopt/enact such a legal act, which contains the norms analogous to those declared unconstitutional". It is precisely this norm that was violated by Parliament of Georgia when it amended the Criminal Code of Practice of Georgia by the December 29, 2006 law, adding paragraph "f" to part 1 of article 42 - "a person may go into hiding". This violation by the parliament of Georgia is unfortunately not an exception. I'll quote another case characteristic for the operation of our Parliament in recent years: the July 21, 1997 decision of the Constitutional Court of Georgia invalidated article 34 of Criminal Code of Georgia adopted in 1960, which envisaged "confiscation of property" as an additional measure of punishment. But by the December 25, 2005 law, a new type of punishment - "deprivation of property" - was added to the system of punishments (see paragraph "i", article 40 of Criminal Code). By doing so, the

parliament actually reinstated article 34 of the Criminal Code of Georgia which was abrogated by the Constitutional Court back in 1997. Shortly afterwards, this amendment was appealed by a group of citizens in the Constitutional Court. But by the July 2, 2007 decision the Constitutional Court did not satisfy the appeal. By the power of law the decision of the Constitutional Court is final and not subject to appeal. Parliament, too, is restricted by law and has no right to reinstate the norm abrogated by the Constitutional Court. As can be seen, however, what is prescribed in the law is ignored in the life. But does anyone care? Speaking out loud alone will not put things to right. It requires more deliberation to break this vicious circle.

Temur Tughushi

RECENT JURISPRUDENCE OF THE CONSTITUTIONAL COURT OF GEORGIA ON THE RIGHT TO LIBERTY

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On 6 April 2009, the Second Board of the Constitutional Court of Georgia delivered judgment on the case *the Public Defender of Georgia v. the Parliament of Georgia*.

In this case, the claimant disputed the constitutionality of Article 142.1(f) of the Criminal Procedure Code of Georgia (hereinafter referred to as the “CPC”) in terms of Article 18.1 and the first sentence of Article 18.3 of the Constitution of Georgia. The CPC Article 142, entitled “grounds for arrest”, defines the legal preconditions which enable the arrest of a person suspected in commission of a crime. One of the grounds provided for by the impugned provision reads as follows:

“Arrest of a person suspected in the commission of a crime can be effected on the basis of any of the following grounds:

...

f) a person may flee.”

The given case is of interest in the light of the preceding judgment #2/3/182,185,191 of the Constitutional Court of Georgia, delivered on 29 January 2003, on a similar issue. In particular, the previous decision ruled on the unconstitutionality of Article 142.2 of the CPC which had similar contents as the provision challenged by the Public Defender of Georgia in the present case. It was ruled that the impugned provision in the previous case had interfered with such a fundamental human right as physical liberty.

The present impugned provision was introduced following the judgement #2/3/182,185,191 on 29 December 2006 by the Constitutional Court. The Constitutional Court, accordingly, had to decide whether the legislator ushered the repealed provision back in a reincarnation. If the Constitutional Court decided that the impugned Article 142.1(f) of the CPC contained similar contents of Article

142.2 that was previously held unconstitutional, then, in accordance with Article 25.4¹ of the Organic Law of Georgia “On the Constitutional Court of Georgia”, the Court would not admit the constitutional claim for the consideration of the merits and would invalidate the impugned provision straight away at the administrative hearing. If the Board examining the case identified substantial similarity between the present impugned provision and the repealed unconstitutional provision, and did not agree with the legal position taken in #2/3/182,185,191 judgment of 29 January 2003, then the Board would relinquish jurisdiction in favour of the Plenary Court under Article 21¹ of the Organic Law of Georgia “On the Constitutional Court of Georgia”.

There has been a view expressed, notably by Professor Otar Gamkrelidze, in academic circles, that the Constitutional Court failed to duly address the issue at stake in the judgment. As mentioned earlier, the issue that the court is to examine at an administrative hearing, and not to be discussed during the consideration of merits, is whether the new provision revives normative contents of the unconstitutional provision repealed in 2003. Accordingly, the decision about the issue preceded the adoption of the final judgment of the Constitutional Court and was enunciated in #2/1-415 Recording Notice of 29 May 2007. At the administrative hearing, the Constitutional Court engaged in comparative analysis of Article 142.2¹ of the CPC, which was held unconstitutional in 2003, and Article 142.1(f) challenged by the Public Defender before the Constitutional Court. The Court, furthermore, pointed out the legal arguments, developed in judgment #2/3/182,185,191 of 29 January 2003 of the Constitutional Court, that led to holding Article 142.2 of the CPC unconstitutional.

As it is evident from judgment #2/3/182,185,191 of 29 January 2003, the claimant, the Public Defender of Georgia, made an observation before the Court that Article 142.2 of the CPC enabled the authorities to arrest a person on the account of “other data” that is different from the grounds provided in Article 142.1. Such a provision, it is argued, left room for arbitrariness and allowed arrest of a person on the ground of “other (unverified) data” with a formal motive that the identity of the person being arrested is unknown or that he/she has no permanent residence. The failure of the provision to meet the standards of legal writing was also pointed out by the representative of the Parliament of Georgia (the respondent).

The Constitutional Court in its judgment of 29 January 2003 examined the constitutionality of grounds of arrest based on “other data raising a doubt as to the commission of a crime by a person”. The Constitutional Court held that “the Constitution of Georgia did not authorise the possibility of arrest on the ground of ‘other data’; these data can be in the basis of a doubt and not the restriction of liberty” The Constitutional Court also pointed out that the wording “raising a doubt as to the

¹ Article 142. Grounds for arrest 1. A person suspected in the commission of a crime can be arrested if there are the following grounds present:

a) a person was caught when committing or upon the commission of a crime;
b) eyewitnesses, including victims expressly incriminate a person in the commission of a crime;
c) a clear trace of a committed crime is found on or by a person or on his/her clothes;
d) a person absconded after the commission of a crime but was identified by a victim afterwards;
e) a person is issued with a “wanted” act.

2. If there are other data, which substantiate holding a person suspect in the commission of a crime, this person can only be arrested in case he tried to abscond, he/she has no permanent residence or his/her identity is unknown.

3. A person set free after arrest cannot be repeatedly arrested on the account of the same doubt.

commission of a crime by a person” was dubious and it was unclear whether the legislator referred to a crime already committed or the possibility of the commission of a crime in future as well, as the first part of the same Article had an express answer to this question. The Constitutional Court also stated that the wording of Article 142 of the CPC, “does not have a permanent residence, or his/her identity is unknown”, could be deemed compatible with the purpose that could motivate arrest of a person. The Constitutional Court also assessed the legal surroundings in which the provision used to be applied. In particular, the Court examined Article 142 of the CPC, “jointly with the Articles related to the 12 hour arrest term, the status of the arrested person and safeguards afforded to him/her. Neither the parties nor the Court examined the constitutionality of arrest in a situation where “an individual was trying to abscond”.

Based on the analysis above, the Second Board of the Constitutional Court adopted Recording Notice #2/1-415 on 29 May 2007. Under this Recording Notice, the Constitutional Court held that Article 142.1.f was not substantively analogous to Article 142.2, which was held unconstitutional in 2003. In particular, unlike the unconstitutional norm, the impugned provision

1) does not allow ambiguous interpretation of the term ‘suspect’. The express wording bearing the reference to “a person suspected in the commission of a crime” excluded any doubts as to who was to be implied therein – a person suspected in the commission of a crime or any person that could commit a crime.

2) does not allow the arrest of a person “on the basis of other data”. It refers in express terms to a ground for arrest which is related to the possibility that a person may escape.

3.) does not provide for any purpose different from Article 141 of the CPC.

The Court also pointed out that following the Constitutional Court’s judgment of 29 January 2003, the Parliament of Georgia effected a few amendments in the Criminal Procedure Code. The legal surroundings in which the impugned provision had to operate have accordingly changed. In particular, the 12 hour term during which an arrested suspect did not enjoy any status and deprived of legal protection was abrogated. At present, immediately upon arrest, one is given the status of a suspect and can avail of legal safeguards afforded by law.

As the impugned provision was not considered to be analogous to the one held unconstitutional, there was, accordingly, no ground to hold the impugned provision unconstitutional under Article 25.4¹ of the Organic Law of Georgia “On the Constitutional Court of Georgia”.

The Board found that the normative regulation through the impugned provision, which defines the possibility of arresting a suspect, was related to the right to liberty guaranteed by Article 18 of the Constitution of Georgia. In the judgment of 29 January 2003, the Constitutional Court did not expressly pronounce itself on the constitutionality of arrest on the assumption that a person “might flee” (“was trying to escape”), which otherwise would have enabled the Second Board of the Constitutional Court to examine the contents of the impugned provision in the present case from the abovementioned perspective. The matter, accordingly, was not adjudicated upon by the

Constitutional Court in 2003, and, in the present case, the Second Board admitted the constitutional claim for the consideration of the merits.

Professor Gamkrelidze expressed an opinion that the terms “was trying to escape” and “may flee” have analogous implication. Accordingly, the impugned provision, provides the same normative regulation as did the provision held unconstitutional. Stemming from the abovementioned view of Prof. Gamkrelidze, the Constitutional Court should have held the impugned provision unconstitutional right at the administrative hearing.

In the Recording Notice, the Court engaged in discussion not about the substantive similarity of the terms “a person was trying to abscond” and “a person can flee”, but the normative regulation of the aforementioned terms. The wording “a person was trying to abscond” existed within the following normative regulation:

“If there are other data which substantiate holding a person suspect in the commission of a crime, this person can only be arrested where he/she tried to abscond, he/she has no permanent residence or his/her identity is unknown”.

As mentioned above, the important factor in this regard is to understand which person is implied therein. The Constitutional Court explained in the judgment of 2003 that it was impossible to make conclusions from the existing wording. The wording “a person may flee” exists in a totally different normative setting: “Arrest of a person suspected in the commission of a crime can be effected if there is any of the following grounds:...f) a person may flee.” It is evident that the legislator implies the possibility of arrest of a person suspected in the commission of a crime. Obviously, the above two normative regulations differ from each other and this was the issue to be examined by the Constitutional Court. Even if the Legislator had not introduced a new wording “a person may abscond” and had left the previous formulation “a person was trying to escape” intact, the unconstitutional provision and the impugned norm would still have been different in terms of substance as they would have operated in different normative settings.

It is evident from the abovementioned, how meticulously the Constitutional Court had dealt with the issue in its Recording Notice. The opinion that the Constitutional Court failed to address the issue appropriately in its judgment is likewise unsubstantiated. The Constitutional Court in its judgment, which is an outcome of the consideration of the merits, would not repeatedly discuss those issues relevant for an administrative hearing and already resolved in the relevant document (Recording Notice).

As for the regulation afforded by the impugned provision, the claimant, the public defender, believes that there must be certain amount of doubt during arrest. This will enable the Court to decide on the application of a preventive measure when an arrested person is brought before it. The standard of a reasonable doubt would not allow law-enforcement officers to act arbitrarily. The claimant believes that the impugned provision being the ground for arrest itself gives rise to a reasonable doubt as to the commission of the crime by that particular person. In the Public Defender’s view, the grounds for arrest as provided by Article 142.1 of the CPC generate a reasonable

doubt, whereas the ground for arrest provided in the impugned provision does not give rise to a reasonable doubt when it comes to a person concerned, let alone an objective observer. The condition that Article 142.1 of the CPC defines the ground for arrest of “a person suspected in the commission of a crime”, and not of any person, is argued to be related to the legislator’s intention to separate “a suspect” from “an accused person”. The Public Defender observes that despite the aforementioned wording, an officer competent to arrest is not supposed to have a reasonable doubt as to the involvement of a person in a particular crime. Such an arrest is accordingly unsubstantiated and unconstitutional.

The Constitutional Court of Georgia requested statistical data of the number of appeals on arrests based on the impugned provision and the decisions taken with regard to those appeals from the Supreme Court of Georgia. The latter was interesting in terms of the interpretation of the impugned provisions by the courts of the general jurisdiction. The Constitutional Court was particularly interested in whether the impugned provision was understood in practice to allow arrest based solely on the possibility of absconding without any reference to a reasonable doubt. According to the statistical data received from the Supreme Court, the courts of general jurisdiction have never ruled on unsubstantiated arrest. Moreover, the issue has never been discussed before the courts of general jurisdiction as not a single case of arrest effected on the basis of the impugned provision has ever been appealed against. The Public Defender observed before the Court that the appeal procedures are so complex and inefficient that it is not worth making use of them despite the fact that they allow compensation for illegal and unsubstantiated arrest.

In its judgment of 6 April 2009, the Constitutional Court examined the notion of “liberty” in Article 18 of the Constitution of Georgia in a narrower sense than it can imply if interpreted literally. In the Court’s opinion, the right guaranteed by Article 18 is not related, e.g., to the freedoms of speech, religion, or information protected by other articles of the Constitution. The Court observed that the liberty in this context “implies one’s physical liberty, one’s freedom to move freely as one wishes, to be or not to be at some place. An individual’s liberty is his/her freedom of movement in a narrower sense. However, the degree and seriousness of interferences within these two freedoms are different. The limitation of the right to liberty is more grievous and the Constitution accordingly provides for special safeguards against it.” The Court pointed out that it is the authorities’ obligation to make sure that the interference with the right is the last resort only.

While the Constitutional Court examined the right within the higher degree of protection, the Court did not consider it to be an absolute right. The Court stated that despite the rigid legal requirements of the Constitution, it is still possible to interfere with the right. Also constitutional standards are stricter as interference with the right gets more intensified. The most intense form of interference with the right is the deprivation of liberty and it sets major obstacles and sometimes excludes the possibility of exercise of other constitutional rights altogether.

Given the fact that the impugned provision determines the ground for arrest, i.e. the deprivation of liberty, the Constitutional Court examined it in terms of the first sentence of Article 18.3, both formally and substantively.

The legislative reservation made through Article 18 of the Constitution of Georgia that a person can only be arrested in the cases defined by law implies that the regulation of the aforementioned issue is the sole prerogative of the legislature. Regulation through the act of another branch of power would formally amount to the breach of the Constitution. The impugned provision is a norm of the CPC which under the Law of Georgia “On Normative Acts” is a legislative act and can accordingly be deemed “a case defined by law”. Accordingly, the impugned provision is in full compliance with the formal wording of Article 18.3 of the Constitution.

If the Constitutional Court had engaged in the formal legal evaluation only during the examination of the interference with the right to liberty, it would have left the legislator with much room for arbitrary action. The legislator may define statutory interferences with the said right which would amount in unjustified and disproportional interference with the right and would render it into a fiction. The Court noted that “While arrest is a less grievous interference with liberty than, e.g., the preventive measure – detention provided by the CPC –there must be all the same a solid constitutional threshold in place that marks the permissible boundary for interference with a basic right”. It should be noted, however, that this threshold is lower than in the cases of far more grievous interferences with the basic right. In the Court’s opinion, stemming from the principle of proportionality, any interference with a right must pursue a legitimate aim and be a proportional means for attaining this aim.

In the given case, the legitimate aim of the interference with the right was the administration of justice. Accordingly, the Court faced a task to establish whether the regulation through the impugned provision was a means of fulfilment of the aforementioned objective; did it place unnecessary burden on a person limited in his/her rights and could the impugned provision leave room for arbitrariness on the part of the law enforcement agencies?

The Constitutional Court did not examine the impugned provision in isolation, but jointly with other related provisions in order to find out whether it permitted the arrest of a person suspected in the commission of a crime or any person. In order to establish who can be considered “a suspect” whose arrest can be effected, the Court referred to Articles 12, 44.23¹, 141 etc. On the basis of overall analysis of the said Articles, the Court found that “a suspect” who can be arrested is a person 1) “who can be reasonably suspected that he/or she committed an offence criminalised by the Criminal Code of Georgia”, but this doubt is not sufficient for laying charges; 2) suspected crime is punishable by deprivation of liberty; 3) there is at least one aim sought by arrest (the person continues criminal activities, destroys evidence *etc.*); and 4) in light of the aforementioned there is a ground for arrest stipulated by the Articles of the CPC, including the impugned provision.

In the Court’s view, arrest is a law-enforcement official’s right and not an obligation to arrest any person who raises certain suspicions. To be legal and substantiated for an arrest, there must be the following preconditions: a reasonable doubt in the commission of a crime, ground and purpose for arrest. Until present, Article 72 of the CPC allows holding a person as a suspect through a prosecutor’s resolution without the deprivation of liberty. The Court held accordingly that forming of a doubt is not independently linked with arrest and the status of a suspect.

In the judgment, the Constitutional Court separated those circumstances which can give rise to a reasonable doubt from those on which arrest can be grounded. In the Court's opinion, Article 18 of the Constitution requires that the grounds for arrest must be exhaustively stipulated in law. However, the circumstances that give rise to a reasonable doubt are not and can never be exhaustively enumerated in the CPC. The Court does not agree that a reasonable ground can arise in some particular circumstances that may not take place in any other circumstances. The Court observed that "a doubt is not a notion which can be exhaustively defined by the legislator and its formation depends on a number of subjective and objective circumstances in each particular case". The legislator is unable to draft all possible versions and specific scenarios of particular cases in advance. The key point made by the legislator to those competent to apply the law is that they must act in compliance with the Constitution.

The Court elaborated its reasoning by relying on international practice concerning a reasonable doubt. The European Court of Human Rights stated in the case of *Murray v. the United Kingdom* that at the very least, the honesty and *bona fides* of a suspicion constitute indispensable elements of its reasonableness. However, there must be sufficient facts or information providing a plausible and objective basis for a suspicion that the person concerned may have committed the offence.² In the case of *Fox, Campbell and Hartley v. the United Kingdom*, the Court held that "that having a 'reasonable suspicion' presupposes the existence of facts or information, which would satisfy an objective observer that the person concerned may have committed the offence. That may be regarded as 'reasonable' will however depend upon all the circumstances."³ The same approach was developed by the Supreme Court of the United States in the case of *Brinegar*: "Probable cause exists where the facts and circumstances within the officers' knowledge, and of which they have reasonably trustworthy information, are sufficient in themselves to warrant a belief by a man of reasonable caution that a crime is being committed."⁴

The Court did not agree with the claimant that the ground for arrest should itself necessarily give birth to a reasonable doubt. In the Court's view, some grounds of arrest may independently give rise to a reasonable doubt, but it does not exclude the possibility for a reasonable doubt to be originated on the basis of other data as well which precede the ground of arrest. In this reasoning, the Court relied on the observation made by the Constitutional Court in its judgment of 29 January 2003 that "other data may lie in the basis of a doubt but not arrest of a person"

The Criminal Procedure Code of Georgia established a higher standard for arrest than a reasonable doubt concerning commission of a crime by a person. The CPC introduced the grounds for arrest, which, taken jointly and cumulatively with a reasonable doubt, create the reality, when a person can be arrested. The Court held that "fleeing cannot be understood as the change in a person's whereabouts alone. Absconding, as the claimant agrees as well, implies a future risk that the person concerned will flee from the investigation and the court. Absconding presupposes a risk that a

² *Murray v. the United Kingdom*, para. 61.

³ *Fox, Campbell and Hartley*, para. 32.

⁴ U.S. Supreme Court. *Brinegar v. United States*, 338 U.S. 160 (1949), Pp. 338 U.S. 175-176.

person concerned will continue his/her criminal activity, will commit another crime at least with the view of ensuring not to be handed over to law-enforcement bodies, and, if possible, will destroy evidence. Eventually, absconding will make it extremely difficult, if not impossible, to administer justice with the person concerned.”

Stemming from all the abovementioned, the Court was satisfied that the impugned provision was in compliance with the clarity and proportionality principles; that the limitation it introduced was indispensable to attain a legitimate aim i.e. administration of justice and did not burden a person unnecessarily. Accordingly, the Second Board of the Constitutional Court did not uphold the constitutional claim and declared the impugned Article 142.1.f of the CPC as constitutional.

Prof. Gamkrelidze expressed critical opinions concerning the abovementioned decision of the Constitutional Court. He believes that law should exhaustively provide for all the grounds giving rise to “a reasonable doubt”. If the legislator fails to do so, then law should be completed in the future. Otherwise, members of law-enforcement bodies can act arbitrarily when effecting arrests. In the opinion of prof. Gamkrelidze, the ground for arrest introduced by the impugned provision that “a person may flee” should independently raise a doubt on the commission of the crime by that person as in case of another ground, e.g., the incrimination of a person by a victim or an eyewitness. According to prof. Gamkrelidze, where the ground for arrest does not give rise to a reasonable doubt, the arrest effected on such ground is unconstitutional.

We find it difficult to agree with the above arguments of prof. Gamkrelidze. The factors giving rise to a reasonable doubt are not those legal circumstances which can be exhaustively enumerated in law. This or another circumstance can validly influence the formation of a reasonable doubt in one case and be altogether inapplicable in another instance. As there is not much jurisprudence of the Courts of Georgia on the interpretation of the standard of a reasonable doubt during arrest, here is an excerpt from the decision of the US Supreme Court on the case of *Brinegar v. the US*. The Court stated:

“In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved. The substance of all the definitions” of probable cause “is a reasonable ground for belief of guilt.... And this “means less than evidence which would justify condemnation” or conviction... it has come to mean more than bare suspicion: probable cause exists where “the facts and circumstances within their [the officers’] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that” an offense has been or is being committed... These long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community’s protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions

of probability. The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests.”⁵

The same approach has been developed by the Constitutional Court of Georgia in its jurisprudence. “Other data can lie in the ground for a suspicion”- The Constitutional Court proved with this approach that the data which can lie in the ground of a doubt may not be exhaustive. This approach was reiterated by the Second Board of the Constitutional Court in its judgment of 6 April 2009.

Here is an illustrative example: A murder is committed and the letter Y is imprinted on the victim’s forehead. An investigator finds out that X lives in the same flat where the victim was found. X has been recently released from a prison where he served sentence for murdering a man and imprinting Y on the victim’s forehead. Moreover, the investigator learns that X had had a fight with the victim and threatened to kill him. It is possible in such a case that the investigator has a reasonable doubt that the murder has been committed by X. According to the considerations of Prof. Gamkrelidze, the investigator cannot have such a reasonable doubt in the above case as the circumstances, which lie in the ground of the doubt (X was sentenced for a similar crime previously, he was in a conflict with the victim and threatened to kill him) are not provided for in any grounds for arrest stipulated in Article 142 of the CPC. In the above case, the investigator can naturally form a reasonable doubt that the murder has been committed by X. Any neutral observer would have the same doubt, although the CPC does not describe such a case and it is impossible to regulate particular situations of the kind in the Code.

Article 18.3 of the Constitution of Georgia does not oblige the legislator to define those specific circumstances where a person can be suspected of having committed a crime. The Constitution obliges the legislator to define by law in which cases such a person can be arrested and, accordingly, restricted in his/her freedom.

The substantiality of circumstances, which lie in the basis of forming a reasonable doubt, in which a law-enforcement officer is authorised to effect arrest, must be checked in each particular case. This is the competence of a court reviewing the reasonableness and lawfulness of arrest. If a court is satisfied that the circumstances based on which a person was arrested are unreasonable, the deprivation of liberty will be considered unsubstantiated. This excludes any room for an arbitrary action on the part of law-enforcement agencies.

The legislator is extremely restricted by the Constitution in setting the grounds for arrest. The legislator is obliged to define such grounds exhaustively and prove that these grounds are necessary for the fulfilment of the purpose of arrest. By virtue of introduction of the grounds for arrest, the legislator sets up one more obstacle in the way of deprivation of individual liberty and provides for the exhaustive list of cases where it is absolutely necessary to effect arrest.

