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INTRODUCTION

The interpretation and application of the European Convention on Human Rights\(^1\) is determined by the fact that on the one hand the Convention is an international treaty and thus subject to the classic international rules concerning treaty interpretation, while on the other hand, it is a treaty with a special character, so that the classic interpretation rules must often yield for rules and methods of interpretation and application that are intrinsic to the European Convention. In the sections to come, the principles of interpretation (1-9) and application (10-11) will be examined. Some of these rules can be applied by national courts when applying Convention standards.

1. VIENNA CONVENTION ON THE LAW OF TREATIES

The European Convention is an international treaty and as such is subject to the classic international rules concerning treaty interpretation as these are codified in the Vienna

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Convention on the Law of Treaties. It shall therefore be interpreted ‘in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’ (Art. 31 Vienna Convention). Accordingly, on some occasions the European Court may adopt and accept the ordinary meaning of particular words in the authentic texts of a provision in the European Convention, which it holds is not contradicted by the context of a sub-paragraph of the provision and which is moreover confirmed by the object and purpose of the provision.

In view of the Vienna Convention, the European Convention is to be interpreted ‘teleologically’, i.e. on the basis of its ‘object and purpose’. Indeed, the Convention is an instrument, a means to achieve a certain goal and this objective is the protection of individual human beings and rights and the maintenance and promotion of the ideals and values of a democratic society. Thus, in the absence of clear wording in the text of a Convention provision, essentially by referring to the object and purpose of the Convention, a right may be read into a Convention provision. The European Court may use the ‘historical approach’ by relying on the ‘Travaux Préparatoires’ of the European Convention and its protocols as a supplementary means of interpretation, in order to confirm the meaning resulting from the application of Article 31 of the Vienna Convention, or to determine the meaning when the interpretation according to the aforementioned provision leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable (Art. 32 Vienna Convention). In practice, recourse to the ‘Travaux Préparatoires’ is very scarce, due to the fact that the ‘Travaux’ are often silent or unclear, or due to rising importance of the evolutive interpretation of the European Convention in the light of present-day conditions. The reliance of the European Court to the object and purpose of the European Convention while interpreting the European Convention has in a number of cases been restricted because the Court held that is was bound by ‘the clear meaning’ of the text.

The European Convention is also a treaty with a special character since it is a human rights treaty. It has a sui generis character, in view of the fact that it differs from the classic, treaties which are based on mere reciprocal engagements between contracting States through the objective obligations it creates and the normative scope associated with these

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3 ECtHR, Luedicke, Belgacem and Koc v. Germany, Judgment of 28 November 1978, § 46 (ordinary meaning of ‘gratuitement’ and ‘free’ in Art. 6(3)(e) is not contradicted by the context of the sub-paragraph and is confirmed by the object and purpose of Art. 6).
4 ECtHR, Soering v. UK, Judgment of 7 July 1989, § 87.
5 ECtHR, Zdanoka v. Latvia, Judgment of 16 March 2006, § 98.
6 ECtHR, Golder v. UK, Judgment of 21 February 1975, § 36 (right of access to a Court).
8 ECtHR, James a.o., Judgment of 21 February 1986, § 64; ECtHR, Johnston a.o. v. Ireland, Judgment of 18 December 1986, § 52.
9 ECtHR, Shamayev a.o. v. Georgia and Russia, Judgment of 12 April 2005, § 33.
obligations. The classic interpretation rules under public international law must therefore on many occasions give way to a number of rules and methods of interpretation that are intrinsic to the European Convention and the Vienna Convention does not oppose that the European Convention is subject to its own rules of interpretation.

In the sections to come, following an explanation of the principle of subsidiarity, the general principles and theories which the European Court of Human Rights uses to substantiate its decisions when interpreting and applying the provisions of the European Convention on Human Rights will be examined.

2. SUBSIDIARITY

The principle of subsidiarity, which is confirmed in the case law of the European Court, is probably the most important of the principles underlying the Convention, and entails that primary responsibility for the effective protection of the Convention’s rights and freedoms lies with the (national legal systems of the) Member States. The principle also implies that in exercising its supervisory task, the European Court is as to substance subject to certain limits or is at least deemed to exercise a certain form of self-restraint. It should, however be noted that the principle of subsidiarity does not water down the protection offered by Convention guarantees. For example, the less domestic courts explain the proportionality of an intrusion, the more freedom the Strasbourg Court may enjoy to examine the matter.