It is evident from the above scenario that the investigator could form a reasonable doubt as to X’s involvement in the crime but he/she cannot effect arrest unless there is a relevant ground

⁵ U.S. Supreme Court. *Brinegar v. United States*, 338 U.S. 160 (1949), Page 338 U. S. 175-176.

under Article 142 of the CPC. The impugned provision sets the wording “a person may flee” as such a ground. It is clear that if a suspect flees, the aim of arrest (averting destroying of evidence, commission of a new crime *etc.*) cannot be attained. A court of general jurisdiction is authorised to review the actual risk that one would abscond and those competent to order arrest are obliged to prove the existence of such a risk. Otherwise, a court will consider such an arrest as unsubstantiated. Thus, once again, the impugned provision leaves no room for arbitrary action on the part of law-enforcement bodies. The Constitutional Court evaluates the normative contents of the provision and the degree of arbitrariness it allows.

It is evident from the above discussion that the legislator does not leave any room for arbitrariness, either through the impugned provision or the Criminal Procedure Code in general. The message sent by the legislator to law-enforcement bodies is constitutional and the Constitutional Court is not in a position to presume that the abovementioned will be understood differently by those authorised to effect arrest or the Courts of General Jurisdiction.

I find it difficult to agree with the opinion that the grounds for arrest must necessarily form a “reasonable doubt” independently and, apart from the impugned provision, all other grounds provided for in Article 142 of the CPC necessarily, and by all means, give rise to such a doubt.

It was not the legislator’s aim to determine the standards of forming a reasonable doubt and particular cases thereof. As mentioned above, such a determination is unfeasible. The circumstances that give rise to a reasonable doubt may precede the emergence of the grounds for arrest or the ground for arrest itself could be one of such circumstances or both of these can be the case at the same time.

It should be decided, in each particular case, to what extent a self-standing ground for arrest can be the ground for forming a reasonable doubt, e.g., a ground such as the incrimination of a person by a victim. From the first view, the aforementioned by all means gives rise to a reasonable doubt on the commission of a crime by a particular person. It may not always be the case. E.g. a victim incriminates X in the commission of a crime. An investigator makes an inquest and finds out that X was not in the country at the time of the commission of the crime; or a robbery has been committed and the victim incriminates someone without limbs. In such cases, the investigator formally has the ground for arrest (incrimination by the victim) but having juxtaposed the circumstances, he/she cannot have a reasonable ground. If the officer proceeds with arrest in such a case, it will be arbitrary despite the fact that there is a legal ground. In the other scenario and under different circumstances, incrimination by a victim may raise a reasonable doubt. The same can be said with respect to the ground for arrest provided by the impugned provision. In a certain situation, the precondition provided for by the impugned provision, in combination with other circumstances or independently, may give rise to a reasonable doubt. The grounds for arrest, either provided in the impugned provision or in other provisions, cannot be expected to form a reasonable doubt in any case as those grounds are not aimed at defining those particular situations where such suspicions arise.

Several aspects can be highlighted in the Constitutional Court’s judgment that are significant in terms of the development of constitutional justice in Georgia: the interpretation of the right to

liberty as guaranteed by Article 18 of the Constitution of Georgia; the determination of “reasonable doubt” standards to be applied during an arrest, which is of utmost theoretical and practical importance; the shaping of Constitutional Court’s approach as to when a recent provision can be considered substantively analogous to the one previously held unconstitutional. On one hand ,the Court’s judgment enables efficient fight with criminality to go on unhindered and, on the other hand, ensures the respect for human rights and protects against arbitrary and unsubstantiated arrest of a person.

David Sulakvelidze

RETROACTIVE APPLICATION OF CRIMINAL LAW – COMMENTARY ON THE JUDGMENT OF THE CONSTITUTIONAL COURT OF GEORGIA

David Sulakvelidze

Doctor of Law

ABSTRACT

This article is a comment on the judgment delivered by the First Board of the Constitutional Court of Georgia on 13 May 2009 concerning the constitutionality of Article 3.1 of the Criminal Code of Georgia. The author presents his views on the constitutional aspects of the application of the said provision. Also, the article discusses the interpretation of the scope and contents of Article 42.5 of the Constitution, attempts to determine the interaction between the respective constitutional and criminal law provisions, analyse aspects related to the retroactive application of criminal law and address important issues from theoretical and practical perspectives. The Article is intended for specialists as well as broader groups of readers.

Retroactive application of criminal law is directly linked to the protective function of law. It reminds us that guarantee of physical security of a person is an important function of criminal law. Criminal law serves as a safeguard against arbitrary retribution/punishment of criminals. The protective function, derived from the fundamental principle of criminal law – *nullum crimen sine lege* (no punishment without law), is usually set forth in respective provisions of national legal orders. In case of Georgia, this principle is enshrined in Article 2.1 of the Criminal Code of Georgia which reads as follows: “[a]n act shall be defined as criminal and punishable by the criminal law being in force at the time of its commission”.

The essence and rationale of the provision mentioned above are clear and self-explanatory enough not to necessitate further comments. It is worth noting that the fundamental nature of the principle enunciated is acknowledged and confirmed by Article 42.5 of the Constitution of Georgia, under which:

“[n]o one shall be held responsible on account of an action, which did not constitute a criminal offence at the time it was committed.”

Likewise, Article 7.1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, states that

“[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed.”

Similar provisions are set out in the Universal Declaration of Human Rights (Article 11.2) and the International Covenant on Civil and Political Rights (Article 15.1).

Apart from the norms governing the retroactive application of criminal law in the actual Criminal Code of Georgia (Article 3.1-2), there were similar provisions in the previous Criminal Code of Georgia (as of 30 December 1960) as well. Article 7.2-3 of the Criminal Code of 1960 was formulated in the following way:

“2. [t]he law abrogating or mitigating a penalty shall have a retroactive effect, *i.e.* shall apply to an act which was committed before the law’s enactment.

3. A law which introduces or aggravates a penalty shall have no retroactive effect”.

Article 3.1 of the Criminal Code of Georgia (as of 3 July 2007) stipulates:

“Criminal law abrogating criminality of an act or mitigating a penalty shall have a retroactive effect. Criminal law introducing criminality of an act or aggravating a penalty shall have no retroactive effect.”

It is worth mentioning that the wording of Article 3.1 of the actual Criminal Code of Georgia underwent significant changes from its enactment on 22 July 1999 until its enforcement on 1 June 2000. The provision was initially formulated in the following manner:

“A criminal law which abrogates criminality of an act, mitigates a penalty or improves the situation of an offender in any other way shall be applied retroactively. No criminal law, which introduces criminality of an act, aggravates a penalty or deteriorates the situation of an offender in any other way, shall be applied retroactively.”

The abovementioned provision was amended on 5 May 2000, again on 30 May 2000¹, and acquired the present wording which omits the reference to any improvement and deterioration of the situation of an offender by a new criminal law.

On 30 May 2007, 13 February 2008 and 24 July 2008, the Public Defender and two citizens of Georgia lodged constitutional claims with the Constitutional Court of Georgia requesting the declaration of Article 3.1 of the Criminal Code of Georgia as unconstitutional. These constitutional

¹ See the Law of Georgia of 5 May 2000 “On the Amendment of the Criminal Code of Georgia”, *Sakartvelos Sakanonmdablo Matsne*, #41(48), 1999, section 209; the Law of Georgia of 30 May 2000 “On the Amendment of Certain Legislative Acts of Georgia”, *Sakartvelos Sakanonmdablo Matsne*, #41(48), 1999, Section. 209.

claims were based on the following considerations: the impugned provision gives a retroactive effect to new criminal laws which deteriorate the legal status of those having committed certain criminal acts before the enforcement of those laws. The aggravation was manifested in the extension of statutory limitations and intensification of the requirements to be met by convicts in order to be released on probation. In the claimants' view, the impugned provision fails to comply with Article 42.5 of the Constitution of Georgia prohibiting the retroactive application of a criminal law unless it mitigates or abrogates criminal responsibility. The claimants argued that the application of the new statutory limitations and the imposition of penalties on them fail to comply with Article 42.5 of the Constitution of Georgia. According to the claimants, the constitutional provision prohibits, in absolute terms, the retroactive application of an aggravating new law when it is related to criminal responsibility. The claimants maintained that the concept of responsibility should be construed broadly in this instance and cover not only the criminalisation of an act and aggravating a penalty but also any situation related to the manifestation of responsibility and its consequences in any other form. In a different case, almost similar observations were made by claimants who were subjected to the application of a new law by the Court of Appeals with regard to the new requirements set for a release on probation. In the latter case, the actual deprivation of liberty was pronounced and the convicts failed to be eligible for a release on probation based on the new provision.

During the consideration of the merits, the applicants' representatives adduced arguments before the Constitutional Court of Georgia to consolidate their respective claims: the representatives of the Public Defender of Georgia claim that in the given case, Article 42.5 is aimed at the respective provisions of substantive criminal law and not at the criminal procedure norms. Criminal responsibility and its scopes are defined by substantive law only and not by procedure law. In the representatives' opinion, "responsibility" referred to in the said article of the Constitution implies not only the criminalisation of an act and the determination of a sanction, but also other concepts related to the exoneration of a person from responsibility. The constitutional provision, therefore, has a broader meaning than the impugned provision which only confines the retroactive application to a crime and a penalty.

The representatives of the Public Defender further maintained that Article 42.5 is concerned not only with the prohibition of retroactive application of those laws criminalising an act or increasing a penalty, but also of those deteriorating an offender's situation in some other way. Precisely, this latter issue is left open by the impugned provision of the Criminal Code. The representatives argued that by virtue of the amendment of the initial wording of the provision in question and by deleting the reference to "otherwise deteriorating the situation", the legislature implied that any law, unless criminalising an act or aggravating a penalty, can be applied retroactively and hence the impugned provision runs counter to the spirit of Article 42.5 of the Constitution. Based on the aforementioned reasoning, the claimants' representatives cited statutory limitations within the sphere of application of the constitutional provision. They suggested that the Criminal Code should offer the corresponding interpretation not allowing of holding person responsible when statutory limitations were extended before the expiry of previous terms under the obsolete legislation.

Furthermore, the representatives of claimant E. Sabauri observed that the actual wording of the

impugned provision allowed the Court of Appeal to extend it to the provisions of the Second Part of the Criminal Code only. Thus, due to application of the new wording of Article 63 of the Criminal Code of Georgia, the defendant's situation worsened in terms of the requirements for a release on probation. The representatives argued that the above-mentioned approach failed to meet the standards of Article 42.5 of the Constitution as release on probation also falls within the notion of responsibility covered by the constitutional provision. Accordingly, the comprehensive safeguard guaranteed by the Constitution against the retroactive application of aggravated responsibility is substantially limited by the Criminal Code. The impugned norm, therefore, is defective and incompatible with the Constitution within the teleological meaning of the Basic Law and its case law produced by the courts of general jurisdiction.

The representatives of the Parliament of Georgia (respondent) objected to the claim of the constitutional claimants with respect to the declaration of unconstitutionality of the impugned provision. The respondent's representatives referred to Article 71 of the Criminal Code of Georgia governing the exoneration from criminal responsibility on account of the expiry of statutory limitations. Such exoneration cannot take place where the statutory limitations are extended before the expiry of the previous terms. Hence, the discussion about the retroactive application of a new law introducing new terms becomes moot. A new law may extend the statutory limitations for a particular offence after the expiry of previous terms. The application of new statutory limitations in this case would amount to allowing an aggravating law to have a retroactive effect and to the violation of the Constitution and the impugned provision. The respondent's representative observed that no such application was established in the claimant's case.

The respondent's representatives further observed that the Constitutional Court could only review an actual impugned provision and not what was omitted therein. Stemming from the above observations, the representatives of the Parliament of Georgia (respondent) concluded that there was no legal ground for the Constitutional Court to pronounce itself on the unconstitutionality of Article 3.1 of the Criminal Code of Georgia.

Prof. Otar Gamkrelidze, acting before the Court as a specialist, submitted that the impugned provision is more limited than the second sentence of Article 42.5 of the Constitution of Georgia. The concept of "responsibility" given in the Constitution is broad and implies the criminality of an act as well as a penalty and other measures altering the legal status of an offender. The wording of the Constitution "mitigates or abrogates responsibility" denotes not only the decriminalisation of an act or mitigation of a penalty, but other instances of invalidation of responsibility as well. It effectively covers statutory limitations and provisions governing probation. Accordingly, the new laws governing the above-mentioned concepts should not be applied retroactively to the detriment of an offender.

Prof. Gamkrelidze further argues that Article 3.1 of the Criminal Code limits the constitutional principle by having referred to "the criminalisation of an act" and "penalty" only. He believes that those latter concepts do not relate to the laws governing either statutory limitations or release on probation. Statutory limitations cannot be linked to the "criminalisation of an act". Similarly, the

concept of probation is not related to a “penalty” as the object of the former is an individual and the latter represents a measure against a criminal act. The impugned provision does not allow any different interpretation. In the specialist’s opinion, judges are encouraged to construe the impugned provision literally in light of the legislative amendment discussed above.

Based on the abovementioned submissions, Prof. Gamkrelidze concluded that Article 3.1 of the Criminal Code fails to comply with Article 42.5 of the Constitution and invited the Court to declare it unconstitutional.

On 13 May 2009, the Constitutional Court passed a judgment on the constitutionality of Article 3.1 of the Criminal Code of Georgia. The arguments of the Board of the Constitutional Court can be summed up in the following way: criminal responsibility, referred to by Article 42.5 of the Constitution, and the notions mentioned in the impugned provision, namely, “criminalisation of an act” and a “penalty” are interdependent. Therefore, where the Constitution guarantees the safeguards against the retroactive application of criminal responsibility, it also implies both criminalisation and penalty in various forms of their existence. Where the Constitution is concerned with exoneration from responsibility, the legislature implies to prohibit responsibility. Therefore, exoneration from responsibility due to the expiry of statutory limitations should be implied within the broader meaning of exoneration from responsibility referred to in Article 42.5 of the Constitution. The wording “abrogates criminality of an act”, given in Article 3.1 of the Criminal Code, should be construed extensively. Moreover, the Constitutional Court concluded that as the impugned provision allows broader interpretation, its literal interpretation (amounting to giving retroactive effect to new laws to the detriment of an offender in instances not mentioned therein) should be deemed legitimate.

It follows from the above discussion that the application of the new extended statutory limitations i.e. the retroactive effect of a new law is permissible only where the terms were extended before the expiry of the earlier limitations. The wording (“introduces criminality of an act”) of the second sentence of the impugned provision, within a broader meaning, should be construed as prohibiting the application of new terms to those offences the previous limitations of which already expired under obsolete legislation.

Moreover, the Board of the Constitutional Court examined the retroactive application of stricter law governing probation and found the following: where probation is sentenced along with an actual penalty, the two concepts are interrelated; probation in such cases guarantees that it can effectively replace the actual imposition of a penalty. The imposition of probation instead of a penalty implies more advantages than a mere mitigation of a penalty. The Legislature thereby enabled a perpetrator to avoid an actual penalty. It is also noteworthy that probation, which falls within the category of indirect penalties, has a subsidiary nature and cannot exist independently from a penalty. Probation, therefore, can be considered as some sort of satellite of a penalty and cannot be assessed separately. Thus, the exclusion of the possibility of probation in relation to a certain crime after it is committed amounts to indirect aggravation of a penalty. While probation is not formally a penalty, it still influences the latter. Where an individual is deprived of the possibility to

enjoy the mitigation of the penalty available at the time of the commission of a crime, this amounts to aggravation of penalty although the sanction itself as a normative reality may remain the same.

It is striking that the judgment of the Constitutional Court entails individual opinions of three judges. *Inter alia*, in her dissenting opinion, Ms. Justice Eremadze points out the failure to establish clear position concerning the genuine implication of the impugned provision as manifested in contradictory approaches taken by the first instance and Appeals Courts when applying Article 3.1 to different concepts of substantive criminal law. According to Ms. Justice Eremadze, it may entail the violation of the right in practice due to the failure to comply with the requirements of foreseeability and clarity of legislation. She also observes that the impugned provision does not allow a unified, sufficiently clear and binding interpretation and fails to impart accurate guidelines to those competent to apply the norm and that leaves room for arbitrary practice. According to one version of methodological interpretation of the impugned provision, Article 3.1 of the Criminal Code of Georgia is in compliance with the Constitution. Hence, the impugned provision does not meet the requirements of accessibility and foreseeability. Ms. Justice Eremadze thus summed up the problems raised by the impugned provision which she considered to be unconstitutional.

With due respect to the judgment delivered by the First Board of the Constitutional Court of Georgia, I shall endeavour to present my position concerning the issue at stake and analyse the considerations discussed above.

When it comes to the review of constitutionality of the norms of substantive law, the accurate contents and scopes of the relevant constitutional provision must be analysed in the first place as well as the standards it sets out for substantive law. This is particularly true where provisions of criminal legislation are examined in Chapter Two of the Constitution of Georgia. The said section of the Basic Law provides for the fundamental catalogue of human rights, the basic constitutional safeguard for all of us.

Article 42.5 of the Constitution of Georgia sets forth a guarantee against the application of a criminal sanction on account of an act which was not criminalised at the time of commission. This guarantee is reinforced by the prohibition of retroactive application of law save the two exceptions. The Constitutional provision is clearly related to the norms of criminal law and serves as a basis for Article 3.1 as well. The scopes of Article 42.5 should be analysed in this context.

The first sentence of the provision does not raise serious concerns. The wording - “[n]o one shall be held responsible on account of an action, which did not constitute a criminal offence at the time it was committed” should be construed literally without any further restrictive interpretation. Accordingly, the principle of *nullum crimen sine lege* is preserved in case of any legislative amendment. The question remains if the second sentence of Article 42.5 should be interpreted literally too.

This enquiry, in my opinion, is to be answered in the negative. Otherwise, it may cause unjustifiable ramifications. There can be new norms adopted in criminal law field which at some point are bound to be applied to the acts committed before their enactment although they are neither abrogating nor mitigating responsibility. It certainly does not fall within the category of retroactive application.

Article 62.2 of the Criminal Code of Georgia stipulates that where the non-custodial sentences are changed, replaced and summed up, a sentence may be calculated by days. Article 43.2 of the previous Criminal Code of Georgia (as of 30 December 1960) governing similar issues did not provide for the rule of calculating days while replacing a custodial sentence with a non-custodial one. Clearly, the said provision of the actual Criminal Code, which neither abrogates responsibility nor mitigates, should apply to individuals who committed a crime before the enforcement of the new Code, *i.e.* 1 June 2000. If interpreted literally, such “retroactivity” cannot be deemed in compliance with Article 42.5 of the Constitution of Georgia. This position is consolidated by the fact that new norms of the Code of Criminal Procedure always apply retroactively whether they improve or deteriorate procedural status of a person.²

Accordingly, it is logical to conclude that Article 42.5 of the Constitution of Georgia is only related to the criminal norms which determine responsibility of providing sanctions, exonerating from sanctions or mitigating/aggravating punishment. The constitutional provision, therefore, should be interpreted restrictively. The provision applies to the norms of criminal law lying in the basis of criminal responsibility, its degree and scopes, exoneration from criminal sanctions, their aggravation and mitigation.

Likewise, Articles 2.1 and 3.1 of the Criminal Code of Georgia apply to the various concepts of criminal law and must be in accord with Article 42.5 of the Constitution of Georgia.

When analysing the guarantees afforded by Article 42.5 of the Constitution of Georgia, the following considerations should be borne in mind: the Article is aimed at establishing a minimal standard in order to protect an offender from excessive and ungrounded punishment. The standard is binding on State authorities and entitles an offender to legitimate expectations.

Article 42.5 of the Constitution guarantees two safeguards which are minimal binding standards in criminal law: the impermissibility of imposition of punishment for an act not criminalised at the time when it was committed and the safeguard against imposition of punishment stricter than provided by law in force when the crime was committed. These safeguards may only be related to an actual penalty clearly defined by law, its degree and scopes, and other benefits and privileges afforded by law for an offender at the time of the commission of a crime. These benefits and privileges are inevitable and by no means potential rights. The exercise of potential rights is dependent on various factors that cannot be assured to take place in advance. Thus, potential rights can or can not originate and accordingly can or can not be exercised in the future.” Moreover, if an offender already acquired an actual right on legal benefit, which can only be exercised in future, legislative amendment adopted to his/her detriment cannot have an adverse retroactive effect on his/her situation and the offender will retain the privilege concerned.

Here is an illustrative example. Article 79 of the Criminal Code of Georgia sets forth terms for annulment of criminal record in terms of various crimes. Criminal record as a legal consequence is related to penalising of an act. When the term expires in relation to a particular convict, he/she

² See, Article 3 of the Code of Criminal Procedure of Georgia.

is entitled to be deemed as having no criminal record. If legislation is amended and the terms are extended with regard to that particular crime, the new terms cannot apply to an individual whose record is already annulled in accordance with previous terms. However, it is also possible that the terms for annulment of criminal record are extended through legislative amendment for certain category of crimes before the term is expired with regard to an offender. In the latter case, new terms will apply as an offender cannot have a legitimate expectation for the preservation of requirements conditioning the acquisition of a potential right. This would amount to an unjustified and excessive burden on the authorities, and will never be compatible with Article 42.5. It is also noteworthy that if State authorities apply more self-constraining initiatives on their own than established by the minimal constitutional standard, and realise such an initiative through legislative amendment or broader interpretation of relevant norms in legal practice, it will be the State's discretion. Any such self-constraining endeavours which reflect criminal law policy would be in absolute compliance with the general spirit of the Constitution aimed at liberalising legal system.

Having discussed protective function of Article 42.5 of the Constitution of Georgia and the scopes of application, it is essential to analyse if article 3.1 of the Criminal Code of Georgia is in compliance with the former and if it hampers the exercise of the said protective function. As mentioned earlier, the first safeguard is against punishing an offender for an act not penalised at the time of its commission. This mandatory requirement is secured by Article 2.1 and second sentence of Article 3.1 of Criminal Code which stipulates that criminal law that criminalises an act cannot be applied retroactively. This means, an individual is protected against criminal repression under any circumstances by both the constitutional and criminal law provisions. The discussion should now turn to the enquiry of whether the impugned provision ensures the right guaranteed by the constitutional provision. The constitutional guarantee is reiterated in the second sentence of Article 3.1 of the Criminal Code stipulating that no law aggravating a penalty must have a retroactive effect. The application of any criminal repression that is stricter and not provided for by actual legislation is thereby excluded in case of legislative amendments aggravating a penalty. An individual can only have a legitimate expectation for immunity against repression as described above but the immunity cannot be as broad and comprehensive as imagined by the claimants' representatives, the specialist and the authors of separate opinions. The notion of "responsibility" referred to in Article 42.5 of the Constitution is interpreted more broadly in these observations than stemming from its genuine implication. And its genuine implication is the protective function *i.e.* to cover legal responsibility in all branches of law, its grounds, degree and scopes, and the concepts of criminal law such as "criminality of an act", "penalisation of an act" and a "penalty". In the context of criminal law, the constitutional term "responsibility" certainly covers other issues as well than merely specify penalties and their degrees. These additional issues can be related *inter alia* to exoneration from criminal responsibility or from a particular penalty. The omission of these concepts in Article 3.1 of the Criminal Code does not mean that the scopes of Article 42.5 of the Constitution are narrowed down in the realm of criminal law.

The contents of Article 3.1 of the Criminal Code cannot be examined without reference to Article 2.1. They must be read and analysed in conjunction. The term "penalisation of an act" in Article 2 covers criminal responsibility and all other issues related to a penalty which can be linked with

Article 42.5 of the Constitution and Article 3.1 of the Criminal Code. However, it must be borne in mind to invoke the respective provisions in appropriate context.

The following examples can further clarify the position discussed above. Article 42.6 of the Criminal Code (as of 19 June 2001) stated that a fine as a complementary penalty could only be levied where it was provided for by a relevant Article of the Second Part of the Criminal Code. Under the actual wording of Article 42, a fine as a complementary penalty can be levied where it is not provided for by a relevant Article of the Second Part of the Criminal Code. There is no doubt that the second wording cannot apply to those having committed a crime before the enforcement of the amendment. This would directly amount to the violation of Article 42.5 and the impugned provision as well. Another example is: Article 72 of the Criminal Code determines the preconditions for early release. A court of general jurisdiction must be satisfied that it is not necessary to serve the rest of the sentence. Moreover, a convict must have served a statutory portion of the sentence which is not less than half in case of less serious crimes. Let us assume that this term is extended through legislative amendment to three fifths of sentence. This would clearly be deterioration of situation. Should the new provision be applied retrospectively in such a case? The answer is rather simple, - it depends. If a convict had already enjoyed early release on parole, no retroactivity is allowed. However, in those cases, where a convict is still serving a sentence before the enforcement of a new law, retroactivity is allowed as there is no acquisition yet of the unconditional right to early release on parole. The right in the latter case is secured after various requirements are met and after the court is satisfied that the objectives of a punishment are attained with regard to the convict.

A similar approach should be taken towards retroactivity where the application of extended statutory limitation under new legislation is at stake, or where stricter and more restrictive preconditions are set for probation than previously. If statutory limitation under previous legislation has already expired and an offender thereby actually acquired the right to be exonerated from responsibility, also if the probation was already served based on preferential conditions under previous legislation, the application of new legislation in such cases must be impermissible. On the contrary, where statutory limitation is extended through a new law and preconditions for the annulment of probation are made stricter before the expiry of more liberal terms under previous legislation or there was no probation served on the basis of more preferential older provisions, new terms and requirements will apply. This cannot be deemed to be genuine retroactive effect. There is no safeguard either in Article 42.5 of the Constitution or in Article 3.1 of the Criminal Code. The two norms, as mentioned above, only provide for minimal mandatory standard below which law-enforcement cannot go. Only such standard is firmly guaranteed in any case of legislative changes and it implies that- a) no one can be punished for an action not criminalised at the time when it was committed; b) no one can be punished more strictly than it was determined at the time of the commission of a respective crime.

The analysis above gives rise to the following question: Does the above position contradict Article 2.1 of the Criminal Code under which criminality of an act and its punishment must be determined by law in force at the time the act was committed? If the said provision is interpreted literally, indeed certain contradiction will arise. However, this would be due to incorrect understanding of

the provision. Legislative changes to the benefit of an offender would not apply retrospectively unless they were manifested directly in the abrogation of criminality or mitigating a penalty. Hence, despite the absence of any reference to this effect in Article 3.1, advantageous amendment shall apply retroactively. It is an established judicial practice and it has never caused misunderstanding and controversies. Naturally, an individual cannot be denied the enjoyment of benefits afforded in good faith by the State as an indispensable and inevitable right.

The State is restrained by the Constitution and current legislation in terms of limitations of individual rights and freedoms. Restriction cannot be unjustified and excessive. The Constitution provides for a lower threshold beyond which the State cannot act to the detriment of an individual. Article 42.5 of the Constitution and Article 3.1 of the Criminal Code provide for such a threshold in the realm of substantive criminal life. Once the rationale of these articles and their interrelation are duly analysed, they cannot be deemed contradictory. Hence, there can be no legal ground to declare the impugned provision unconstitutional.

During the consideration of the merits of the case before the Constitutional Court, some participants raised the issue of the initial wording of Article 3.1 of the Criminal Code. It was argued that the wording gives retroactive effect to laws that otherwise improve an offender's situation and prohibit retroactive application of laws that deteriorate the situation other than criminalisation of an act and aggravate a penalty. The preservation of such wording and its enforcement would allegedly prevent the problems in judicial practice and unconstitutional decisions.

I distance myself from the above considerations as they contradict the fact that the initial wording of the impugned provision has never been applied. The reference to other improvement and deterioration of offender's situation was deleted from the original wording of the impugned provision before the enforcement of the then new Criminal Code of Georgia *i.e.* before 1 June 2000. Moreover, even in case of the application of the initial wording of Article 3.1 of the Criminal Code, the courts of general jurisdiction would have delivered similar decisions, which pressed the claimants to appeal to the Constitutional Court.

In the light of the reasons offered above, I find myself unable to agree with the positions taken by the members of the Constitutional Court in their respective opinions about the unconstitutionality of the impugned provision. I also disagree with the viewpoint that in case of the norm's proper interpretation by the courts of general jurisdiction, no decision would be taken that casts doubt on the irreversibility of retroactive application of aggravating laws which may in turn render criminal prosecution "ever-lasting". In my opinion, there is no legal ground for such assumptions. The observation of Prof. Gamkrelidze is noteworthy in this context. The specialist maintained that the courts of general jurisdiction had interpreted the impugned provision within its genuine meaning. However, according to the specialist, the provision narrows down the scope of application of Article 42.5 thus contradicting it. In light of the above discussion, I oppose the viewpoint expressed by the specialist too.

Some of the considerations given in the motivational part of the judgment rendered by the First Board of the Constitutional Court may be controversial from the point of view of legal doctrine.

They, however, do not substantially influence the right solution found by the Court and, therefore, are not discussed in the actual Article.

CONCLUSION

Finally, I would like to point out one central aspect that the issues at stake do not fall within the constitutionality realm but pertain to criminal law policy. They raise problems in different spheres of social life, marking their effect on legal system, its operation, and ought to be solved at certain stage of development. External factors such as country's commitments to international instruments are also relevant in this context. The Constitution is constrained *vis-à-vis* an individual and so is criminal law policy. The constraints, however, cannot go beyond certain standards being universally recognised and reinforced in international instruments. The State, due to certain considerations, may not afford offenders the benefits going beyond constitutional minimal standards. It does not mean that a court of general jurisdiction is in breach of the Constitution as it is impossible to violate nonexistent rights and obligations.

Criminal law policy granting, through legislative initiative or judicial practice, an individual more benefits and safeguards than relevant constitutional provisions (as in the case of the constraining standards of Article 42.5) is certainly most desirable and welcome. Similar advantages or legal benefits are accordingly reflected in the outcomes of criminal justice administered at national level. The above discussion is based on the assumption that State is a living mechanism with its internal logic and interrelated concepts are to be construed in their entirety.

Ketevan Eremadze

CONSIDERATIONS REGARDING THE JUDGEMENT OF THE CONSTITUTIONAL COURT OF GEORGIA – RESPONSE TO DAVID SULAKVELIDZE’S COMMENTARY

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The substance and the scope of the legal force of the Constitutional Court’s judgment are defined by the Constitution of Georgia (Article 89.2) and legislation regarding the Constitutional Court (Article 25.1 and Article 43.8 of the Organic Law of the Constitutional Court of Georgia).

However, in practice, the judgment is effective only if the result of its enforcement is adequate to the substance of the judgment. From this point of view, for the purpose of the effectiveness of the Constitutional Court’s judgments, it is important to first read them correctly and then to think about their enforcement. Naturally, the resolution of this issue is not dependent solely on the enforcer’s ability and skills. It is dependent on whether the judgment itself allows for correct interpretation. Every judgment is valuable in two respects. Of course, it is essential that the position of the court be correct as the constitutionality of the norm must be resolved correctly. However, it is of no less importance for the grounds underlying the court’s position to be adequately justified. The position given in the judgment and the relevant arguments should be clear and unambiguous and there should be clear indications of the grounds or the reasons as to why the impugned provision is constitutional, or why it is not.

To what extent a judgment satisfies these criteria and is thus effective – and having knowledge of this fact – is important for the court. The court itself should have the ability to see the problems of the enforcement of its judgments so that it may predict and resolve similar issues in the future. If the court will not be ready to receive opinions on its judgments, including critical ones, then it will not be able to develop and contribute to the development of the law.

In general, in every sphere, development is conditioned by the existence of diverse opinions, the exchange of views, and criticism. In terms of the effectiveness of the judgments of the Constitutional

Court, it is important to have discussions about them. Naturally, the best path is to do this is to receive opinions and assessments from lawyers, scholars and members of society at large in order to analyse the problems associated with the enforcement of the judgments.

From this perspective, the comments of Georgian Supreme Court Judge David Sulakvelidze regarding the ruling of the Constitutional Court of Georgia N1/1/428, dated 13 May 2009, are crucial. The article “On Retroactive Application of Criminal Law in Georgia: Constitutionality of a Provision in Force” analyses the various parts of judgment, as well as dissenting opinions and provides the author’s alternative position.

The mentioned judgment of the Constitutional Court concerns the constitutionality of Article 3.1 of the Criminal Code of Georgia. The complexity of the issue is evident from the fact that there are three central dissenting opinions on the judgment – not to mention numerous conflicting opinions of scholars and lawyers on the issue. Sulakvelidze’s additional, alternative position illustrates the problems of the impugned provision.

I confirm my respect towards Sulakvelidze. His article is valuable and interesting. It enables me to again assess and check the correctness of my position. However, in the article below, I think it is necessary to draw attention to various issues regarding the judgment, as well as dissenting opinions criticised by Sulakvelidze. I will try to make some arguments and grounds for my judgment clearer, without claiming that our views agree with those of the author.

1. In the first place, it is necessary to comment on the author’s differentiation of issues of criminal policy and issues of constitutional review of a provision. On the one hand, he mentions that state and criminal policies are bound by the Constitution, but at the same time he asserts, “I would like to point out one central aspect that the issues at stake do not fall within the constitutionality realm, but pertain to criminal policy. They raise problems in different spheres of social life, marking their effect on the legal system, its operation, and ought to be solved at a certain stage of development.”

Thus, according to Sulakvelidze, the normative regulations of issues of criminal policy -including those regarding statutes of limitations and requirements for release on parole and specifically those concerned with change of legislation and operation in time- are not subject to constitutional review. This view questions the decision of the Constitutional Court to review the provision, and if the court had agreed with it, it should have never examined the case on its merits.

I cannot agree with this approach. Decisions of the political branch affecting this or that sphere is a manifestation of a specific policy. The state’s policy in any sphere (in criminal law or in other branches of law, as well as economic, financial, social policy) is a result of range of internal and external, as well as historical and pragmatic considerations. Therefore, specific needs, necessities and motivations lie behind those motivations. If we allow for this to happen, there will be a temptation to take a range of issues out of the protected area of the Constitution for political purposes and necessity, which would logically raise the risk of the adoption of decisions amounting to human rights violations. But this does not mean that the state’s policy in any sphere, including in criminal law, can go beyond the boundaries set by the Constitution. It is unnecessary, even uncomfortable to argue this point. If we allow for

this to happen, there will be a temptation to take a range of issues out of the protected area of the Constitution for political purposes and necessity, which would raise the risk of human rights violations.

Naturally, the presumption of the state's good will and of constitutional action operates, but the very existence of constitutional review is an acknowledgement of the fact that each and every authority can violate the constitution. This institution is created exactly for preventing and resolving unintended errors or the temptation to abuse authority.

As every political decision should be within the boundaries set by the Constitution, similarly every issue, including those involving criminal policy, concerning human rights, is subject to review by the Constitutional Court. Naturally, at the same time, the Court's judgments should not involve it in political process. The Court should not make political judgments and violate the principle of the separation of powers.

“Judicial branch has indeed an important role for realisation of the principle of separation of powers – it, on the one hand, is a means for an individual to protect himself from state's arbitrariness, and on the other hand, is an additional instrument for different branches to ensure that each other's activities are within their respective spheres of competence and in line with the requirements of the Constitution and laws. However, it is evident that achievement of this is impossible if the judiciary will not make use of its powers as well as if it will go beyond them. Therefore it is necessary to draw a clear line for the powers and obligations of judiciary stemming from the principle of separation of powers. The principle of separation of powers necessitates on the one hand, independence of the branches of authority from each other and clear line between their spheres of competence. Within the scope of this requirement, naturally the judiciary cannot substitute legislative or executive branches, resolve issues within their competence, substitute its' own decision with those of political branches in cases of identified illegality. Judicial branch does not have authority to impose its opinion on the state regarding issues of ... policy. Obligation of the judicial branch is to examine constitutionality of decisions of political branches, which is different in principle from resolving the disputed issue on its own. Judiciary examines and acknowledges.... violation of the Constitution, on the grounds of which relevant competent body has obligation to resolve the issue in line with the constitutional requirements. Therefore, the competences of judicial branch are limited to resolving issue of law and not of politics, which itself stems from the principle of separation of powers” (Dissenting Opinion of members of the Constitutional Court of Georgia - Mr. Besarion Zoidze and Ms. Ketevan Eremadze on the Judgment of the First Chamber of the Constitutional Court N1/2/434 27th August, 2009).

It is undisputed that these discussed issues pertain to criminal policy, but it is also unquestioned that they are within the constitutionally protected area. This is not challenged by the author of the article as well. While interpreting Article 42.5 of the Constitution, he sees the issues of statutes of limitations and of the requirements for release on parole within the protected area of the Constitution. Moreover, the article is intended to assess the constitutionality of these issues, arguing for the constitutionality of the provision. In the face of this, he does not make clear exactly

on what he bases his opinion that these issues pertain to criminal policy and are not subject to constitutional review. His article is evidence to the rejection of this opinion.

It should not necessitate proving, that any activity of the state, including those that are politically justified, profitable and effective, should have basis in law and be restrained by the constitution. Regular and unconditional adherence to this requirement results in stability, a sense of fairness in society, and trust towards the state.

2. According to Mr. Sulakvelidze, dissenting opinion that argues for the unconstitutionality of the provision does not have any reasonable grounds. To challenge any opinion it is important to analyze its main arguments and defeat them with counterarguments; however, this is not done in the article. My dissent provides justification of the view that there are reasonable grounds that Article 3.1 of the Criminal Code of Georgia can be interpreted in more than one way, including the one that is inconsistent with the Constitution.

2.1 As the rationale of the court’s opinion regarding the constitutionality of the provision is based on extensive interpretation of the penalty, criminality, and punishable nature of dissent, I emphasised the potential interpretive scope of these words. We analyzed how comprehensively and exhaustively they regulate the substance of criminal responsibility as mentioned in the Constitution and therefore, whether the obligation to interpret them extensively is unambiguous (as it is provided in the judgment).

With this purpose I interpreted concepts of crime, criminality, criminalizing, penalty, release on parole, and responsibility, and made legislators’ unambiguous will evident regarding the non-equivalence of crime and criminality, penalty and responsibility, penalty and release on parole.

It is noteworthy that the author of the article does not have any serious argument regarding the reasons why these concepts cannot be interpreted the way they are provided in our dissent. In my opinion, any word or concept mentioned in the law has specific and independent meaning. Within the requirement of the foresight of the law, it is unacceptable that the regulation of identical relations in the same law is described with different words and concepts or vice versa - different relations are regulated with the same words or concepts. It is possible that the relations implied in different words or concepts may include or complement each other, but in any case, when there are no differences between them, the introduction of different names is not reasonable at all.

On the basis of the aforementioned, I think that it is very risky to argue that different terms have identical contents. If we allow for such a possibility, this will contribute to terminological chaos, which will confuse as the persons with respect to which these provisions should apply also the ones applying the law, and will create grounds for different applications of the law. In this case, a probability of error rises.

Besides this, making the terms and concepts identical implies that the relations regulated by them are equivalent. Allowing this would make the contents and substance of these relations obscure, and question trust towards the traditional meaning behind the terms. These will create additional problems regarding the foresight of the law.

The interpretation of these terms gave me a reason to disagree with the position of the Court as stated in the judgment that the impugned provision has identical contents with Article 42.5 of the constitution. In my opinion, applying the law the impugned provision would not create an obligation to interpret and apply the law in such way. This is not indicated by the provision itself, and furthermore its correct interpretation leads us to opposite result.

2.2 According to the author of the article, the “absence of specific terms in the second sentence of Article 3.1 of the Criminal Code of Georgia does not mean that the scope of the application of Article 42.5 of the Constitution in criminal law is narrowed down.” He mentions for the attention of the dissenting authors that Article 3.1 of the Criminal Code should not be read independently of Article 2.1 of the same code. They should be read together, which in his opinion resolves the problem. As the terms in art.2 state, the punitive quality includes criminal responsibility and all the issues pertaining to that penalty that can be associated with Article 42.5 of the Constitution and Article 3.1 of the Criminal Code.

The author of the article is right in that articles 2 and 3 of the Criminal Code should be read together, but exactly reading of these provisions together raises additional problems regarding the foresight of the impugned provisions.

In the Criminal Code of Georgia, the presumption of prohibition of retroactivity is given in Article 2, whereas exceptional cases of allowed retroactivity are stated in Article 3.

It is important to make clear the protected area of article 2, and in a given case an issue whether general rule of application of criminal law in time applies to statutes of limitations and to release on parole.

The rules determined by Article 2 of the Criminal Code of Georgia, with the use of terms punishability (in dissent an interpretation of this term is given) includes not only provisions regulating punishability and penalty, but also applies to statutes of limitations and to requirements for release on parole. Specifically regarding these institutions, Article 2 establishes that the application of the provisions regulating statutes of limitations and release on parole, the presumption of prohibition of retroactivity is in force. This means that the person applying the law should apply the law that was active when the crime was committed.

Article 3 of the Criminal Code of Georgia, judging from its title “Retroactivity of Criminal Law”, concerns exceptions from the general rule (Article 2) prohibiting retroactivity. In this provision, apart from second sentence of the first subparagraph, legislators within the discretion set by the Constitution determined to which act that mitigates responsibility should be given retroactive force.

In the first sentence of Article 3, legislators establish two cases in which a criminal act should have a retroactive force. This is applicable if the law decriminalises an activity or mitigates a penalty. Therefore, as a result of reading Article 2 and the first sentence of Article 3.1 together, apart from the mentioned two cases, criminal law (including those aggravating statues of limitations or requirements for release on parole) does not have retroactive force. Naturally we are not concerned with other cases of acceptable retroactivity, which are determined in other parts of Article 3.

On the basis of the above mentioned, although the primary function of the first sentence is to determine exceptions, we can state that there are two rules in this provision – when the law has retroactive force and when it does not. Generally, there is no other resolution of the issue; either the law should have a retroactive force or it should not.

As there are two alternatives regarding the retroactivity of various issues, in our opinion, the legislator had a choice to determine only those cases when the law could have a retroactive force, as an exception from the general rule of prohibition, as a result of which for other cases the prohibition would have applied automatically. Exactly this is the constitutional requirement for the legislator. The legislator should have determined only those cases, when the law could have a retroactive force. In this case in the Criminal Code we would have a determined regulation for resolution of retroactivity issue for the law. On the basis of this, it is logical that the first sentence be sufficient for the relations within the scope of Article 3 for the resolution of retroactivity issues, as the answer is given on both questions – when should an act have retroactive force and when it should not.

This normative order is challenged by the second sentence of Article 3.1. Here, the legislation specifies two cases in which the law should not have a retroactive force, specifically in cases when the law criminalises a behaviour or aggravates a penalty. Therefore, this provision directly indicates not on those cases allowing for retroactivity, as is proposed by the title, but instead on cases of prohibition of retroactivity. At the same time, it provides for specific cases of prohibited retroactive application of the law. Such a formulation of the provision, naturally, does not enable to prove that apart from these two cases the law does not have retroactive force. However, a systemic analysis of the provision not only does not exclude it, but on the contrary, it gives reasonable grounds for exactly such an interpretation.

For the cases given in the second sentence of Article 3.1, the prohibition of retroactive application of law is also determined in Article 2 and the first sentence of Article 3.1, with the difference that the scope of prohibition of the second sentence of Article 3.1 is narrower. It concerns only cases of criminalization and aggravation of penalty. Therefore, for other laws aggravating responsibility, including those of increasing terms of statutes of limitations or making requirements for release on parole stricter, it does not contain a prohibition of retroactive application.

At first glance, the wording of this sentence is not contradictory to the constitutional provisions, as the Constitution also prohibits retroactive application of the law aggravating penalty or criminalizing behaviour. It seems also that the problem should not be that the impugned provision does not comprehensively regulate the scope of constitutional prohibition of retroactive application of law because as we already have mentioned, the law aggravating responsibility (including those of statutes of limitations and requirements for parole) includes Article 2 and the first sentence of Article 3.1. Therefore, without the necessity of repetition of the issues in second sentence of Article 3.1, adequate regulation of the constitutionally of the protected sphere is given in the Criminal Code.

But in the face of this, it is absolutely unclear what motivation is behind the second sentence. If it says nothing additionally and only partly repeats the issues which are already regulated by the

Criminal Code, then its existence is unnecessary. In this case, for the resolution of the issues of retroactivity the person applying the law is not bound by its scope. This raises the issue that the only function of this norm is to narrow down the scope of prohibition of retroactive application of law. Otherwise, its existence in the provision determining exceptions does not have any justification.

“When there is an exception form a general rule, there is not resource for application of general rule on those cases. If general rule is applied on exceptions, then there will not be an exception. Therefore, it is logical that when the legislator introduces exceptions, this at the same time means that it expresses the will that general rule be not applied on those cases” (Dissenting Opinion of the Member of the Constitutional Court Ms. Ketevan Eremadze on the Judgment of the Constitutional Court of Georgia N1/1/428, 447, 459 13 May 2009).

On the basis of this, we can state that the second sentence of Article 3.1 establishes two rules – the first determines the cases when a law does not have a retroactive force, and the second, according to article’s title, its aim and function, implies that in other cases a law has a retroactive force. Therefore, by specifying concrete cases of prohibited retroactive application of law, it automatically excludes other cases from the scope of prohibition. Thus the provisions out of the scope of the second sentence of Article 3.1 are beyond the scope of prohibition.

It is necessary to consider the following as well: Despite the fact that Article 42.5 of the Constitution establishes two rules – when a law can have a retroactive force and when not, the main function of it is to emphasise general rule of prohibition of retroactive application of law. In the face of this, significance of the second sentence of Article 2.1 raises. When in the Criminal Code exists simultaneously with general rule of prohibition of retroactive application of law a specific provision for prohibition, legislatures will and motivation for this becomes clear.

Therefore, the fact that the prohibition of the retroactive force of a law is associated to two specific cases enables us to interpret the provision reasonably so that it is an intention of a legislature to reject the scope of prohibition determined by the Constitution. In any case, the structure, function, and title of Article 3 give sufficient grounds for such an interpretation. The result of this is that the law that increases statutes of limitations and aggravates requirements for release on parole can be given retroactive force. Such a reading of the provision is contradictory to the Constitution.

In the face of this, that there is no unambiguous will of the legislature regarding the scope of prohibition of retroactive application of law, a judge applying the law does not have a clear directive how he or she should act. If the judge concludes that the second sentence only repeats Article 2 and it does not have independent meaning, then any law that aggravates responsibility should not be applied in a retroactive manner. However, if he concludes that second sentence of Article 3.1 does have a specific and independent meaning (plausibility of such an interpretation was argued above) then as was mentioned a judge can read the provision in conflict with the Constitution but in line with the law.

It should be mentioned that these arguments may seem frail, unconvincing and incorrect, but for arguing against such an interpretation, at least more convincing counter-arguments should be

provided. Instead, in the article the author just writes that reading Article 2.1 and Article 3.1 of the Criminal Code of Georgia together is sufficient to conclude that criminal law cannot be applied in a retroactive manner, within the scope identical to the one guaranteed by the Constitution. However the article does not answer the main question –why and how is this achievable? What gives grounds for reading the provision only in such a manner that is in line with the Constitution?

It is noteworthy that the author substantiates his position by specific examples. However, these examples are not proving the point he is making, instead they only demonstrate that the Constitution as well as the impugned provision protect only issues of genuine retroactivity, which we ourselves do not deny.

3. According to Mr. Sulakvelidze, the constitutional guarantees regarding the retroactive force of the law regulating criminal responsibility can only apply to the real penalty directly and clearly provided by the law, to its scope and severity and also to privileges related to the punishment, which was enshrined as a right of a the convicted in law when the crime was committed and not as a conditional right, acquirement of which is dependent on other not foreseeable factors and circumstances, on the basis of which the right may be acquired and may not. At the same time, is as a result of realisation of conditions stated in the law, the person who committed the crime has acquired a right for certain type of legal privilege, a new law worsening his conditions cannot restrict it.

On the basis of the above mentioned, Mr. Sulakvelidze is of the opinion that, if a new law increases the terms of statutes of limitations or makes more severe requirements for release on parole before the expiration of shorter statutes of limitations of the old law or before the person was subjected to release on parole pursuant to the provision of the previous law, the provisions of the new law would apply. According to him, this cannot be viewed as genuine retroactivity, is not protected by Article 42.5 of the Constitution and neither by Article 3.1 of the Criminal Code.

It is noteworthy that the judgment of the Constitutional Court and my dissenting opinion indicate clearly that Article 42.5 of the Constitution applies only to the issues of genuine retroactivity of the law regulating responsibility. False retroactivity is not an object of constitutional protection and therefore, it is not assessable in this respect. Thus it is of material importance to correctly draw line between genuine and not genuine retroactivity, so that the scope of constitutional protection be not artificially narrowed or on the contrary extended. This issue is extensively analyzed in the Judgment, with which I completely agree and thus will not discuss it again now. I will emphasise only the following: In our opinion, in this respect, identical approach to statues of limitations and to requirements for release on parole (as is given in the article) is not correct. On the basis of expiration of the term of statutory limitations abrogating from responsibility the reason behind is that un rebuttable evidence and therefore, impossibility of establishing fault, the issues is decided in favour of suspect for the purpose of prevention of punishing the innocent.

Existence of statutory limitations is on the one hand acknowledgement of the fact that it is impractical to deliver objective justice and fair trial after lapse of certain time, because testimonies of witness are less convincing and evidences are less conclusive. The purpose of this is to ensure,

that a court not be obliged to render a decision on the basis of evidence, which because of lapse of time are not faultless. By this the legislator rejects suspicious justice, and decides the issue in favour of the individual and relieves him from responsibility. This then gives a person the right not to be tried after lapse of the term given in statutes of limitations. This is acknowledgement of the fact that a criminal act has lost its feature of assessment, which is necessary to make a person responsible for it and secondly, criminal act which was qualified as criminal not as a result of factual reality but instead as of normative one, loses its force towards the individual.

If not for these circumstances, relief of responsibility because of statutes of limitations would be unreasonable. When the obligation to conduct criminal prosecution is annulled, the change in the legal status of a subject should be viewed as his right.

In such cases, the application of genuine retroactivity regarding the person already relieved from the responsibility ignores foresight of the law and, what is more important, questions outcome of the law. The person relieved from criminal responsibility be tried and punished. However, “when legislation increases the statutory of limitations before the expiration of the term of previous statutes of limitations, this case cannot be viewed as violation of the Constitution.... it is true that in this case, person’s rights are negatively affected by the fact that criminal prosecution is prolonged, but this normative reality is justified by legal security. Legislator by this emphasises the fact, that for the prosecution of person previous terms of statutes of limitations were not sufficient. As fair trial demands determined statutes of limitations, it is impossible to free person from responsibility only on the ground that the previous law determined other terms. Until the terms of statutes of limitation is expired, the person does not have right to be freed from criminal responsibility. He cannot have legal expectation, that the state will not exercise prosecution within the time frame of limitations. Before the expiration of the term of statutes of limitations, continuation of the term does not violate person’s liberty to foresee legal results of his criminal act. In respect of foreseeing legal results, situation before continuation of the term and after it are identical. Therefore before the expiration, it cannot violate legitimate expectations of an individual” (Judgment of the Constitutional Court of Georgia N1/1/428, 447, 459 2009 13 May).

As to the requirements for release on parole, although the opinion of the court regarding the resolution of the constitutional issues is different from my one, our positions are identical in the respect that parole affects person’s punishability. Existence of release on parole ensures that traditional type of punishment may not be applied. When person is subjected to such conditional punishment instead of real one, this indirectly is more than mitigation of a penalty. Legislation written by this normative rule gives opportunity to an individual to avoid being subjected to penalty. Therefore, “when the opportunity of mitigation of a penalty is annulled, which the individual had when he committed the crime, this amounts to aggravation of the penalty, despite the fact, that penalty abstractly may stay the same” (Judgment of the Constitutional Court of Georgia N1/1/428, 447, 459 2009 13 May).

For example in accordance with the sentence of 11 September 2006, adopted by the Chamber of Criminal Cases of Tbilisi Court of Appeals, Kazbegi District Court was not entitled to suspend the punishment in question for a probationary period: “The reasoning of the judge concerning the

retroactive application of Articles 63-64 of the Criminal Code is not founded since the said provisions are of general nature, whereas Article 3 of the Criminal Code refer to those provisions of the Special Part of the Code, which either mitigate or aggravate a punishment.” The Supreme Court of Georgia did not admit the case and stated: “As regards the punishment imposed on the convict, it is fair and the Chamber of Cassation agrees with the reasoning and findings of the Court of Appeals on this head of the sentence as well” (Ruling No. 1013ap of the Supreme Court of Georgia, adopted on 14 January 2007). By virtue of the inadmissibility ruling, the Supreme Court made the point that the position of the Court of Appeals, inter alia, on the possibility of the suspension of sentence was in compliance with the established jurisprudence of the Court of Cassation.

In my opinion, the application of release on parole is of the same degree of probability as application of specific penalty (for example of incapacitation) or abrogation from responsibility. Person has equal expectations towards certain severity of penalty or release on parole. As release on parole is a form of realisation of penalty, it is not of material importance whether the law ameliorates the penalty or the form of its realisation, because this latter is ultimately a condition-specific form of realisation of penalty. With this logic, the right to prohibit retroactive application of law aggravating penalty is equivalent to prohibition of retroactive application of the law aggravating requirements for release on parole. On the basis of the aforementioned, before the application of release on parole retroactive application of the law aggravating its conditions is a genuine retroactivity case and contradicts the constitutional requirements.

4. The author of the article also does not agree with the judgment of the court and with the position in my dissenting opinion regarding the application practice of impugned norm in the courts of general jurisdiction. Despite the fact, that according to the dissenting opinion, the current practice indicates to ambiguousness and unconstitutionality of the impugned norm, whereas according to the court although the norm itself is constitutional, but in case the general courts had applied the norm correctly they would not have come to the same decision, which have questioned prohibition of retroactive application of the aggravating law; the common position between me and my colleagues is that it is in principle unacceptable position that Article 3 of the Criminal Code of Georgia be applied only with respect to the Special Part of the Criminal Code. The approach of the general courts of Georgia is exactly this. In their decisions it is clearly stated that protected area of Article 3 of the Criminal Code is only the Special Part of the code and therefore the provisions regulating statues of limitations and issues of release on parole are beyond the scope of that provision. In my opinion, this position might be shared even by the Supreme Court of Georgia. This means that practice of application of this provision will continue in this direction. It is noteworthy that this practice of the Supreme Court concerns general issues. The issue is about application of general rule, the scope of its interpretation, which conditions consistent application of the norm in all analogous cases. Therefore the courts exclude extensive interpretation of the provision (which is provided by the judgment of the Court and shared by Mr. Sulakvelidze). As it seems, they do not see any possibility of use of Article 2 in this case, because if they did they would not have used the new law that aggravated responsibility, instead of the less severe law valid when the crime was committed, while this have not been done.

On the basis of the above-mentioned, it is unclear as to the basis on which Mr. Sulakvelidze justifies existing practice. While in the article he does not agree with only the argument of the courts of general jurisdiction and thinks that it is necessary to apply prohibition of retroactivity to the General Part of the Code (with only exception, if the case concerns genuine retroactivity), it is evident that his position that the judgment of the court and dissent is unjustified and ungrounded.

Apart from this, the author of the article justifies the practice of the general courts on the basis of specific claimants. The case was not of genuine retroactivity, which means that courts should have used the law that was valid during the proceedings. But then how he can explain the fact that these specific decisions were made by the courts on the basis of Article 3? If the issue is not of genuine retroactivity then there is no reason for indication of either Article 2 or Article 3.

In my opinion, analysis of the practice indicates additionally on the ambiguousness of the provision, as there is no clear position regarding the scope of the provision. Although there is a precedent of application of the impugned norm with respect to the General Part of the Criminal Code, but Appellate and Supreme Courts clearly stated that the protection by Article 3 covers only the Special Part of the Criminal Code. If the judge applying the provision does not make decision solely on the basis of the Constitution then he/she has a choice between stating that the impugned provision does not have any independent meaning or applying the law at hand retroactively, which is prohibited by the Constitution.

In my opinion, this kind of legislative regulation, application of which contains risk of violation of the Constitution, is against requirements of foreseeability and certainty of the law.

“When the provision can be interpreted in more than one way (including one of them in line with the Constitution and another not) the judge applying the law may only see one or all ways. If he simultaneously sees two options of reading a provision – one contradictory to the Constitution and another not, it is evident that the provision should be interpreted the way that is in line with the Constitution. But ambiguousness is exactly this, that it gives reasonable grounds that different judges will read it differently. Of course, if the person applying the law deems, that the provisions constitutionality is under question, he should be guided directly by the Constitution, but this does not mean that the provision is constitutional.

It is undisputed, that the person applying the law has an obligation to act in line with the Constitution, and a violation of which results in relevant consequences. But the existence of such and obligation does not make the provision constitutional and does not justify leaving unconstitutional provisions in force. In case of a dubious provision, if the application of the Constitution would have been a sufficient guarantee, constitutional control of normative act would be unnecessary.

If an ambiguous provision gives reasonable grounds to read it in contradiction to the Constitution, it does not satisfy requirements of foresight and should be recognised as unconstitutional. In this case, neither the obligation of a judge to interpret the provision in line with the Constitution nor the case-law of the Constitutional Court would ensure constitutionality of the provision” (Dissenting opinion of the member of the Constitutional Court of Georgia Justice K. Eremadze regarding the Judgment of the Court N 1/1/428 447 459 13 May 2009).

Irakli kotetishvili

PLEA AGREEMENT – COMPARATIVE ANALYSIS

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INTRODUCTION

Since 1980, plea bargaining has become an accepted and regular feature of life in the jurisdictions of all Western European countries, particularly in Germany and France. This is the case throughout all Western European states, with their very diverse and different modes of criminal procedure. Thus, it is fair to say that debates about plea bargaining have finally ceased in Western Europe. Everyone has accepted that plea bargaining does indeed exist in Europe and there are benefits to it.

Plea bargaining occurs around the world. It is a procedural revolution that began over the last 20 years. Plea bargaining occurs in a long list of countries with inquisitorial heritage, or common law heritage, or socialist justice heritage, spanning India, Russia, Italy and to Latin America. We see plea bargaining working successfully everywhere regardless of the country's social and economic heritage. It is a universal development, and I disagree with commentators who refer to the American model of plea bargaining as the classical model. I disagree strongly with this assertion. In my own country, the model is very, very different – and I would even dare to say better than the American model. Throughout Europe, we also have many various models to choose from. Thus, I think it is wrong to look at the defects in the American system and to say they are systemic to plea bargaining on the whole. They are not. If a country faces a problem such as a victim's non-participation, then you can simply include in the legislation, as do the Estonians, for example, a provision allowing the victim to play an active role in the plea bargaining. There are many models of plea bargaining and my major message in this paper is that we simply cannot afford to wait. We simply cannot afford to ignore plea bargaining due to increasing numbers of criminal cases and demands that we act accordingly. If we do not act accordingly, our criminal procedure will be downgraded to the point where serious injustice will occur. I think that it is no coincidence that the countries that originally developed plea bargaining were bastions of defending human rights.

My message is essentially that it is possible to organize a plea bargaining system without violating those principles. If you look, for example, at the European Court of Human Rights' case-law, then you will realize that very little of it concerns cases arising from plea bargains. This has not proved a rights

issue in either the United Kingdom or the United States, where the Supreme Court has repeatedly said that plea bargaining provisions do not violate the right to a fair trial and the presumption of innocence because you always have a right to a trial and you always have your presumption of innocence – only an individual properly advised who wishes to plead guilty can voluntarily decide to abandon these rights in pursuit of another interest.

THE ESSENCE AND FORMS OF A PLEA AGREEMENT

The “plea agreement” is a relatively new institute of the Georgian criminal justice system. Introduced in January 2005, the plea agreement intends to simplify the criminal justice administration and ensure quick and effective justice. In 2008, for the first time, the index of its application by Georgian courts exceeded 50 per cent of the total number of cases.

In its essence, the plea agreement is an accelerated and effective form of passing a judgment. The plea agreement encourages the defendant to cooperate with the investigation, provide information on various types of organized crime, and/or on cases known to the defendant, other past and potential offences and, of course, the offence of which the defendant is accused.

The plea agreement may be concluded during the preliminary investigation or substantial review hearing. The number of cases with plea agreements concluded during the preliminary investigation increases every year and motions are filed in courts on passing judgments without having a substantial hearing of the case.

The plea bargain may be initiated by the defendant or by the prosecutor.

The basic principle of the plea agreement is the following: the defendant pleads guilty and cooperates with the investigation hoping for more lenient punishment. Sometimes, there may be neither an admission of guilt, nor cooperation, but the defendant may agree to the measure of punishment proposed by the prosecutor and, thus, full-scale trial may be avoided (*nolo contendere*).

Parties are free to conclude a plea agreement on any case, but the seriousness of the crime dictates the conditions of the plea agreement and the severity of the punishment. In regards to the above, we should mention a case involving a plea agreement concluded with an individual charged with purchasing, keeping and shipping large quantities of narcotics into Georgia, whose sentence was more lenient than stipulated by law. The sentence could have been much higher, or even a life sentence.

In the case that parties reach a plea agreement, the court does not proceed with the examination of all the evidence, but rather only examines incidents of violations of the defendant’s rights.

The plea agreement can be concluded based on a guilty plea or *nolo contendere* plea. In terms of the guilty plea, the defendant confesses. In terms of the *nolo plea*, he does not object to the charges

brought against him, and agrees with the prosecution on either the measure of the punishment or the total liberation from punishment. The plea results in conviction.

In terms of the plea agreement, the prosecutor may request the punishment's reduction, and in the case of multiple offences, decide upon the mitigation and/or partial removal of the charges.

Georgian criminal law does not determine the categories of cases subject to the plea agreement. When concluding the plea agreement, the prosecutor needs to consider the following: a. public interest; b. the punishment envisaged for the committed crime; and, c. the level of the act's culpability and illegality.

The plea agreement does not limit the defendant's right to request prosecution any incidents of torture or degrading and inhuman treatment against him. The plea agreement does not release the defendant from civil or other liabilities. Under special circumstances, the chief prosecutor or his deputy may apply to the court and request the release of a specific defendant from civil liabilities. In such a case, civil liabilities are assumed by the government.

A defendant who has been incriminated on the basis of a plea agreement must be informed fully about the agreement's content, including the information provided to the investigation.

In order to more clearly describe the essence of the plea agreement, we would like to examine a real case that took place in Georgia.

On April 7, 2007, an investigation was opened by the Interior Ministry's Special Operative Department on a criminal case against K.P. K.P. was charged with purchasing, keeping, and shipping large quantities of narcotics into Georgia. The crimes are defined in the Georgian Criminal Code (Article 260, Section III, Paragraph A, and Article 262, Section IV, Paragraph A).

The execution of the crime by K.P. was confirmed by the arrest and personal search reports, the witness questioning, the chemical examination, and the evidence provided by the suspects.

Upon receiving legal advice from his lawyer, the defendant voluntarily expressed a desire to cooperate with the investigation. Due to the circumstances, acting in compliance with public interests and aiming to maximize state resources, the prosecutor decided to enter into a plea agreement with the defendant.

In May 2007, a plea agreement was concluded between the prosecutor and K.P. over the guilty plea. Subject to this deal, K.P. consented to the prosecutor's proposal on a conviction without reviewing the case substantially. K.P. was convicted to nine years in prison for committing a crime under Article 260 (3) Paragraph A of the Criminal Code, whereby the court used its right under Article 55 to confer a lighter sentence in regards to the crime committed under Article 262 (4) Paragraph A of the Criminal Code, which originally entails a graver sentence for the respective crime.

Pursuant to Article 59 (1) of the Criminal Code, the aforementioned sentences were added to define the final sentence as constituting 18 years of imprisonment. Moreover, the accused has been advised that signing the plea agreement does not liberate him from civil liability.

The prosecutor filed a motion before the Tbilisi City Court in favour of approving the plea agreement.

The plea agreement was signed by the accused, his lawyer/defence attorney and the prosecutor.

In this case, a plea agreement was concluded regarding his guilt, as K.P. voluntarily made a guilty plea and cooperated with the investigation. Consequently, his sentence was significantly reduced (i.e. he was sentenced to a cumulative sentence of 18 years where the probable sentence would have been far graver and could have constituted life in prison). The court's judgment was rendered without reviewing substantially the case.

It should be noted that the plea agreement in the case of K.P. was concluded in the full observance of Georgian Criminal Law. In particular, in the process of the plea bargain, the prosecutor had advised the defendant that signing the agreement would not liberate him from civil or other liability (although in special circumstances, the chief prosecutor or his/her deputy are entitled to address the court on the issue of exempting the accused (defendant) from civil liability, in which case the civil responsibility is born by the court). The agreement was concluded in a prior written agreement with the supervisory prosecutor with the lawyer's (defence attorney's) direct participation and the accused's prior consent. The motion on the plea agreement is discussed by the court to clarify procedures.

I would like to discuss the judgment of the Tbilisi District Court from 16 May 2005. On 16 May 2005, the Tbilisi District Court rendered a judgment on the case of A.J. and R.A. without reviewing substantially the case and approved the decrees on the plea agreement from 6 April 2005.

The individuals were accused of committing a crime under Article 332 (1) of the Criminal Code.

On 8 April 2005, Tbilisi District Court received a motion from the Akhaltsikhe Regional Court to render a judgment without reviewing substantially the case. According to the motion, the prosecution requested the approval of the plea agreement's decree on the sentence from 6 April 2005, which was prepared by the prosecution and the accused with the defence lawyers. In particular, the prosecutor's office requested that A.J. be convicted according to Article 332 (1) of the Criminal Code and sentenced to a 1,500-lari fine without being banned from occupying a position or pursuing a particular type of activity pursuant to Article 55 of the Criminal Code.

In addition, the prosecution requested that R.A. be convicted according to Article 332 (1) of the Criminal Code and sentenced to a 500-lari fine without being banned from occupying a position or pursuing a particular type of activity to Article 55 of the Criminal Code.

After examining the case materials and considering the aggravating and mitigating circumstances of the accused's responsibility, the Court Chamber ruled on approving the plea agreement decrees and conferred a judgment without reviewing substantially the case.

From the example above, it is evident that this is the case of a plea agreement over the sentence. Since the accused have not admitted their guilt, but only consented to the sentence requested by

the prosecutor, based on which a lighter sentence was awarded. In particular, the crime envisaged under Article 332 (1) of the Criminal Code (Abuse of official authority by an officer or a person equal thereto in contempt of public service requirements to gain any profit or privilege for oneself or others who have come as a substantial prejudice to the right of a natural or legal person, legal public or state interest) shall be punishable by fine or by jail time up to four months or three years, by the deprivation of the right to occupy a position or pursue a particular activity for the term not in excess of three years. As already mentioned, in this particular case, pursuant to Article 55 of the Criminal Code, the Court Chamber requested from both defendants only the compulsory payment of fines (i.e. awarded a lighter sentence than that originally envisaged by the law).

The court rendered the judgment without reviewing substantially the case in accordance with the requirements laid down by the Criminal Code.

The Court Chamber listened to the participants in the court proceedings, was convinced that the plea agreement has been concluded voluntarily without coercion, intimidation, deceit, or any other illegal pledge, and that the accused had the right to receive competent legal aid.

Prior to the approval of the plea agreement, the Court Chamber was assured in the following:

- The accused fully understood the nature of the crime with which they were charged;
- The accused fully understood the sentence envisaged for the crime, the commission of which they did not admit, yet the sentence to which they consented;
- The accused were fully aware that if the court would not approve the plea agreement, it would have been impermissible to use against them any information that they would have submitted to the court in the process of the plea agreement discussion;
- The accused were fully aware that they were entitled to the following constitutional rights: a. right to defence; b. right to refuse agreement on a guilty plea; c. right to substantial the court reviewing substantially the case;
- The plea agreement was not the result of coercion, intimidation, or such a pledge, which goes beyond the limits (scope) of the plea agreement;
- All conditions pertinent to the agreement between the accused and the prosecutor were reflected in the plea agreement in written form.
- The accused and their defence lawyers fully knew the case materials.

The plea agreement was approved at the public court session (sitting) in accordance with the legislation (although according to the Criminal Code of Procedure it is possible to have a closed court hearing provided that significant grounds exist; in this event, the court renders the judgment reflecting the plea agreement).

COURT DECISION

The court passes a judgment within 15 days from the moment it receives the motion. The court is entitled to return the plea agreement without confirmation due to an absence of sufficient evidence or a violation of the CPC provisions on the motion. If so, the case is returned to the prosecutor's office to make the decision on the indictment. Before the case is returned to the prosecutor's office, the court may offer the parties to change the plea agreement's conditions.

The defendant is entitled to refuse such conditions at any stage before the court passes its judgment and to request a substantial review of the case. Such a refusal does not require the approval of the defence attorney. The parties are also entitled to change the conditions of the plea agreement prior to the rendering of a judgment. In the case that the defendant refuses to enter a plea agreement, the defendant will be indemnified from the guilty plea against him.

APPEALING JUDGMENT

Within 15 days from the moment of the judgment's rendering, the defendant is entitled to file an appeal in a higher instance court to request the cancellation of his decision to accept the plea agreement, if the:

- Plea agreement was concluded through deception;
- Defendant was limited as to the right to defence;
- Plea agreement was the result of coercion, duress or threat;
- Presiding judge ignored the legally applicable basic legal requirements.

The prosecutor is entitled to file an appeal in a higher instance court within a month if the defendant violates any conditions of the plea agreement. If the court approves the prosecutor's motion, it abolishes the plea agreement.

With regard to the aforementioned, it is interesting to look at a decision of the Supreme Court of Georgia. The prosecutor submitted a complaint to the Supreme Court denouncing the judgment of the Tbilisi District Court Criminal Law Chamber from 5 January 2007 on approving the plea agreement of the convict G.B.

The prosecutor's complaint was based on the fact that the judgment of the Tbilisi District Court Criminal Law Chamber approved the plea agreement between the prosecution and G.B. G.B. was pronounced guilty under Article 338 (2) Sub-paragraph B of the Criminal Code envisaging four years in prison and as an additional penalty G.B. was requested to pay a 500-lari fine.

The execution paper relevant to the payment of the additional 500-lari penalty was sent to the Tbilisi Bureau of the Justice Ministry's Execution Department.

According to the letter of the Tbilisi Bureau dated August 7, 2007, the convict violated the pledge noted in the plea agreement and approved by the court, and failed to pay the 500-lari fine.

The Supreme Court Criminal Law Chamber, acting in accordance with Article 679⁶ (1) and (2) of the Criminal Code of Procedure denounced the judgment of the Tbilisi District Court Criminal Law Chamber, which had approved the plea agreement with regards to G.B. (Article 679⁶ (2)) and returned the case to the Prosecutor General's Office for preliminary investigation (Article 679⁶ (3)).

Based on the above, it is clear that the Supreme Court's decision was rendered in accordance with the Criminal Code of Procedure, as the convict violated the pledge that was part of the plea agreement.

VICTIM RIGHTS WITHIN THE PLEA AGREEMENT

A victim must be informed about the conclusion of the plea agreement, although he has no right to appeal such a decision.

In this regard, we must mention the case of *"Canadian Citizen Hussein Ali and Georgian Citizen Elene Kirakosiani v. Parliament of Georgia"* in the Constitutional Court of Georgia (#403,427. 19.12.2008). These individuals were victims in criminal cases involving a plea agreement. They believed that they were deprived of the right to a fair hearing (CPC 679⁷, Part 2 and 679⁸, Part 2), as those articles did not allow the victims to appeal the plea agreement and receive restitution for losses incurred as a result of the crime and reach a fair and adequate punishment for the crime. At the trial applicant stated that according to the Article 679⁷ (2) of the Criminal Procedure Code accused and prosecutor are entitled to take a claim in appeal court about affirmation of plea agreement. Thus, according to Article 679⁸ (2) of criminal procedure code of Georgia, victim has no right to appeal against plea agreement. According to the applications, questionable provision of the law is not in accordance with the constitution, because it excludes the opportunity of appeal to the court and fair trial guarantee.

The Constitutional Court did not grant constitutional motions, as the victims (appellants) reserve the right to file a civil suit and seek compensation. In the case of the plea agreement, the defendant makes a confession placing the victim in a favourable position, as the court judgment and plea agreement have an evidential effect on the court examining the civil suit, allowing it to make a decision regarding the restitution of loss. In addition to the above, the court is in no way limited in determining the volume of compensation on the basis of the above-mentioned documents. Also the Constitutional Court explained that right to appeal to the court is not absolute and it needs to be regulated by the law. Special interest which can be expressed by the victim towards the punishment

is insufficient in order to use right to appeal, which is underlined by the Constitution of Georgia (Article 42 (1)). Quick and effective implementation of justice, serves public interest and this is the purpose of plea agreement too.

TOTAL IMPUNITY OF DEFENDANT / TOTAL EXCULPATION OF THE DEFENDANT

An important aspect of the Georgian plea agreement is the possibility for the defendant's total impunity based on the "plea agreement". In specific cases when the defendant's cooperation with investigative bodies results in the identification of white-collar offenders and/or "most wanted" criminals and the defendant's personal involvement creates conditions to resolve these cases, the chief prosecutor can appeal to the court and request the defendant's total release from punishment. If the motion is satisfied, the individual is released from his punishment, although he is convicted. Full impunity in exchange for paying a fine is not allowed.

STATISTICS OF ADMINISTERING THE PLEA AGREEMENT IN GEORGIA

Below are the statistics of the plea agreement covering the years 2004-2008 and first six months of 2009, which prove that the necessity to administer the plea agreement grows daily.

Most criminal cases were resolved in 2005 through a substantial review and constituted 87.3 per cent. As for the plea agreement, it presented 12.7 per cent, or 680 criminal cases, of which 52 per cent were guilty pleas and 48 per cent were nolo contendere pleas.

For the 2006 year, judgments passed through the main hearing constituted 5,478 criminal cases, or 55.8 per cent, and 4,333 cases were resolved by a plea agreement, or 44.1 per cent.

Courts of the first instance passed judgments on 17,526 criminal cases in 2007. This figure includes 9,094 judgments resolved by substantial review, 51.9 per cent, and 8,432 judgments resolved by plea agreements, or 48.1 per cent.

A total of 8,790 criminal cases were resolved by substantial review in 2008, or 50.1 per cent, and 8,770 cases by plea agreement, or 49.9 per cent.

According to the data for the first six months of 2009, courts passed judgments on 3,341 criminal cases by substantial review, or 45.5 per cent, and on 4,007 cases by plea agreements, 54.5 per cent¹.

¹ The statistics in this chapter are the official figures of the Chief Prosecutor's Office of Georgia.

On the basis of the above figures, the dynamics of plea agreements during these years are: 12.7 per cent in 2005; 44.1 per cent in 2006; 48.1 per cent in 2007; 49.9 per cent in 2008; 54.5 per cent in 2009 (six months).

QUESTIONS AND ANSWERS ABOUT PLEA AGREEMENTS

Below I would like to respond to all of the stereotypes existing in relation to the plea agreement system in Georgia.

a. The institute of the plea agreement lacks transparency

This assessment may be countered by the following:

- The conclusion of the plea agreement involves both parties;
- On behalf of the prosecution, the plea agreement is approved by the senior prosecutor;
- The participation of the defence attorney is mandatory;
- All plea agreements are examined and confirmed by the court at an open hearing, i.e. public attendance is available.
- The court looks into the case materials, including the evidence;
- The judge needs to make sure that the defendant is fully aware of the plea agreement's content and its legal results. The defendant's consent is voluntary;
- The defendant is entitled to reject a plea agreement after it is concluded before its confirmation by the court (even at a hearing) and demand the case's substantial review;
- The judge is entitled to reject and return the plea agreement back to the prosecutor.

b. The idea is wrong that during the plea agreement's examination, the judge does not examine guilt and evidence, i.e. the innocent may be punished

According to the CPC Art 679⁴, the court examines the justification of charges, the legality of the penalty indicated in the motion, and the voluntary nature of the confession. Therefore, if the court believes that the evidence is insufficient, it returns the plea agreement without confirmation to the prosecution.

The defendant is entitled to appeal the court judgment confirming the plea agreement if the defendant believes that the plea agreement was reached via deception or threat, he was deprived of the right to defence, or the court substantially violated legal requirements.

c. The idea that not all cases can be subjected to a plea agreement is wrong

It must be noted that this thesis is directly linked with another incorrect assessment (below) that the “plea agreement is concluded only in exchange for money” and, therefore, it may only be concluded on petty categories of crimes.

The idea is wrong for several reasons:

- a. The plea agreement may be concluded not only on a fine, but on any other penalty;
- b. If the plea agreement is concluded on an actual penalty (imprisonment) and the defendant cooperates with the investigation and helps to resolve other case or assist in another way, then the plea agreement may be administered on all types of crime;
- c. Plea agreements are mostly applied in organized crime cases. Without this institute, it would be practically impossible to resolve organized crime and other complex cases;
- d. The plea agreement may not be concluded only in exchange for a fine on any type of crime. If the case involves grave and/or violent crimes, then a necessary precondition for the plea agreement is the defendant’s special cooperation with the investigation and the provision of important information.

d. The idea that the plea agreement is concluded only in exchange for money is wrong

According to the Criminal Procedures Code, the plea agreement is not limited by a fine. There are several unambiguous circumstances: a) as per Chapter XIV¹ of the Criminal Procedures Code, the plea agreement can be concluded based on a guilty plea or *nolo contendere* plea; b) any type of penalty may be imposed by a plea agreement – the deprivation of liberty, the restriction of liberty, on-the-job limitation of military service, correctional labour, public mandatory labour, the deprivation of the right to hold high posts or run certain business, fines, property seizures, or conditional sentences.

It must be mentioned that a plea agreement is the only tool enabling the imposition of a more lenient penalty than provided by law. Therefore, it is useless to argue that plea agreements are concluded only on fines. Court practice contains a plea agreement with a penalty of 21 years of deprivation of freedom.

EUROPEAN COURT ON HUMAN RIGHTS CASE LAW AND CRIMINAL LEGISLATION OF GEORGIA

Among the rights and freedoms envisaged by the European Convention of Human Rights, the most significant is the “Right to a Fair Trial”, guaranteed by Article 6. It is a fundamental right with regards to which we will discuss the Georgian model of the plea agreement. Ensuring this right constitutes a significant guarantee for the protection of other rights of the European Convention on Human Rights. For example, if a person was arrested unlawfully and then found guilty of a crime, this would constitute a violation of Article 6.

The statement made by the European Court of Human Rights in the case of *Delcourt v. Belgium* has its roots in the most important character of that right. The court established that, in a democratic society, the fair implementation of justice has such a particular importance that the restricted interpretation of Article 6(1) would be irrelevant with the article’s aims and essence.

In the case of *Neumeister v. Austria*, the European Court established that each party to the proceedings shall enjoy equal possibilities to represent their case and none shall have any advantage over the other.

In Georgian practice, the prosecutor, who is party to the criminal case, may “request reduction of punishment and in the case of multiple offences, make a decision upon the mitigation and/or partial removal of charges” by force of the plea agreement. The court found a violation of the principle of equality of arms in Article 6(1) in the case of *Borgers v. Austria* because the prosecutor gave recommendations to the court about whether or not to agree on the claimant’s appeal and the prosecutor participated in the decision-making.

Although there is no straight indication of those two rights in Article 6, the European Court of Human Rights stated in relation to these rights in the case of *Murrey v. UK* that “in spite of the fact that there is no straight indication in Article 6, it is unquestionable that the right to silence during questioning and the right not to give testimony against herself/himself generally constitutes recognized international standards, which are seen as the core of the right to a fair trial recognized in Article 6”.

As already mentioned above, the object of the plea agreement in accordance with the criminal proceedings law of Georgia is to ensure quick and effective justice. As well as from the norms regulating this institution, it is clear that the additional object of the institution is to encourage the defendant to cooperate with the investigation and to provide information on various types of organized crime and/or cases known to her/him. The general purpose of the plea agreement is to ensure quick and effective justice for the defendant and to decrease the workload of the judiciary and prosecution service.

The European court in the case of *Langoborger v. Sweden* made the following statement: “Even if persons are technically qualified to consider the particular issue, and there exists no ground to

call their honesty in question, it is important to protect requests of impartiality and sovereignty". Hence, the prosecutor brings charges and it is not desirable for her/him to determine the guilt of the accused, the possible sentence and to file a motion to the court to assert his assertions.

In the case of *Piersack v. Belgium*, the court defined that "former prosecutors cannot be judges on cases which were investigated by their departments; even if these cases have never been under their personal management". Except for the above cases, there can be found many judgments of the European Court of Human Rights where it has been shown explicitly how important it is for the judicial authority to be independent and impartial from investigating or prosecuting agencies to realize the right to a fair trial is envisaged by Article 6 of the European Convention of Human Rights.

PLEA AGREEMENT IN THE US

Many years have passed since the plea agreement was born in the American criminal justice system. As a mechanism for criminal prosecution, it was periodically used before the 19th century.

In the US the legislative definition of such practices occurred after the establishment of its legal – even if adverse – historical tradition, which some commentators call "invisible justice". The prosecutor and lawyer, often with the participation of a judge, consented to a certain qualification and punishment outside a court hearing, which in most cases ended up in a gentlemen's agreement. It was conditioned due to the peculiarity of the American judicial practice, where the participation of jurors is guaranteed and the implementation of criminal justice happens in accordance with the principle of adversity. The first is the growing financial burden of the state, and the second, is the sheer length of court hearings and the overloading of the judiciary due to the solid protection of formal procedures.

In spite of the fact that almost 90 per cent of criminal cases are decided by plea agreements, discussion ensues about how constitutional the practice of plea agreements actually is taking into account public court principles reflected in the US Constitution. Supporters of the plea agreement indicate the practice's effectiveness, claiming that it saves state resources and the right to a public court is not absolute. The defendant may waive his application and plead his guilt. Accordingly, a system of case law and legislation was established aimed at stimulating the plea agreements avoiding full-scale trial. The opponents of the plea agreement indicate that the wider application of the plea agreement infers the refusal of the conception of judicial justice and fundamental guarantee. In their assertion, despite its very first aim representing a decreasing workload of the judiciary, it factually excludes the administration of justice. To that end, the reference here is to genuinely "rapid" and "effective" proceedings, but not to "justice".

American justice is often called "rich man's justice". Hiring a lawyer is expensive and only wealthy defendants may spend money to support full-scale proceedings to prove his case. And the offices of public lawyers are overloaded and cannot ensure the proper representation of every single

defendant. The plea agreement is based on the hypothetical suggestion that both sides – the prosecutor and the lawyer – are placed in an equal “bargaining position”.

CONCLUSION

At the end of this paper, I would like to suggest several good reasons why I think plea bargaining is a healthy part of any rights-respecting criminal justice system, and I will say a necessary part of any rights-respecting system of criminal justice.

My first point is simply efficiency. The point about plea bargaining is that it concentrates our resources on the cases that matter. We don’t have the resources to give a careful and thorough and detailed trial to every case that appears before us. We can’t do it. It is impossible. No country, however wealthy, can. So it’s very important that we have a system allowing us to identify all cases simple or complex that are either important for us as a community or for the individual concerned, and which cover difficult issues that we need to resolve. Plea bargaining is a very effective method of dealing quickly with cases that can be dealt with quickly, allow us to spent time and effort and resources on cases requiring more time and effort and resources, and acts as a screening device. It is very effective and if we don’t screen cases, then we are going to degrade our treatment of all criminal cases. And, therefore, I think it’s very important that we consider how plea bargaining can work if properly controlled as a means of ensuring that good and important weighty cases are always given the maximal consideration and everyone keeps their absolute right to a fair trial in a public court with as many due process protections as necessary.

My second point is related to delay, as our court list gets longer and longer. Defendants have to wait longer and longer, and if we insist upon the unrealistic aim of giving every defendant equal time in court, then we create a fresh abuse of their rights, which is delaying their access to the court. As we see from Article 6 of the European Convention of Human Rights, and in the International Convection of Civil and Political Rights, delay is one of the most serious breaches of a defendant’s human rights.

My third point is about victims. Now, many opponents of plea bargaining speak about the potential exclusion of victims from procedures in plea bargaining. That is not necessarily the case. You can decide to include the role of the victim within plea bargaining. That is not a problem. It is a historical accident that the role of the victim in the US and the UK has been very minimal. They only have “service rights” for the victim – the right to know what’s happening. They don’t give the victim participation rights largely because they are strongly adversarial countries and they believe in the conflict of adversaries. If they have a prosecutor and a victim as parties, then there is a violation of the balance, and effectively you have two prosecutors and one victim, which they regard as unfair. So, historically, they haven’t given a role in court to victims. Other countries do. In many European countries, the victim is a party and can have representation in court and can appeal. Those countries

developed systems of plea bargaining very successfully by including victims. So there is no problem about the inclusion of the victim in the plea bargaining system if that's what a country wishes to do.

The other important point that I wish to make about victims is that, sometimes, particularly if the cases are very sensitive and deal with a very intimate matter, such as sexual offences, particularly sexual offences involving children, bringing that person into court to give evidence is traumatic and can result in repeated victimization. Many victims describe the experience of the questioning in court as a second violation. If there is a system of guilty plea and plea bargaining, the victim can be shielded and defended from having to go to court and that is a huge advantage that many victims might find very beneficial. So there are advantages also for victims within the plea bargaining and guilty plea system.

Equally, and this is my fourth point, a guilty plea system allows tremendous opportunities for restorative justice and conciliation, which involve victims. I think it is an important aspect of justice that we are all developing more and keeping cases out of court and allowing them to be dealt with in a restorative victim-centred format. Throughout Europe this is happening. Throughout the countries of the former Soviet Union this is also happening. I think plea bargaining enables and allows this new form of justice to function like medicine and it is also an excellent aspect of the system.

My fifth point is that plea bargaining and the guilty plea system provides a legitimacy for convictions. If you talked to people who have been convicted by single judges or even by juries, they tend to say that "the court prejudiced against me because I'm black, because I'm minority, and the whole thing was unfair, and I'm just a victim of the system". A defendant who has to stand up and say "Yes, I agree, I am guilty, I have done this, I want to expiate my guilt in public" receives the element of what scholars would call a personal acceptance of his guilt in public. It makes a powerful statement that is beneficial both to the individual and to the community. The guilty plea allows the person to practically state that they are guilty and they wish to rebuild themselves. It's very difficult to say after admitting your guilt in public that you have not been probably advised and that you are actually innocent.

As a sixth point, contrary to what many commentators are saying, I think that plea bargaining is an important aspect to adversarial justice. As I said earlier it is no coincidence that the plea bargaining system developed in countries that also developed an adversarial system and were the most committed to adversity. Plea bargaining envisages the defendant as an active participant, as an adversary in the system, not as an impassive object of the system, but rather as an active subject of the procedure.

In other words, a profoundly inquisitorial process sees the defendant as a scientific object to the inquiry and the adversarial process sees the defendant as an active adversary with the right to defend himself in the negotiated process. Therefore in my view, plea bargaining is emblematic of the defendant's active role protected by his or her rights, and of course, nothing can stand on the way of every defendant's right, if he has to choose to have a full trial in an open court. That's the fundamental idea of plea bargaining. Nothing can stand in the way of you being able to have your

case dealt with in court. The prosecution are prepared to put the deal on the table that you like. If you are against the plea bargain, then fine, you have to go to trial. That's absolutely fundamental.

My last point is that plea bargaining all over the world is the most effective weapon against corruption, which poisons every political system. And the best way of attacking it is using plea bargaining. Plea bargaining, to put it simply, offers the only route for prosecutors to break through the wall of silence that protects the corrupt because prosecutors can offer deals to minor players in corruption who can then in return for those plea deals provide evidence against major players.

George Meladze

LAUTSI V. ITALY

George Meladze

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The European Court of Human Rights' judgment was met with hysteria by Italian politicians. The Italian defence minister said, "That woman [Lautsi] and all those who made the judgment must be condemned to death".

Party groups have also tabled special addresses. Except on the far left, all politicians joined them in condemning the judgment. They proposed a special resolution stating that the government must demand adherence to the subsidiarity principle. Except on the far left, all political parties condemned the 3 November 2009 *Lautsi v. Italy* court verdict. In this "unprecedented" case, the court found displaying a crucifix in the classroom of an Italian public school to be incompatible with the convention. The judgment caused uproar in Italy and other catholic states.

The judgment was denounced by the Vatican as well. A Vatican spokesman, Federico Lombardi, said the crucifix was a fundamental sign of the importance of religious values in Italian history and culture, and a symbol of unity and welcoming for all of humanity – not of exclusion.

"The European court had no right intervening in such a profoundly Italian matter. It seems as if the court wanted to ignore the role of Christianity in forming Europe's identity", he said.

"The judgment must be rejected with firmness. Italy has its culture, its traditions and its history. Those who come among us must understand and accept this culture and this history. The ruling aimed to wipe out our Christian roots. We are in the process of creating a Europe with neither identity nor traditions"- commented Alessandra Mussolini.

On Facebook, 23,000 people joined a group to oppose the court decision.

However, secularist organizations expressed contradictory views.

"Interpreting the government's position, one sees that its arguments are similar to those of Islamic states that refuse to protect human rights. Accordingly, the arguments are inadmissible for liberal society", an Italian Humanist Association said.

The Lautsi case is not the first such case in Italian judicial history. Displaying crucifixes at public buildings is the norm in Italy. A Muslim parent, Adel Smith, and Judge Luigi Tosti tried to protest presenting such symbols in public places.

Smith, the head of the Union of Italian Muslims, succeeded in getting a court order to ban the official display of religious symbols at school. The decision was followed by a public uproar and the Supreme Court later abolished the order during a rehearing.

Tosti too had to overcome civil resistance. He was fined numerous times and sentenced to several months in jail for refusing to enter public buildings where Christian symbols were displayed.

“I went to school and saw that the cross in the classrooms. This doesn’t seem to be an innovation. In kindergarten, three crosses were displayed on the same wall. Catholicism is everywhere in Italy and sometimes it is disturbing, particularly if you are an atheist”, Lautsi said.

“The case was significant for me in terms of moral values rather than obtaining financial compensation. Italy regards itself as a secular state and it should honour this value”, she added.

HISTORICAL REVIEW – RELIGIOUS SYMBOLS IN ITALY

Legislation regulating the display of religious symbols at public institutions in Italy was adopted under Mussolini’s rule. At the advent of fascism, the state adopted a series of circulars aimed at enforcing the obligation to display the crucifix in classrooms. Each school in Italy had to have the image of the crucifix alongside Mussolini’s portrait. The parties claimed that exposing the cross and the Mussolini’s portrait stressed the separation of church and state.

The Education Ministry’s Circular No. 68, dated 22 November 1922 stated, “We order all of the municipalities of the Kingdom to restore in schools the two sacred symbols of faith and national sentiment”.

The Education Ministry’s Circular No. 2134-1867 dated 26 May 1926 stated, “The symbol of our religion, sacred to faith and patriotism, urges and inspires young students in universities and other higher educational institutions to sharpen their wits and intelligence to sustain the high duties that are their destiny”.

Article 119 of Royal Decree No. 1297 dated 26 April 1928 (Approval of the General Regulation of Primary Education Services) lists the crucifix among “equipment and materials needed for school classrooms”.

The Lateran Pacts, dated 11 February 1929, marked the “reconciliation” of the Italian state and the Catholic Church. Catholicism was confirmed as the official religion of the state. Article 1 of the treaty read: “Italy recognizes and reaffirms the principle enshrined in Article 1 of the Albertine Statute of the Kingdom of March 4, 1848 that the Catholic, Apostolic and Roman religion is the only religion of the state”.

The Catholic religion changed its status following ratification by Law No. 121, dated 25 March 1985, of the first provision of the Additional Protocol to the new Concordat with the Vatican, dated 18 February 1984, amending the Lateran Pacts of 1929. Under this provision, the principle proclaimed in the opening of the Lateran Pacts that the Catholic religion, the only religion of the Italian state, is no longer considered in force.

However, the issue of other laws regulating religiously significant matters has not been resolved. Just this legal gap led to a complex legal case that emerged in Lautsi's case. National courts considered that these regulations of religious symbols were still valid and useful for the case.

ARGUMENTS OF PARTIES PRESENTED AT THE EUROPEAN COURT OF HUMAN RIGHTS

The government presented an interesting position to make its arguments weightier. First, the government argued that the crucifix is a religious symbol, but it may also represent other values.

"The cross is certainly a religious symbol, but it also has other meanings. It would also have ethical significance", the government said in a message. "Certainly, the values that underpin democratic societies today have their immediate origins also in the thinking of non-believers, even opponents of Christianity. However, the thought of these originators was nourished by Christian philosophy, not least because of their upbringing and the cultural milieu in which they were trained and lived. In conclusion, the democratic values of today are rooted in the more distant past – that of the Gospel message. The message of the cross would be a humanist message, which could be read independently of its religious dimension, consisting of a set of principles and values that form the basis of our democracies. Since the cross carried this message, it was perfectly compatible with secularism and accessible to non-Christians and non-believers, who might accept it since the cross evokes the distant origins of these principles and values. In conclusion, since the symbol of the cross could be seen as devoid of religious significance, its presence in a public place would not in itself affect the rights and freedoms guaranteed by the convention".

FOR A FIRMER GUARANTEE, THE GOVERNMENT ADDED OTHER ARGUMENTS:

1. In accordance with long-standing tradition, the European court considers that the violation is a much more active interference than the mere display of a symbol for finding the infringement of rights and freedoms (*Folgerø and others v. Norway* [GC], no. 15472/02, CECHR 2007-VIII).

2. The crucifix is indeed displayed in the classroom, but it is not required of teachers or students to address the slightest sign of acknowledgement, reverence or mere recognition, let alone recite prayers in class. In fact, they are not even asked to pay any attention to the crucifix.

3. There is no European consensus on how in practice to interpret the concept of secularism. The prohibition of the mere display of symbols would give a predetermined material content to the principle of secularism contrary to the legitimate diversity of national approaches and would lead to unpredictable consequences.

4. Italy, though secular, has freely decided to keep the crucifix in classrooms for various reasons, including the need to find a compromise with the parties of Christian inspiration representing an essential part of the population and their religious sentiment. The government does not maintain that it is necessary, appropriate or desirable to keep the crucifix in classrooms, but the choice of keeping one is not political and therefore it is subject to the criteria of opportunity – not of legality.

5. Teaching in Italy is totally secular and pluralistic. The curriculum does not contain any reference to a specific religion and religious instruction is optional. A teacher is not forbidden from displaying religious symbols in the classroom.

THE APPLICANT OPPOSED THE GOVERNMENT WITH HER POSITION:

1. Despite varying interpretations, the crucifix has primarily a religious connotation. The fact that the cross may be “read” in other ways does not mean it loses its main religious connotation.

2. Favouring one religion by exposing a symbol gives students in public schools a sense that the state adheres to a particular religious belief. But under the rule of law, no person should perceive the state as being closer to one religious faith than to another, especially those who are more vulnerable because of their young age.

3. By requiring the display of crucifixes in classrooms, the state gives the Catholic religion a privileged position, which would lead to state interference with the right to freedom of thought, conscience and religion of the applicant and her children, and the right of the applicant to educate her children according to her moral and religious convictions, as well as to a form of discrimination against non-Catholics.

4. The undeniable pressure on minors is obvious. It gives the impression that the state is alien to those who do not identify with this religion.

The expert Greek Helsinki Monitor stated its position in relation to the case. First, it emphasized the symbolic meaning of crucifixion. It challenged the assertion of the Italian government that one must see in the cross anything other than a religious symbol and that the cross imports humanist values – such a position is offensive to the Church as a cross has just religious meaning for this body. Finally, other religions too would see the cross as a religious symbol.

The Greek Helsinki Monitor notes that according to the Toledo Guiding Principles on teaching about religions and beliefs in public schools (Council of Experts on the Freedom of Religion or Belief of the Organization for the Security and Cooperation in Europe), the presence of such symbols in public schools can be a form of implicitly teaching religion, for example, by giving the impression that this particular religion is favoured over others. If the court in the case of *Folgerø* (2004) found that participation in religious activities can affect children, then, according to the Greek Helsinki Monitor, the exhibition of religious symbols may also affect them.

COURT'S JUDGMENT

The case was significant from different perspectives. However, the court presented quite a brief and principled consideration of the cases. The court took into account the nature of the religious symbol and its impact on students of a young age, especially the children of the applicant. Indeed, in countries where the vast majority of the population belongs to a particular religion, the manifestation of rites and symbols of their religion without restriction on place or manner may constitute pressure on students who do not practise that religion or who adhere to another religion (*Karaduman v. Turkey*, Commission decision of May 3, 1993).

“55. The presence of the crucifix can be easily interpreted by students of all ages as a religious symbol and they will feel that they are being educated in a school environment characterized by a particular religion. What may be encouraging for some religious students can be emotionally disturbing for students from other religions or those who profess no religion. This risk particularly affects students belonging to religious minorities. The negative freedom is not limited to the absence of religious services or religious instruction. It covers the practices and symbols expressing, in particular or in general, a belief, a religion or atheism. This negative right deserves special protection if the state expresses a belief and if a person is placed in a situation from which he cannot escape or only by a disproportionate effort and cost.

56. The display of one or more religious symbols cannot be justified either by the request of other parents who want religious education consistent with their beliefs, nor, as the government argues, by the necessity of a compromise with political parties of Christian inspiration. Respect for the beliefs of certain parents in education must consider the beliefs of other parents. The state is obliged to maintain religious neutrality in public education where attendance is required irrespective of religion and must seek to instil critical thinking in students.”

The court considers that the presence of crucifixes in classrooms goes beyond the use of symbols in specific historical contexts, and their religious meaning was predominant. The court also believes that this argument was grounded with the Vatican's position. The latter officially declared that by displaying Christian symbols, Italy emphasized its Christian origins.

Accordingly, the court found grounds for the violation of rights and supported Lautsi's position in the case.

LAUTSI'S CASE – PRECEDENT FOR OTHER COUNTRIES

The court's judgment may significantly change European traditions, the Guardian wrote in November 2009. The judgment sparked outraged reactions in Poland and Lithuania. Supporters of Catholicism called the judgment "ideological persecution". However, it is not the first time the court has been criticized for the inappropriate protection of religious freedom.

The following reviews of several cases from European practice give a general idea about the prerequisites of Lautsi's case and the court's steps before making this judgment.

On July 29, 2009, the court stated its position about French legislation banning the display of religious symbols in public places. Special emphasis is placed on Muslim clothes. The court considered the appeal of French students inadmissible. The students appealed against the legislation and called it incompatible with the convention. However, the court handed down a decision saying France could take measures, including political party closures, to protect democracy and secularism.

The case of *Dogru v. France* dated 4 December 2008. Students in France were expelled from school after refusing to remove their headscarves to participate in their gym class. The court handed down the same decision and said the state could make better considerations about keeping order at school and the restriction was not a violation of the convention.

In the case of Leyla Sahin in 2005, a citizen disputed religious freedom, indicating particular articles. She said by banning headscarves in public buildings, Turkey violated her rights. The court reiterated that the state may impose regulation forms for religious freedom itself and has the right to have a secular position, including a certain limitation over believers' rights.

In the case of *Dahlabi v Switzerland* dated 15 February 2001, the court judged the citizen's right to wear traditional clothes at school where he had been a teacher. The court said the limitation was legal as far as a teacher is an example for children and his clothes could affect their religious views.

Domestic legislation has been developed simultaneously in various European countries. Eight German states banned religious clothes at schools, universities and public places. The German Constitutional Court prohibited the display of religious symbols at schools in 2003.

The Netherlands imposed different restrictions on wearing headscarves at different times. The Amsterdam and Utrecht municipalities even proposed cancelling welfare to unemployed women wearing headscarves as they drastically decrease employment opportunities in Christian countries.

Even at a glance, it is evident that religious symbols are a controversial topic in public and legal discussions in Europe. Lautsi's case is significant for several reasons. First, it extended the range of the conception of religious symbols and brought Christian symbols up for discussion. This is extremely rare in the European context and surely worth separate mention.

In addition, the court's judgment is highly interesting as far as it changed its traditional attitude to religious issues. Prior to Lautsi's case, the court avoided intervening in judging the lawfulness of state regulations. It preferred to judge as an indifferent observer. The court used arguments within the range of accordance. It said the state had a wide range of tools for handling religious issues and would not interfere to change the order. This attitude is evident in all the above cases.

A court shows a different attitude in cases where not only religious freedom, but other rights come under question. In such cases, the court's position is more inflexible. For example, let's take the *Brankevich* case in 2007.

The Russian authority imposed a ban on a protestant group meeting and praying in public places. The authors of the prohibition believe that such meetings could run the risk of disorder much higher than when Muslim women wear headscarves. However, unlike the headscarf case, the court supported the position against the state. This judgment was likely affected by a ban on unifying and meeting. The court even pointed out the significance of the right of unification. It stated that despite the religious intention of the meeting, it is still essential to protect the right of meeting.

Now, we can only conclude that the court somehow divided the rights into religious and non-religious categories. In relation to non-religious rights, the court is active and ready to overlook the range of state abilities and to regulate public relations itself. If it finds out grounds for violation, then it often intervenes and contradicts the European convention in terms of rights.

As for religious rights, the court is more cautious when the state maintains a secular position – and vice versa. The court intervened actively when it observed a trend of religiousness in Italy. Moreover, a new trend becomes urgent. The court adheres to secular principles in member states and supports the separation of the state and the church. Lautsi's case is proof.

However, it is essential to interpret the court's judgment correctly. Rome Mayor Gianni Alemanno said, "The crucifix cannot be offensive to anyone". His words prove that the debate was heated. Of course, the court did not intend to offend anyone. The court adhered to its main principle – equal treatment.

The court's effectiveness in carrying its point is questionable. One cannot definitively say that the Grand Chamber will review and change the judgment. It is also unpredictable to what extent the court will further adhere to its principles, referring to the Lautsi case as a precedent for such cases as official symbols and religious symbols of the state, and the priority attitude of member states to certain churches (Greece, England, Scandinavian countries, Germany, etc).

It is interesting to review Lautsi's case in the Georgian context. It is normal to display icons, crosses and religious symbols at schools and public places. However, we cannot take this as an innovation

in legislation. Georgian legislation has regulated the issue of displaying religious symbols in a law on general education adopted five years ago. According to Georgian legislation, displaying religious symbols is permitted only for educational purposes. Therefore, Lautsi's case can be regarded as one more call to the state to observe legally established guarantees.

Carolyn Evans¹

THE ‘ISLAMIC SCARF’ IN THE EUROPEAN COURT OF HUMAN RIGHTS²

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[The wearing of religious clothing and symbols has become a source of potent legal and political controversy. This article analyses the way in which the European Court of Human Rights has dealt with claims by two women (one a teacher and one a student) who were denied the right to wear headscarves in their educational institutions. The article analyses the way in which the Court considered but failed to fully engage with three issues raised in those cases: proselytism; gender equality; and intolerance and secularism. It criticises the Court’s reliance on stereotypes and generalisations about Muslim women, and Islam more generally, and explores the way in which two contradictory images of Muslim women inform the Court’s decisions.]

I. INTRODUCTION

Veils, it seems, are very revealing. As soon as a Muslim woman covers her head there are large numbers of people — from journalists to politicians, academics to talkback radio callers — who know exactly who she is and what she stands for.³ Despite the fact that women, both Muslim and non-Muslim, have been wearing head coverings of various kinds for many centuries, suddenly headscarves are engaging attention throughout the world.⁴ While the media has focused on the

¹ This article was first published in Melbourne Journal of International Law, Vol 7. 2006

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³ See, eg, the following selection of recent media attention: Zarema Velikhanova, ‘Women Challenge Headscarf Ban in Azerbaijan’, Tulsa World (Oklahoma, United States), 4 December 2005, G3; Vincent Boland, ‘Turks Debate Headscarf’s Role in Public Life Appointments’, Financial Times (London, United Kingdom), 17 March 2006, 6; Liam Houlihan and Clare Masters, ‘Quick Make-Over: The Amazing Transformation of Michelle Leslie’, Herald Sun (Melbourne, Australia), 21 November 2005, 1.

⁴ In the 10 year period of 1989–98, over 1500 press articles were written on religion in schools in the UK and France alone, the vast majority on headscarves. For an analysis of these, see Lina Liederman, ‘Pluralism in Education: The Display of Islamic Affiliation in French and British Schools’ (2000) 11 Islam and Christian–Muslim Relations 105, 110–12.

changes to the rules for schoolgirls in France,⁵ there have been controversies in many countries — from Danish women who were sacked from their jobs as check-out operators,⁶ to British schoolgirls who did not find the school's Muslim uniform sufficiently strict,⁷ to a Muslim witness in New Zealand whose wearing of a veil over her face when giving evidence in a car theft trial was challenged by the defence,⁸ to an Australian soccer player who was told by a referee that she could not take part in a match unless she removed her headscarf.⁹

The political and legal controversies surrounding the wearing of religious clothing, particularly in public institutions such as schools, universities and public service offices, found their way to the European Court of Human Rights ('the Court') in two important decisions. The first, *Dahlab v Switzerland*,¹⁰ involved a school teacher who was banned from teaching in a primary school because she dressed in traditional, modest clothing including a headscarf. The second case, *Şahin v Turkey*,¹¹ involved a university student who was prohibited from study because she wished to wear a headscarf in her lectures and examinations.¹² *Şahin* is particularly important because it is the first Grand Chamber decision on the issue of religious clothing, but *Dahlab* is also a highly relevant case, despite being dismissed as inadmissible, because this perfunctory treatment is common for religious freedom cases brought by religious minorities in Europe. Thus *Şahin* is of more importance in a legal sense, but *Dahlab* is likely to be more representative and typical of the fate that awaits other applicants in religious freedom cases of this nature.

This article examines both cases and the reasoning that the Court employs in each to determine that the states in question had not breached the applicants' freedom of religion. The decisions of

⁵ For a good contextualisation of these issues, see generally T Jeremy Gunn, 'Religious Freedom and Laïcité: A Comparison of the United States and France' [2004] Brigham Young University Law Review 419. See also Jon Henley, 'France to Ban Pupils' Religious Dress', *The Guardian* (London, UK), 12 December 2003, 17; Keith Richburg, 'Chirac Urges French School Ban on Muslim Headscarves' (2003) *The Muslim News* <http://www.webstar.co.uk/~musnews/news/print_version.php?article=6488> at 22 May 2006; Robert Graham, 'Chirac Urges School Ban on Muslim Headscarves', *Financial Times* (London, UK), 17 December 2003; 'Chirac Urges School Ban on Muslim Headscarf', *Reuters News* (London, UK), 18 December 2003; 'France Says "Non" to Muslim Headscarves in Schools', *Associated Press Newsfeed*, 18 December 2003; Jane Kramer, 'Taking the Veil: How France's Public Schools Became the Battleground in a Culture War', *The New Yorker* (New York, US), 22 November 2004, 58.

⁶ Clare MacCarthy, 'Danish Muslim Dismissed for Wearing Headscarf Loses Court Case', *Financial Times* (London, UK), 19 December 2003, 10.

⁷ *R (on the Application of SB) v Denbigh High School Governors* [2005] 1 WLR Civ 3372.

⁸ Tony Stickley and Elizabeth Binning, 'Lawyer Protests Wearing of Veil during Testimony', *The New Zealand Herald* (Auckland, New Zealand), 17 April 2004, A5.

⁹ 'Soccer Referee Suspended after Questioning Muslim Player's Headscarf', *Associated Press Newswires*, 23 June 2004; 'Australian Soccer Hopes New Rule on Muslim Headscarves Will Go Global', *Agence France Presse*, 21 May 2004; 'Referee Steps Aside after Asking Muslim Player to Remove Headscarf', *Associated Press Newswires*, 5 May 2004.

¹⁰ *Dahlab v Switzerland* (2001) V Eur Court HR 449 ('*Dahlab*').

¹¹ *Case of Leyla Şahin v Turkey*, Application No 44774/98 (Unreported, European Court of Human Rights, Grand Chamber, 10 November 2005) ('*Şahin*').

¹² Prior to these cases, the Court had only given brief consideration to the issue of religious apparel. One case, *Karaduman v Turkey* (1993) 74 DR 93, involved a female university student who was unable to graduate because she refused to remove her headscarf for the identity photo required for graduation. The Commission dismissed this case as manifestly ill-founded. The Commission treated in the same manner a claim from a Sikh who complained that he could not legally ride a motorcycle in the UK as the law that required him to wear a motorcycle helmet was incompatible with wearing his turban: see *X v The United Kingdom* (1978) 14 DR 234. Another claim from a Sikh who was denied permission to wear his turban due to occupational health and safety issues was likewise dismissed by the United Nations Human Rights Committee: see *Singh Bhinder v Canada*, Human Rights Committee, Communication No 208/1986, UN Doc CCPR/C/37/D/208/1986 (28 November 1989) [2.1]–[2.7], [6.1]–[6.2].

the Court in both cases relied on two contradictory stereotypes of Muslim women as the essential basis for the decisions. While the formal tests adopted by the Court set a very high bar for states that seek to limit the rights of those within their jurisdictions, in practice, the rights of minority religions in many European states have been routinely limited and the Court has not condemned such limitations. The two cases discussed in this article are examples of the way in which the members of the Court find it difficult to move outside the religious paradigms that are most common in Europe (that is, either broadly Christian or secular) and to deal with non-Christian religions in a manner that is respectful and culturally sensitive.¹³ They also demonstrate the extent to which the Court was prepared to rely on government assertions about Islam and the wearing of headscarves — assertions that were not substantiated by any evidence or reasoning.¹⁴

II. THE RELEVANT CONVENTION PROVISION

The key provision in the Convention for the Protection of Human Rights and Fundamental Freedoms¹⁵ with respect to freedom of religion is art 9. It states:

- 9.1 Everyone has the right to freedom of thought, conscience and religion; this right includes the freedom either alone or in community with others and in public or private, to manifest his religion or belief in worship, teaching, practice and observance.
- 9.2 Freedom to manifest one's religion or belief shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

The first sub-section sets out the positive scope of the freedom. Unlike the US and Australian constitutions,¹⁶ the European Convention on Human Rights makes it clear that religious freedom is not limited to beliefs but extends to manifestations, that is, actions as well as beliefs.¹⁷ Thus, religious practices such as wearing particular clothing can be more easily and less controversially captured by art 9 than it can in some constitutional systems.

¹³ See generally Carolyn Evans, *Religious Freedom under the European Convention on Human Rights* (2001) 117–23; Paul Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (2005) 351 criticising the Court's lack of a global approach to religious issues and its consequent difficulty in dealing appropriately with minority religions.

¹⁴ *Dahlab* (2001) V Eur Court HR 449, 458–9, 461; *Şahin*, Application No 44774/98 (Unreported, European Court of Human Rights, Grand Chamber, 10 November 2005) [150], [154].

¹⁵ Opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) ('European Convention on Human Rights').

¹⁶ United States Constitution amend I; Australian Constitution s 116.

¹⁷ The complexities of trying to untangle belief and practice are explored well in Gabriel Moens, 'The Action–Belief Dichotomy and Freedom of Religion' (1989) 12 *Sydney Law Review* 195.

The Court has set out a variety of tests for each of the terms 'worship, teaching, practice and observance'.¹⁸ The wearing of headscarves almost certainly falls into the category of 'practice' (assuming that it falls within the scope of religious freedom at all). This is the most amorphous and least well defined of the categories of protected religious freedom, in part because the Court will often say that it is assuming a breach of art 9 (and then go on to explore the limitations in art 9(2)) without discussing in any detail the claims of the particular practice to the protection of art 9(1).¹⁹ This is precisely the approach that the Court took in *Dahlab* and *Şahin*. In *Dahlab*, for example, the

Court simply proceeded on the assumption that wearing religious clothing was covered by art 9(1).²⁰ In *Şahin*, the Grand Chamber took the slightly more encouraging route of quoting the original Chamber judgment, which discussed the fact that the applicant believed that she was obeying a strict religious injunction in wearing a headscarf.²¹ This, the Grand Chamber held, meant that her decision 'may be regarded as motivated or inspired by her religious belief'.²² This wording is important, as the Court has held on numerous occasions, and has reiterated in *Şahin*, that not every action that is motivated or inspired by religious belief is entitled to protection as a practice under art 9. The Court then 'proceeds on the assumption' that the regulation of clothing in this case constituted an interference with the right to manifest a religion.²³ The Court thus merely assumes this position, and carefully qualifies it so that it is clear that it has not decided 'whether such decisions are in every case taken to fulfil a religious duty'.²⁴ There is no clear finding (only an assumption) that religious freedom has been interfered with and no clear test set out for later cases.²⁵

Despite the reluctance of the Court to make such a determination, there is a strong case for arguing that the wearing of religious clothing, at least when the wearing of such clothing is a requirement of the religion, does fall within the protection of art 9. In a decision by the European Commission that has since been followed a number of times in European cases, it was held that the term 'practice' in art 9(1) did not 'cover each act which is motivated or influenced by a religion or belief'.²⁶ Rather, the manifestations must be 'normal and recognised manifestations'²⁷ of the religion or belief that 'actually express the belief concerned'.²⁸ Over time, this test narrowed into a type of 'necessity' test whereby the Court judged whether a particular activity fell within the scope of art 9(1) by asking whether the activity in question was required by the religion or belief (as compared to merely being motivated, influenced or encouraged by it).²⁹ Using this test, the wearing of heads-

¹⁸ Evans, above n 11, 105–10.

¹⁹ *Ibid* 134–5.

²⁰ *Dahlab* (2001) V Eur Court HR 449, 461.

²¹ *Şahin*, Application No 44774/98 (Unreported, European Court of Human Rights, Grand Chamber, 10 November 2005) [78].

²² *Ibid*.

²³ *Ibid*.

²⁴ *Ibid*.

²⁵ *Ibid*.

²⁶ *Arrowsmith v the United Kingdom* (1978) 19 Eur Comm HR 5, 19. See also Evans, above n 11, 113, 116–19.

²⁷ *Arrowsmith v the United Kingdom* (1978) 19 Eur Comm HR 5, 20.

²⁸ *Ibid*.

²⁹ See Evans, above n 11, 115–23 for an overview of the relevant cases and a critique of the methodology used by the Court. This approach has been used in many instances to exclude cases that the Court or Commission deemed unmeritorious, particularly those involving mi-

carves by women who believe that the wearing of such garments is a compulsory obligation of their religion should be held to be a manifestation of religious practice. That the Court was unwilling to state this explicitly in its judgment demonstrates its general reluctance to acknowledge the value and religious importance of many key religious practices outside of Christianity. It compares poorly to the clear and unambiguous finding of the UN Human Rights Committee in dealing with a student whose wearing of the headscarf at university led to her harassment by university authorities. In that case, the Committee commented on the application of art 18, the religious freedom provision in the International Covenant on Civil and Political Rights,³⁰ stating that the freedom to manifest one's religion encompasses the right to wear clothes or attire in public which is in conformity with the individual's faith or religion. Furthermore, it considers that to prevent a person from wearing religious clothing in public or private may constitute a violation...³¹

Even if the wearing of religious apparel is covered by art 9(1), art 9(2) makes it clear that the right to manifest a religion can be subject to limitations of a specific kind.³² Thus, even if the wearing of religious garments is a manifestation of religion, it may be subject to limitations where necessary in a democratic society in 'the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others'.³³ It is this limitation clause that is the focus of most of the decisions of the Court, including the two examined here.

The limitations clause of art 9, while not precisely the same as the clauses used in similar articles of the European Convention on Human Rights, is of sufficient similarity that the basic tests developed under similar provisions — for example, the free speech or free assembly articles — are also used with respect to religious freedom. In particular, the term 'necessity' has been found to connote a high burden to be discharged by a state. Necessity is 'not synonymous with "indispensable" neither has it the flexibility of such expressions as "admissible", "ordinary", "useful", "reasonable" or "desirable"'.³⁴ A measure does not become a 'necessity' simply because it has the support or approval of a majority of the population — as is appropriate with a human rights instrument, the Court must also consider the rights of minorities.³⁵

Yet despite this seemingly strict test, the degree of oversight by the Court has been lessened by the development of the concept of the margin of appreciation.³⁶ The margin of appreciation plays a

nority religions or beliefs. In this case, however, it would seem to work in favour of Muslim women who wear the headscarf because of a belief that to do so is required by their religion.

³⁰ Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

³¹ *Raihona Hudoyberganova v Uzbekistan*, Human Rights Committee, Communication No 931/2000, UN Doc CCPR/C/82/D/931/2000 (18 January 2005) [6.2]. The Committee noted in the same paragraph that this freedom could be limited if there were sufficient justification, but that Uzbekistan had not made any submissions to the Committee regarding justification. In such circumstances the Committee found a violation of art 18.

³² For an overview of these limitations, see Javier Martinez-Torron, 'The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief: A Comparative Perspective' (2003) 3(2) *Global Jurist Advances* [6], available from <<http://www.bepress.com/gj/advances>> at 22 May 2006.

³³ European Convention on Human Rights, above n 13, art 9(2).

³⁴ *Handyside v the United Kingdom* (1976) 24 Eur Court HR (ser A) 5, 22; 1 EHRR 737, 754.

³⁵ *Şahin*, Application No 44774/98 (Unreported, European Court of Human Rights, Grand Chamber, 10 November 2005) [108].

³⁶ See generally Howard Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (1995) for a good overview of the variety of contexts in which the margin is applied.

role in deferring to the judgement of states whose democratically elected officials are said to be in closer contact with the particular needs of their populations. One context in which it is employed is where there is little or no European consensus on a particular issue, or where the issue is of particular complexity or sensitivity.³⁷ The Court stresses that it is not intended to abrogate the duty of the Court — the margin of appreciation goes 'hand in hand with ... European supervision'³⁸ — but in some cases, such as *Şahin*, it seems to lead to a very high degree of deference to state authorities.

While the margin was only briefly mentioned in the *Dahlab* decision (though it no doubt played some role in informing the Court's conclusions),³⁹ it was of great significance in *Şahin* partly because of the Court's analysis that there was no European consensus on whether religious clothing should be permitted in educational institutions.⁴⁰ This example demonstrates the potential problems with the margin of appreciation — even an issue such as whether there is a European consensus is one that depends very much on the way in which the Court frames the question. In *Şahin*, for example, the Court considered in some detail the approach of numerous other European states to the wearing of religious apparel in educational institutions.⁴¹ The Court pointed to the variety of practice in schools where some states permitted religious clothing with few restrictions and others did place limitations on the students' right to wear religious clothing or symbols.⁴² In the case of higher education institutions, however, only three States — Turkey, Azerbaijan and Albania — prohibit the wearing of such garments in universities⁴³ and indeed many states described by the Court allowed pupils at all educational stages to wear religious clothing. Thus, if the Court poses the question in terms of the degree of consensus about the wearing of religious apparel in educational institutions, the answer is that there is no consensus, although most European states permit it.⁴⁴ On the other hand, if the Court asked what degree of consensus there is about the wearing of religious clothing in universities, there is a very high degree of consensus that students should be permitted to wear such clothing.⁴⁵ This distinction between school and university students is important given the differences between the two student groups in terms of maturity, independence and capacity for decision-making. Indeed, in *Dahlab* the Court seemed to recognise that this distinction is of significance because the particular vulnerability of young children made it important to protect them from certain religious influences (an argument which is discussed further below).⁴⁶

³⁷ The Court has invoked the margin in many cases relating to religion by reference to a lack of European consensus on these issues. For example, in *Otto-Preminger-Institut v Austria* (1994) 295 Eur Court HR (ser A) 6, 19; 19 EHRR 34, 57, the Court held that it is 'not possible to discern throughout Europe a uniform conception of the significance of religion in society' and thus some deference to the decision-making of the national authorities was required.

³⁸ *Şahin*, Application No 44774/98 (Unreported, European Court of Human Rights, Grand Chamber, 10 November 2005) [110].

³⁹ *Dahlab* (2001) V Eur Court HR 449, 462–3.

⁴⁰ *Şahin*, Application No 44774/98 (Unreported, European Court of Human Rights, Grand Chamber, 10 November 2005) [109].

⁴¹ *Ibid* [55]–[65].

⁴² *Ibid*.

⁴³ *Ibid* [55].

⁴⁴ *Ibid* [55]–[65].

⁴⁵ *Ibid* [3] (Dissenting Opinion of Judge Tulkens).

⁴⁶ *Dahlab* (2001) V Eur Court HR 449, 463.

The Court justifies its deference to national institutions and standards on a number of bases in the judgment. The first is that the appropriate relationship between church and state is one about which reasonable people could widely differ. This is clearly correct but represents a very high level of abstraction — there might well be specific issues in relation to the church–state relationship where there is greater consensus and therefore less justification for limiting rights. The Court then, more problematically, moves to the more specific level of the wearing of religious symbols in educational institutions, and claims that diversity in this area is demonstrated by the discussion of comparative law. As noted above, however, it is not at all clear that this discussion does support the conclusion of significant European diversity, at least in so far as higher education is concerned. The judgment then moves outward again to a higher level of abstraction — this time relating to the significance of public expressions of religious belief and the diversity of approach regarding this issue. Finally, it concludes that states are in a better position to determine how best to protect rights and freedoms and to maintain public order when making determinations on these issues.⁴⁷ The judgment segues between empirical claims about difference, legal claims about the role of the margin of appreciation, and normative claims about the primacy of national institutions in dealing with religion and state issues. Given the centrality of the margin of appreciation in this judgment, it is disappointing that the justification for using it is not particularly coherent and, at least as far as the empirical claims are concerned, not well made out.

It is also worth briefly noting that the Court seemed to extend the margin in *Şahin* beyond respecting the decisions of democratically elected governments to respecting university authorities who are also — or so the Court found — better able to understand the needs of their education community than the Court. In assessing the way in which internal university rules should be imposed, the Court stated that by reason of their direct and continuous contact with the education community, the university authorities are in principle better placed than an international court to evaluate local needs and conditions or the requirements of a particular course.⁴⁸ In using the same language to refer to the superior decision-making capacities of university authorities as it has used for governments, the Court is opening the door to a dangerous extension of the margin of appreciation principle. In *Şahin*, the Court effectively defers twice — first to the views of the Government and then to the views of the university about the application of these principles. The ‘European supervision’ with which the margin of appreciation is supposed to work ‘hand in hand’ is difficult to discern.

⁴⁷ *Şahin*, Application No 44774/98 (Unreported, European Court of Human Rights, Grand Chamber, 10 November 2005) [109].

⁴⁸ *Ibid* [121].

III

A. FACTUAL BACKGROUND

Dahlab v Switzerland

The first of the two cases decided on the issue of religious freedom and the Islamic headscarf was *Dahlab v Switzerland*,⁴⁹ which was handed down by the Court in 2001.

The case involved a Swiss primary school teacher who converted to Islam. When she converted she decided that she needed to wear long, loose clothing and a cover over her hair, though not her face. She wore this apparel for a period of over four years (although some of that time was spent on maternity leave). During that time there were no complaints from her colleagues, her pupils or their parents. When her students asked her why she covered her head she said it was to keep her ears warm.⁵⁰ She seemed to have been very sensitive to the idea that she should not proselytise — so much so that she used this excuse rather than identifying herself as Muslim to her students.

But then, an inspector called. When the inspector reported that Ms Dahlab was wearing these garments, the Director General of Public Education became involved. After an attempt at mediation, the Director General issued a direction that she cease wearing these garments at school. She refused and challenged this decision in the Swiss courts, where she lost.⁵¹

While this article does not look at the Swiss Court's decision in detail, it is worth noting two aspects of that judgment. First, the domestic court gave far more detailed and thoughtful consideration to the issues than the European Court did, despite ultimately finding against the applicant. Even the summary of the Swiss judgments is significantly longer than the operative part of the European Court's own reasoning.⁵²

Second, the Swiss Court clearly found Ms Dahlab's stance odd and judged her against the norms of a Christian country. The Court partly justified the fact that she was sacked despite the absence of any law explicitly prohibiting the wearing of religious clothing by saying that it was impossible for the law to comprehensively cover all the required behaviours by teachers, and that some leeway was allowed in circumstances where the conduct 'would be regarded by the average citizen as being of minor importance'.⁵³ No mention is made of the fact that who the average citizen is and what he or she thinks is important are products of a culture in which the wearing of religious clothing is now peripheral. The determination of rights issues, based on assertions about the convictions of majorities about what is important and what is not, has serious implications for religious freedom which are insufficiently explored in the judgments.

⁴⁹ *Dahlab* (2001) V Eur Court HR 449.

⁵⁰ *Ibid* 456.

⁵¹ X c Conseil d'Etat du canton de Genève (1997) BGE 123 I 296, 312; *Dahlab* (2001) V Eur Court HR 449, 451–2.

⁵² *Dahlab* (2001) V Eur Court HR 449, 452–7, 461–4.

⁵³ *Ibid* 453.

The Swiss Court continued that it was ‘scarcely conceivable’ that schools could be prohibited from exhibiting crucifixes (as they had been in an early case)⁵⁴ yet be required to permit teachers to wear religious clothing. It said that the fact that teachers were permitted to wear religious symbols such as ‘small pieces of jewellery’ was an issue that did not require further discussion,⁵⁵ quite probably because any further discussion would have revealed that such small pieces of jewellery were almost invariably crucifixes which are arguably in quite a different position when worn around the neck of a particular Christian teacher than when nailed to the wall arguably as a representation of the values of the school as a whole.

The case arose in the European Court as a jurisdictional matter. Switzerland argued that the case was so ‘manifestly ill-founded’ that it did not deserve to proceed to the merits phase. The Court agreed.⁵⁶ A woman with an otherwise spotless employment record who had spent years wearing Islamic clothing to which no-one objected had been effectively sacked because of her religion. But the issue was so clear that it did not even deserve a full and proper consideration by the Court.

B. *Şahin v Turkey*

The second case, *Şahin v Turkey*, was given more serious consideration by the Court and ultimately was decided in a split decision by the Grand Chamber.⁵⁷ Leyla Şahin was a fifth year medical student who had studied for four years at Bursa University in Turkey before transferring to the medical faculty at Istanbul University. She claims to have worn the Islamic headscarf for the four years at Bursa and the first few months at Istanbul. After that time the Vice-Chancellor issued a circular that instructed lecturers to refuse access to lectures, tutorials and examinations to students ‘with a beard or wearing the Islamic headscarf’.⁵⁸ Ms Şahin was refused permission to sit for certain examinations and was excluded from other subjects because she refused to remove her headscarf. She attempted to continue to attend lectures and was issued with a warning by the Dean of Medicine. She participated in what the Court described as an ‘unauthorised assembly’ outside the deanery of the faculty of medicine, protesting against the rules on dress, and as a consequence, was suspended for a semester. While a general university amnesty released her from this penalty, she left the university and completed her studies in Austria.⁵⁹

She brought a case against the Government of Turkey, arguing that her right to freedom of religion had been violated by her exclusion from university. While, as opposed to the *Dahlab* decision,

⁵⁴ Ibid 457.

⁵⁵ Ibid 456–7.

⁵⁶ Ibid.

⁵⁷ Şahin, Application No 44774/98 (Unreported, European Court of Human Rights, Grand Chamber, 10 November 2005).

⁵⁸ The judgment reproduces the relevant sections of the circular: *ibid* [16].

⁵⁹ See *ibid* [14]–[28] for the full facts of the case.

the Court found that the claim was not manifestly unfounded and thus admissible, both the Court at first instance and the Grand Chamber dismissed the claim.

IV. KEY ELEMENTS OF REASONING

In both cases the Court dealt very briefly with the key elements of contention between the parties. As discussed above, the focus of both judgments was on whether the state could justify the restrictions placed on wearing religious apparel by reference to the criteria set out in art 9(2) of the European Convention on Human Rights.⁶⁰

The core of the Dahlab decision is dealt with in a single paragraph. When explaining the approach taken to art 9(2) generally, the Court repeats the particularly loaded phrase, often used in art 9 cases, which describes the weighing of the different interests in the case. The Court, it says, must 'weigh the requirements of the protection of the rights and liberties of others against the conduct of which the applicant stood accused'.⁶¹ At this point in the decision, the right-holder ceases to be Ms Dahlab and she instead becomes someone 'accused' of behaviour. Instead of weighing the rights of Ms Dahlab against the rights of others, the Court sets up a scenario in which these mysterious and ill-defined others must be protected against a presumptive wrongdoer.⁶²

Once these preliminaries are dealt with, the Court moves to the heart of the issue. It is worth quoting this significant extract at length, as it formed the basis of the decision:

The 'Islamic Scarf' in the ECHR During the period in question there were no objections to the content or quality of the teaching provided by the applicant, who does not appear to have sought to gain any kind of advantage from the outward manifestation of her religious beliefs.⁶³

The Court accepts that it is very difficult to assess the impact that a powerful external symbol such as wearing a headscarf may have on the freedom of conscience and religion of very young children. The applicant's pupils were aged between four and eight, an age at which children wonder about many things and are also more easily influenced than older

⁶⁰ While some issues were raised in Şahin about whether the restriction was prescribed by law, these will not be discussed here as they were specific to the legal arrangements in Turkey: see Şahin, Application No 44774/98 (Unreported, European Court of Human Rights, Grand Chamber, 10 November 2005) [79]–[98]. The focus will be on those parts of the reasoning stating that the restrictions were necessary in a democratic society — statements from which more general principles can be derived: at [100]–[123].

⁶¹ Dahlab (2001) V Eur Court HR 449, 462.

⁶² For an example of a more rigorous weighing of the competing values, see Bahia Tahzib-Lie, 'Dissenting Women, Religion or Belief, and the State: Contemporary Challenges that Require Attention' in Tore Lindholm, W Cole Durham and Bahia Tahzib-Lie (eds), *Facilitating Freedom of Religion or Belief: A Deskbook* (2004) 455, 473–83.

⁶³ Note the insidious implication of 'appear to' and the hint that she might have been seeking some unspecified but illegitimate gain. Even in this one sentence when the Court acknowledges that Ms Dahlab appears to be a good teacher who taught her students well, it throws out suggestions of hidden, unknown harms that they need not specify and against which she cannot, therefore, defend herself.

pupils. In those circumstances, it cannot be denied outright that the wearing of a headscarf might have some kind of proselytizing effect, seeing that it appears to be imposed on women by a precept which is laid down in the Koran and which, as the Federal Court noted, is hard to square with the principle of gender equality. It therefore appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils.⁶⁴

There are three key elements to this reasoning. The first is that wearing the headscarf might have a proselytising effect; the second is that it is incompatible with gender equality and the third is that it is incompatible with tolerance and respect for others.

In *Şahin*, the proselytising element is less of a feature of the judgment, which instead relies on gender equality and religious tolerance (as perceived through the margin of appreciation) as the essential bases for its conclusion. While pressure on other students is a key consideration in *Şahin*, it is not dealt with in terms of proselytism. This makes sense as most of the other students will share the same religion as the women wearing headscarves, even if they have a different understanding of its requirements. Instead it is analysed more in terms of the rights and freedoms of others.

While *Şahin* is a Grand Chamber judgment, and did deal with the issues in a little more detail, the Grand Chamber relied in part on the decision in *Dahlab* with respect to gender equality and tolerance, and cites the relevant section of the quotation above as justification for its conclusions.⁶⁵ That passage, therefore, forms the basis of the following analysis.

A. Proselytising

The first form of harm referred to in *Dahlab* is that of proselytising. It should first be acknowledged that the evidence of direct proselytising by Ms Dahlab was nonexistent. As the facts make clear, she did not even tell her students that she was Muslim, let alone verbally encourage them to convert.

The evidence of indirect proselytism was also very weak and was based entirely upon the wearing of the Islamic headscarf. The Court acknowledges the problems with finding any empirical evidence to support the claims of harm. The decision states that it is 'difficult to assess the impact' of wearing such clothes.⁶⁶ It heavily qualifies the claim of proselytism — 'it cannot be denied' (rather than it is true) that there 'might' be 'some kind' of proselytising effect.⁶⁷ This wording is a roundabout way of saying that there was no evidence whatsoever presented to the Court of any harmful

⁶⁴ *Dahlab* (2001) V Eur Court HR 449, 463.

⁶⁵ *Şahin*, Application No 44774/98 (Unreported, European Court of Human Rights, Grand Chamber, 10 November 2005) [111].

⁶⁶ *Dahlab* (2001) V Eur Court HR 449, 463.

⁶⁷ *Ibid.*

or proselytising effect beyond the mere assertion of the Government that the proselytising effect existed. Indeed, for several years there had been something of an experiment in the classes taught by Ms Dahlab — if wearing of the headscarf by her had a proselytising effect it should surely have been possible to produce evidence from students who had suffered as a result. But the Court did not consider the fact that over that reasonably extended time there was no harm and no evidence of any proselytising effect on the children. The Court tries to blur the picture by creating the impression that the effects are unknown and unknowable rather than being prepared to accept that the evidence that exists suggests that there is no harm, at least in a case such as this with a sensitive teacher.

Furthermore, the evidence of harm, which in this case amounted to largely unsubstantiated assertions, was very weak. The test that the Court is supposed to use is whether the action taken by the state to limit religious freedom is 'necessary in a democratic society'.⁶⁸ As discussed above, 'necessity' is a high threshold test. Even if the Court's assumption — that there might be some proselytising effect on the children — is true, it is not clear why this effect is sufficient to discharge the burden of necessity.

The weakness of the Court's use of proselytism in this case is underlined by the general case law of the Court with respect to far more overt forms of proselytism than that engaged in by Ms Dahlab. The Court has, in previous cases, held that attempting to convince others of the truth of your religion is protected as a manifestation of religious freedom. The leading case in this area is *Kokkinakis v Greece*, which involved a Jehovah's Witness couple who were charged with a criminal offence after knocking on the door of a member of the Greek Orthodox Church and trying (unsuccessfully) to convince her to convert to their church.⁶⁹ The Court held that the conviction was a breach of art 9 of the European Convention on Human Rights because simply attempting to convince others to change their religion is not in itself a breach of religious freedom.⁷⁰ However, the wording used by the Court in *Kokkinakis*, to distinguish between permissible and unacceptable forms of proselytism, is indicative of the difficulty that the Court has when dealing with non-Christian religions. 'Bearing Christian witness' in the ways sanctioned by the World Council of Churches is held up as protected proselytism, while the practices disapproved by the Council are held to be impermissible.⁷¹ Ms Dahlab was not involved in any of the types of practices condemned as improper, which tend to focus on coercive measures such as the use of threats, financial or other incentives, or control techniques.

The Court also held, however, that special protection is needed for those who are particularly vulnerable, or to ensure that positions of authority are not abused. So a superior officer who attempted to use his military rank to put pressure on subordinates to convert was not held to be

⁶⁸ European Convention on Human Rights, above n 13, art 9(2).

⁶⁹ *Kokkinakis v Greece* (1993) 260 Eur Court HR (ser A) 6, 8; 17 EHRR 397, 399 ('*Kokkinakis*').

⁷⁰ *Ibid* 17; 414.

⁷¹ *Ibid* 21; 422.

protected by the freedom.⁷² In *Kokkinakis*, the Greek laws were found not to be in themselves a breach of art 9 because they protected vulnerable people such as children or the mentally incapable.⁷³

In *Dahlab* both factors were present — children are generally considered particularly vulnerable to intellectual or emotional manipulation and the student-teacher relationship has an element of power that is open to being abused. But the behaviour in this case was far from being a clear case of proselytism. Even if the students were particularly vulnerable and curious in early primary school, it is not quite clear what malign or coercive influence Ms Dahlab was exercising. She did not even tell them that she was Muslim. Are pupils likely to feel that they should also be Muslim in order to be like their teacher? That would be a very long stretch. The school was presumably filled with Christian teachers. The children would have been, in their home life, exposed to the religion or religions of their parents, relatives, and other figures of authority. Those families that were religious would have given explicit religious teaching to their children, attended religious ceremonies and participated in religious celebrations. Is there any reason to believe that children are so in the thrall of a particular teacher, who only teaches them for one year, that they will ignore or defy all the other authority figures and cultural influences in their lives, will actively seek out information about the religion of their teacher (as the teacher has not given any information herself) and will then feel pressured to convert to that religion? That line of logic seems absurd, but without it the *Dahlab* facts do not fall within the usual principles used by the Court to determine the circumstances in which proselytism is illegitimate. If Ms Dahlab had been giving explicit religious instruction to students, or had required them to participate in religious activities such as praying, then the case for proselytism would have been made out quite easily. But all that she was doing was being true to her religion in her own behaviour. It is difficult to understand how this amounts to improper pressure on children in religious matters.

Furthermore, the Court's references to the curiosity and vulnerability of children in the early years of school give rise to another set of questions. While the Court focuses on this issue as evidence that there might be a proselytising effect from the wearing of particular clothing, it also seems to be relevant to ask what message is being sent to curious and vulnerable children when their teacher is dismissed for wearing Muslim clothing. Such children might well ask where their teacher has gone and what she had done wrong. The Court's judgment makes clear that there were Muslim children in the school who wore traditional Muslim clothing and they might well wonder why dressing as they do or as their mothers do is so terrible that it requires an otherwise good teacher to be forced out of the school community.⁷⁴ In addition, children who are already inclined towards mistrust, religious hatred or racial discrimination could be sent the message that their fears are justified and their stereotypes valid. For a judgment that relies heavily on the idea that Muslim women force their views on others and that children need protection from intolerant or discriminatory practices,

⁷² *Larissis v Greece* (1998) I Eur Court HR 362, 367–8, 381; 27 EHRR 329, 334–6, 351.

⁷³ *Kokkinakis* (1993) 260 Eur Court HR (ser A) 6, 17; 17 EHRR 397, 414.

⁷⁴ *Dahlab* (2001) V Eur Court HR 449, 460.

the Court seems oblivious to the coercive nature of state intervention and any messages that this action might send about intolerance and discrimination.⁷⁵

B. Gender Equality

The next type of harm is that of gender inequality. This is a serious issue that deserves proper consideration, but it did not receive such consideration by the Court in either case. In both cases the Court made the assertion that wearing the veil is incompatible with gender equality, but in neither case did it flesh out the reasoning behind this statement beyond saying that it 'appears to be imposed on women by a precept which is laid down in the Koran'.⁷⁶ The way in which the word 'imposed' is used here is loaded. Most religious obligations are 'imposed' on adherents to some extent and the Court does not normally refer to the obligations in such negative terms. It is not clear why wearing headscarves is any more imposed on women by the Qur'an, than abstinence from pork or alcohol is imposed on all Muslims, or than obeying the Ten Commandments is imposed on Jews and Christians. Both Ms Dahlab and Ms Şahin lived in societies where there was no imposition by the state that required women to wear particular religious clothing — indeed, it is clear from the cases that the governments in question were unsupportive of the wearing of Muslim clothing. In this circumstance the adoption of the headscarf by educated, intelligent women might be better described as voluntary compliance with what they perceived to be a religious obligation.⁷⁷

Further, the Court is coy about the 'precept' and the particular part of the Qur'an to which it was referring. There is no detailed discussion of the teaching on clothing or of the different interpretations that it is given in different Muslim societies and by different Muslim scholars.⁷⁸ The vague, broad-brush approach to the issue by the Court seems to rely on the popular Western view — that the Qur'an and Islam are oppressive to women and there is no need to be more specific or to go into any detail about this because it is a self-evident, shared understanding of Islam.

Yet once the particular details of the cases are examined, the Court should have realised that the simplistic assumptions about Muslim women were questionable. The two women who were the applicants in the cases did not appear to be stereotypically subordinate. Both were prepared to litigate in domestic and international courts to protect their rights. Both were educated, professional women (a teacher and a medical student) and Ms Dahlab was a working mother, having returned to

⁷⁵ For example, a 31 year-old Moroccan woman who had immigrated to France said that her perception of the exclusion of girls who wear the veil is that the school authorities 'say to ... [the girls] ... "your culture. It's not good." You don't have a right to judge like that': Caitlin Killian, 'The Other Side of the Veil: North African Women in France Respond to the Headscarf Affair' (2003) 17 Gender and Society 567, 577.

⁷⁶ Dahlab (2001) V Eur Court HR 449, 463.

⁷⁷ This is not to deny that the headscarf may be imposed on some women, but it is not directly the Qur'an that coerces. The Qur'an may set out some obligations with respect to clothing, but it is social institutions — governmental, familial or cultural who may take away the choice of women to decide what clothing to wear.

⁷⁸ Dahlab (2001) V Eur Court HR 449, 463.

work relatively quickly after giving birth to her children. Ms Şahin attended student protests against the prohibition on headscarves. In short, their behaviour, beyond wearing the headscarf, tended to indicate that they were strong-minded and intelligent women who refused to be oppressed by what they considered to be illegitimate regulation of their clothing. There was nothing in evidence to suggest that either woman considered herself less than equal to men or that she wished to perpetuate gender inequality in society more generally. They gave uncontested evidence that they wore the headscarf voluntarily and through their own choice, rather than because of their subordination to a particular man or to men generally.⁷⁹ In their view, the imposition in relation to clothing was not that found in the Qur'an but that of the respective states.

The main argument of the Court in relation to gender equality, therefore, must be the broader one — that the veil is an unambiguous symbol of gender inequality. The logic of the Court's position seems to follow these lines: whatever evidence the women in the cases gave (and indeed whatever they may genuinely but mistakenly believe about their own motivation),⁸⁰ those who wear the veil demonstrate their own acceptance of gender inequality and (possibly) also seek to perpetuate this inequality in society as a whole.⁸¹ The Court's reasoning is oblique so it is not even clear if these two bases are what the Court is referring to. However, they are the strongest bases for this element of the decision and therefore constitute the focus of the rest of this discussion.

The Court does not develop its reasoning in either case, merely stating that it is 'difficult to reconcile'⁸² the wearing of the headscarf and gender equality. It is not clear where this difficulty lies. There are certainly feminist arguments from both Muslims and non-Muslims that criticise the wearing of the headscarf as oppressive to women.⁸³ There are also writers from both inside and outside Islam who explore the very many meanings of the headscarf to Muslim women and who make feminist arguments in favour of Muslim clothing.⁸⁴ The Court fails to engage with the complexity of this debate.

In her powerful dissenting judgment in Şahin, Judge Tulkens criticises the paternalism of the majority who refuse to allow a young woman to act in a manner consistent with her personal choice on

⁷⁹ Şahin, Application No 44774/98 (Unreported, European Court of Human Rights, Grand Chamber, 10 November 2005) [12] (Dissenting Opinion of Judge Tulkens).

⁸⁰ Some women (though not the two applicants in these cases) may not be able to fully or accurately explain why they wear distinctive religious clothing — 'oftentimes people engage in symbolic behaviour without a conscious understanding of what they do': Linda Arthur, 'Introduction: Dress and the Social Control of the Body' in Linda Arthur (ed), *Religion, Dress and the Body* (1999) 1, 4.

⁸¹ It is possible that the ready acceptance of the viewpoint that the headscarf is both oppressive of women and a symbol of fundamentalism is due to the regular media propagation of this viewpoint: see Liederman, above n 2, 111.

⁸² Dahlab (2001) V Eur Court HR 449, 463.

⁸³ This debate within Islam is not a new one. For an overview of the writings of early 20th century Muslim feminist and opponent of veiling Zin al-Din, see Bouthaina Shaaban, 'The Muted Voices of Women Interpreters' in Mahnaz Afkhami (ed), *Faith and Freedom: Women's Human Rights in the Muslim World* (1995) 61, 68–72.

⁸⁴ For the diverse reactions of a group of Muslim women to the French laws on the headscarf, see Killian, above n 73. For an overview of some of the different scholarly perspectives, see Chouki El Hamel, 'Muslim Diaspora in Western Europe: The Islamic Headscarf (Hijab), the Media and Muslims' *Integration in France* (2002) 6 *Citizenship Studies* 293, 301–4.

the basis that this would promote sexuality inequality.⁸⁵ She then neatly dissects the reasoning of the majority in assuming that banning headscarves will improve gender equality:

However, what, in fact, is the connection between the ban and sexual equality?

The judgment [of the majority] does not say. Indeed, what is the signification of wearing the headscarf? As the German Constitutional Court noted in its judgment of 24 September 2003, wearing the headscarf has no single meaning; it is a practise that is engaged in for a variety of reasons. It does not necessarily symbolise the submission of women to men and there are those who maintain that, in certain cases, it can even be a means of emancipating women. What is lacking in this debate is the opinion of women, both those who wear the headscarf and those who choose not to.⁸⁶

In the final sentence of this passage, Judge Tulkens makes the important point that a male dominated Court (in this case 12 male judges and five female judges, one of whom dissented) is simply accepting the assertions of gender inequality by a male-dominated Government and is paying little attention to the views of women.⁸⁷

The majority of the Court falls into the error of refusing to engage with the reality of Muslim women's lives and the complex and multiple reasons for which different women wear the veil. This attitude — which assumes that the observer understands the symbolic meaning of the headscarf without engaging with the women who cover their heads — has been analysed by Homa Hoodfar from her study of the experience of young Muslim women in educational institutions and the labour market in Canada. These women express their frustration at the assumption that veil equals ignorance and oppression [which] means that young Muslim women have to invest a considerable amount of energy to establish themselves as thinking, rational, literate students/individuals, both in their classrooms and outside.⁸⁸

She criticises this assumption about the nature of the veil as racist and colonial and argues that while 'for Westerners [the veil's] meaning has been static and unchanging, in Muslim cultures the veil's functions and social significance have varied tremendously, particularly during times of rapid social change'.⁸⁹ This observation is far from unique or radical; as Judge Tulkens notes, even the

⁸⁵ Şahin, Application No 44774/98 (Unreported, European Court of Human Rights, Grand Chamber, 10 November 2005) [12] (Dissenting Opinion of Judge Tulkens).

⁸⁶ Ibid (citations omitted).

⁸⁷ When Muslim women are asked about their views on these issues, they too are divided about the correct response by the state: see Killian, above n 73, 575–86.

⁸⁸ Homa Hoodfar, 'The Veil in Their Minds and on Our Heads: Veiling Practices and Muslim Women' in Lisa Lowe and David Lloyd (eds), *The Politics of Culture in the Shadow of Capital* (1997) 248, 249 (emphasis in original).

⁸⁹ Ibid. See also Faegheh Shirazi, 'Islamic Religion and Women's Dress Code: The Islamic Republic of Iran' in Linda Arthur (ed), *Undressing Religion: Commitment and Conversion from a Cross-Cultural Perspective* (2000) 113, 118–19; Joesph Stempf, 'Veiling and Unveiling: Reconstructing Malay Female Identity in Singapore' in Linda Arthur (ed), *Undressing Religion: Commitment and Conversion from a Cross-Cultural Perspective* (2000) 169, 169–82; Sebastian Poulter, 'Muslim Headscarves in School: Contrasting Legal Approaches in England and France' (1997) 17 *Oxford Journal of Legal Studies* 43, 71.

German Constitutional Court recognised that the veil has many meanings, yet the complexity of the debate is not touched on by the Court in Şahin.

The debate over the extent to which religious clothing perpetuates gender inequality is a complex one. There are circumstances in which a government might legitimately make a decision to restrict or prohibit some forms of religious clothing in order to further gender equality.⁹⁰ Such a measure might be justified particularly in situations (such as was asserted in Şahin) where there is: evidence that other women would be pressured into unwilling compliance with religious clothing;⁹¹ violence against women who refuse to veil;⁹² or when women's clothing is being used for political purposes to further a cause inimical to women's rights.⁹³ Yet even then, the exclusion of women from important public spaces such as schools and universities is a peculiar way to achieve gender equality and has the potential to harm women's educational and employment rights in the name of gender equality.⁹⁴ In the earlier moves to restrict schoolgirls from wearing the headscarf in France during the mid-1990s, more than 100 Muslim girls were expelled from school for refusing to comply with the ban.⁹⁵ This demonstrates that it is not a simple matter of banning religious clothing and thus ensuring that all girls remove the veil and embrace a Western notion of sexual equality. The reality is that some women will no longer be able to pursue their education or their careers in public places. If a feminist analysis is to be undertaken, the harm done to these women must be taken into account.

C. Intolerance and Secularism

The final element of the justification for banning the headscarf is that it is incompatible with a tolerant, secular society that respects the rights and freedoms of others. Again, the evidence of direct intolerance of either of the applicants is minimal. Ms Dahlab had not coerced her students to dress, behave or believe in the same way as she did. She did not exclude students or parents from

⁹⁰ These circumstances should, however, be demonstrated by clear evidence. As the Quebec Human Rights Committee put it, 'one should presume that hijab-wearers are expressing their religious convictions and the hijab should only be banned when it is demonstrated — and not just presumed — that public order or sexual equality is in danger': as cited in Cynthia DeBula Baines, 'L'Affaire des Foulards — Discrimination or the Price of a Secular Public Education System?' (1996) 29 *The Vanderbilt Journal of Transnational Law* 303, 324.

⁹¹ For a discussion of the problems related to the state's imposition of religious clothing on women, see Tahzib-Lie, above n 60, 483–7. In the context of schools, Sebastian Poulter makes the interesting point that the dividing line between normal parent–adolescent debates over appropriate clothing and patriarchal control is also not an easy one to draw: Poulter, above n 87, 72–3. This observation, however, does not apply as readily in the context of a woman in the workforce or at university.

⁹² For an example of widespread social violence being used to impose religious clothing on women, see the discussion of Algeria in Karima Bennouna, 'SOS Algeria: Women's Human Rights under Siege' in Mahnaz Afkhami (ed), *Faith and Freedom: Women's Human Rights in the Muslim World* (1995) 184, 187–8.

⁹³ Strict enforcement through legal or social means of religious clothing can be a way of manifesting conservative, patriarchal social control. As Linda Arthur notes, '[i]n many of the most conservative groups ... dress codes are used as gender norms that reinforce the existing power system': Linda Arthur, 'Introduction: Dress and the Social Control of the Body' in Linda Arthur (ed), *Religion, Dress and the Body* (1999) 1, 1.

⁹⁴ For an interesting description of the way in which compulsory de-veiling limited the social freedom and economic independence of many women in Iran, see Hoodfar, above n 86, 259–67.

⁹⁵ Baines, above n 88, 307.

her classroom. She did not denigrate the beliefs of others or promote the superiority of her own views, except in the way in which everyone who is serious about her beliefs must do so — by living in compliance with them. Similarly, there is no evidence that Ms Şahin was intolerant of the views of others. She did not engage in any behaviour that involved attempting to force her views on others. She was not guilty of any disciplinary offence at university other than those related to clothing and she did not belong to any of the fundamentalist groups within Turkey. At some level, the Court seems to be saying that anyone who is sufficiently serious about advertising the fact that they are Muslim must be, by definition, intolerant. Of course, the Court does not make that point explicitly, but this equating of Islam with intolerance (and Islamic woman with oppression) seems to inform the Court's judgment implicitly.

Juxtaposed against intolerant Islam is tolerant secularity — a secularity which needs protection against fundamentalism and what the Court describes as 'political Islam'. The state is the guarantor of secularity and the Court gives a classical liberal description of the role of the state in relation to religious disputes:

The Court has frequently emphasised the State's role as the neutral and impartial organiser of the exercise of various religions, faiths and beliefs, and stated that this role is conducive to public order, religious harmony and tolerance in a democratic society. It also considers that the State's duty of neutrality and impartiality is incompatible with any power on the State's part to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed and that it requires the State to ensure mutual tolerance between opposing groups.⁹⁶

State secularity is assumed to be unproblematic and a method of ensuring that all religions and beliefs are treated fairly and equally. In his comparison to this bland assumption by the Court, Professor Jeremy Gunn views the role of *laïcité* and religious freedom in France and the US respectively as inherently conflictual.

But despite the popular beliefs that *laïcité* and religious freedom are founding principles that unite the citizens of their respective countries, they actually operate in ways that are more akin to founding myths. If we probe their historical backgrounds, it becomes clear that neither doctrine originated as a unifying or founding principle. Rather, each emerged during periods of confrontation, of intolerance, and often of violence against those who held dissenting beliefs. Moreover, in current controversies involving religion and the state, where the doctrines are cited for the ostensible purpose of resolving conflicts, they continue to be applied in ways that divide citizens on the basis of their beliefs and that belittle those whose beliefs do not conform to popular preferences.⁹⁷

This more probing analysis of the role played by *laïcité* (and a similar point could be made about secularism in both of the cases under analysis) does not assume that a secular state is a non-con-

⁹⁶ Şahin, Application No 44774/98 (Unreported, European Court of Human Rights, Grand Chamber, 10 November 2005) [107] (citations omitted).

⁹⁷ Gunn, above n 3, 422.

troversial guarantor of minority rights.⁹⁸ In the case of Turkey, Özlem Denli concludes her analysis of the complex question of the anti-democratic nature of both Kemalist-inspired and militarily underpinned secularity and fundamentalist religious politics with the observation that secularism is not a neutral position that levels all distinctions in public life.

Rather it is 'a normatively prescriptive model that favors certain forms of modern religion at the expense of others that are equally legitimate'.⁹⁹ For the Court, however, secularity is unproblematic and, at least in the case of Turkey, measures taken for the protection of a secular government, untainted by the influence of 'political Islam', has led to the Court approving a series of quite repressive measures by the Turkish Government, including the banning of a popular Muslim political party that was part of a coalition government in Turkey and might well have won the forthcoming elections outright if it had been allowed to contest democratic elections.¹⁰⁰

The willingness of the Court to assume that the veil was a dangerous signifier of intolerance and anti-secular fundamentalism is particularly disturbing when set in the context of another judgment of the Court in relation to Turkey heard not long before Şahin. In that case, a religious leader was prosecuted for explicitly criticising secularism, calling for a Muslim state with sharia law, and using offensive names to refer to children born outside of wedlock.¹⁰¹ The punishment of a male religious leader who deliberately set out to undermine secularism and to increase intolerance of non-Muslims, secular Muslims, and those born out of wedlock was held by the Court to violate his freedom of expression under art 10.¹⁰² But the punishment of a woman, who never criticised secularism or its claims in the state realm, and about whom there was no proof of personal intolerance, was held not to be a violation of rights.

Part of the explanation for the distinction in treatment between an overtly intolerant leader and women who come to symbolise intolerance through their clothing is the power of the symbolic role of the control of women as a signifier of cultural and political power.¹⁰³ An offensive public statement is simply a political claim that can be adjudicated in the rational realm, no matter how irrational the statement. Such debate may simply be accepted as an impotent gesture that the dominant culture can tolerate in part because of the strength of secularity and modernity. But control of women is a signifier of success in the culture war between secular governments and Muslim subcultures

⁹⁸ Thus, in states that highly value secularism, the adoption of religious clothing may be perceived as incompatible with full citizenship. As Cynthia DeBula Baines puts it in the French context, 'a simple hijab, when worn by Muslim girls, signifies to many French a refusal to become French': Baines, above n 88, 311.

⁹⁹ Özlem Denli, 'Between Laicist State Ideology and Modern Public Religion: The Head-Cover Controversy in Contemporary Turkey' in Tore Lindholm, W Cole Durham and Bahia Tahzib-Lie (eds), *Facilitating Freedom of Religion or Belief: A Deskbook* (2004) 497, 511.

¹⁰⁰ *Refah Partisi (the Welfare Party) v Turkey* (2003) II Eur Court HR 269, 269–72; 37 EHRR 1, 1–7.

¹⁰¹ *Gunduz v Turkey* (2003) XI Eur Ct HR 259, 262–6; 41 EHRR 59, 61–5.

¹⁰² *Ibid* 272–5; 71–4.

¹⁰³ Fatima Mernissi, 'Arab Women's Rights and the Muslim State in the Twenty-First Century: Reflections on Islam as Religion and State' in Mahnaz Afkhami (ed), *Faith and Freedom: Women's Human Rights in the Muslim World* (1995) 33. Mernissi argues that

[s]ince the abolition of slavery, only women and minorities are left as a test for the state to modernize itself ... This is why most of the debate around democracy in the Muslim world circles endlessly around the explosive issue of women's liberation, and also why a piece of cloth, the veil, is so loaded with symbolic meaning and so powerful as a source of violence within, and now also without, Muslim territories: at 44.

in those societies. The women in these cases cease to be individuals with their own personalities, histories and concerns. Instead they become a symbol of the tension between the imagined West (secular, rational, egalitarian, human rights respecting) and imagined Islam (religious fundamentalist, irrational, discriminatory and violative of human rights). Having accepted such a world view, it is little wonder that the Court opts for the West.

V. ISLAM AND THE MUSLIM WOMAN IN THE COURT'S JUDGMENTS

The reasoning in this case reflects part of the broader debate about Muslim girls and women and their clothing. The debate reflects two seemingly contradictory views of Muslim women and girls. The Court uses both stereotypes of Muslim women without any recognition of the inherent contradiction between the two and with minimal evidence to demonstrate that either stereotype is accurate with respect either to the applicants or to Muslim women more generally.

The first stereotype is that of victim — the victim of a gender oppressive religion, needing protection from abusive, violent male relatives, and passive, unable to help herself in the face of a culture of male dominance. This view is reflected in the statements by the Court in both cases that it is difficult to reconcile the headscarves with gender equality.¹⁰⁴ This argument is also used by many governments who seek to justify the ban on the headscarf on non-religious grounds.¹⁰⁵ When these arguments are raised in public debate they are normally in relation to stories about Muslim girls whose male relatives use threats or violence to impose unwanted religious dress upon them.¹⁰⁶ The state (supported by the Court) acts as the rescuer of these women and girls.

It is undoubtedly true that some women and girls face oppression in the home with respect to what they wear (as well as other issues of personal honour such as sexual purity). The state that takes gender equality seriously should guarantee the rights of personal safety and autonomy of women. But caution needs to be exercised before assuming that this means that all Muslim women need rescuing (or, indeed, that no non-Muslim woman needs the same protection and safety). Patriarchal Western societies have used the justification of saving women from the barbarity of their own cultures (including Muslim cultures) for many centuries as a partial excuse for colonialism and racism.¹⁰⁷ This is a point of which many Muslims are acutely aware and it should at least lead to some level of self-reflection on the part of those Westerners who suddenly realise the need to save a new generation of Muslim women from Muslim men.¹⁰⁸

¹⁰⁴ Dahlab (2001) V Eur Court HR 449, 463; Şahin v Turkey (2004) Eur Court HR 299, [111].

¹⁰⁵ Henley, above n 3, 17.

¹⁰⁶ R (on the application of SB) v Denbigh High School Governors [2005] 1 WLR Civ 3372.

¹⁰⁷ Liz Fekete, 'Anti-Muslim Racism and the European Security State' (2004) 46 Race and 106 Class 3, 19.

¹⁰⁸ Indeed, the precise nature of what Muslim women need saving from has changed over time — at one point the colonial enterprise was constructed in part to save Muslim women from the sexual demands of Muslim men. Now it is to save them from the sexual repression

The second stereotype relied on by the Court is that of aggressor — the Muslim woman as fundamentalist who forces values onto the unwilling and undefended. This is illustrated in the Court's discussion of proselytism and intolerance. The woman in a headscarf is inherently and unavoidably engaged in ruthlessly propagating her views — even a school teacher who never mentions the word 'Islam' is such a dangerous proselytiser that she needs to be removed from the school. Moreover, the values that are being propagated are dangerous, intolerant and discriminatory, and threaten to undermine the secular system that would otherwise grant equal protection to all religions and beliefs.

Again, such images of Muslim women who wear the headscarf are common in mainstream political debate. The French leadership regularly invokes a vision of militant, fundamentalist schoolgirls who actively seek to undermine the secularity of the French legal system by wearing a headscarf.¹⁰⁹ In Australia, Member of Parliament Sophie Panopoulos was supported by another senior Liberal in her claim that girls who wore the headscarf in Australian schools were engaging in an 'iconic act of defiance'.^{108 110}

These two stereotypes are deployed by the Court and in popular political culture with respect to the same group of women (in the case of the Court, two specific women) with no recognition of the conflict between the two images. On the one hand, women such as Ms Şahin and Ms Dahlab are representations of gender inequality — oppressed, submissive, victims of patriarchy. They have conformed with sexist religious dictates that force women to be asexual, timid and deferential. On the other hand, those very same women are dangerous destabilisers of the state. They have such personal force that their mere presence is enough to amount to problematic proselytising (proselytising far more problematic than overt, deliberate attempts to encourage others to change their religion). They have the capacity to ruthlessly pursue a religious Islamic state (even, improbably, in Switzerland). In the course of a single sentence in Dahlab, Ms Dahlab transforms from a woman who needs rescuing from Islam to an Islamic woman from whom everyone else needs rescuing.

So what unites these two, disparate images of Muslim womanhood — the victim and the aggressor; the one in need of protection and the one from whom we all need protection? The link seems to be the idea of threat. The implicit threat in the woman who is too powerful, too intolerant, too aggressive is easy to see. But the victim is a threat too. A threat to the liberal, egalitarian order. A threat to control by the state and secular authorities because their coercion is less effective than that of the family and the subculture. In response, the state increases its coercion and control. With all the concern that the French Government (and certain English schools) had with fathers or brothers using violence to force girls to wear the headscarf to school, there was almost no mention of punishing the men involved or even working with the relevant communities to eliminate domestic violence. Instead, the girls were used as a battleground for cultural control, with each side continually making life more difficult for the girls involved. If the family forces girls to wear headscarves,

and denial of Islam.

¹⁰⁹ Jon Henley, 'Something Aggressive about Veils, Says Chirac', *The Guardian* (London, UK), 6 December 2003, 19.

¹¹⁰ 'Bishop Backs Ban on Muslim Headscarves', *Australian Associated Press Newsfeed*, 28 August 2005.

then the state will ban the girls from public schools. If the state bans them from public schools, then the family will send them to religious schools. If the family sends them to religious schools, then the state will cut off funding to the religious schools. If the state cuts off funding, then the family will refuse to allow the girls to go to school at all. Such brinksmanship can deny a girl an education for many years before it is resolved.

In all this contestation, the position of the many women who voluntarily choose the headscarf for one of many reasons is marginalised, when in reality it is far more representative of the mainstream. Ms Dahlab and Ms Şahin went to the European Court of Human Rights to assert that they were not some symbol of oppressed womanhood in need of rescue, nor aggressive proselytisers in need of restraining. They hoped that their rights might be upheld when there was no sign that they had done any harm. They asked for the fulfilment of the promise of the European Convention on Human Rights — equality, freedom and dignity. Instead the Court sided with the state and permitted a good teacher to be humiliated and rendered virtually unemployable in her chosen profession until she agreed to remove her headscarf. The Court sided with the state against a student who was denied access to education and forced out of university. Such judgments, justified on the basis of equality, tolerance and human rights, do harm to the very notion of neutrality that the Court claims to be central to proper adjudication in these areas. When those who are not Christians but whose rights have been violated can gain no relief from the Court because the Court employs stereotypes and refuses to engage with the complexity of modern religious pluralism, then religious freedom and pluralism are undermined and the notion of human rights degraded.