The principle of subsidiarity comprises three crucial characteristics: (1) the European Convention is not exhaustive and the Contracting States are free to offer wider protection under national law; (2) the national authorities are generally better positioned than the Court at Strasbourg to assess the proper balance between the protection of the general interest of society and the protection of the individual rights of the individual seeking justice; (3) both characteristics determine the pursuit of common standards of human rights protection within the community of Contracting States: the necessity of effective protection of the rights and freedoms of a person can in certain circumstances lead to uniformity, but the

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11 ECtHR, Mamatkulov and Askarov, Judgment of 4 February 2005, § 100.
12 ECtHR, Shamayev a.o. v. Georgia and Russia, Judgment of 12 April 2005, § 500.
search for uniformity is by no means a basic objective of the European Convention\textsuperscript{16}. The basic idea of the signatories to the ECHR to protect the rights and freedoms both nationally and at European level, is also illustrated in a number of other Convention provisions, such as Art. 1 and Art. 13 ECHR, Art. 35 ECHR, or Art. 41 ECHR.

3. EFFECTIVENESS

Since the European Convention is a mechanism for the protection of human rights, it is “of crucial importance” that it is interpreted and applied in a way in which these rights are not theoretical or illusory, but are practical and effective\textsuperscript{17}. The principle of effectiveness\textsuperscript{18} is a key element to the realisation of the ‘object and purpose’ of the European Convention, and leads to an extensive interpretation of the rights –and thus also to an evolutive interpretation of the rights (infra)--, as well as to a restrictive interpretation of the limitations. These are two aspects of the same teleological vision, whereby the second aspect is a corollary of the first.

The requirement of an extensive interpretation of the Convention rights for example implies that the mere appointment of a lawyer prior to a lawsuit is insufficient, but that the assistance provided by the lawyer should as a whole be effective\textsuperscript{19}. The intentional use of lethal violence by government agents should form the subject of a form of effective official investigation\textsuperscript{20}. A right based on Art. 11 ECHR would be largely theoretical and illusory if it were limited to the founding of an association, since the national authorities could immediately disband the association after its foundation without having to comply with the European Convention; the protection afforded by Art. 11 ECHR therefore not only relates to its creation but it lasts for an association’s entire life\textsuperscript{21}. On the other hand, exceptions to, restrictions on, or interference with the rights guaranteed under the Convention must be strictly or narrowly interpreted\textsuperscript{22}.

\textsuperscript{16} See ECtHR, Tyrer v. UK, Judgment of 25 April 1978, § 31 (whereby the ECHR is interpreted in the light of present-day conditions).
\textsuperscript{17} The first judgment in which this is expressly stated: ECtHR, Airey v. Ireland, Judgment of 9 October 1979, § 24 (with a reference to 4 previous judgments in which the principle was implicitly); ECtHR, Mamakulov and Askarov v. Turkey, Judgment of 4 February 2005, § 121.
\textsuperscript{19} ECtHR, Artico v. Italy, Judgment of 13 May 1980, § 33 (where a violation of the right to legal aid under Art. 6(3)(c) ECHR was found because the legal aid lawyer appointed by the state was completely ineffective).
\textsuperscript{20} ECtHR, McCann, Farrell and Savage v. UK, Judgment of 27 September 1995, § 161.
\textsuperscript{21} ECtHR, United Communist Party of Turkey a.o. v. Turkey, Judgment of 30 January 1998, § 33.
\textsuperscript{22} E.g. ECtHR, Barthold v. Germany, Judgment of 25 March 1985, § 43 (under Art. 10 ECHR); ECtHR, Guzzardi v. Italy, Judgment of 6 November 1980, § 98 (exceptions under Art. 5(1) ECHR); ECtHR, Van Mechelen v. Netherlands, Judgment of 23 April 1997, § 58 (exceptions to the rights of defense under Art. 6 ECHR).
4. AUTONOMOUS MEANING

The notions or concepts used in the European Convention have an “autonomous meaning”\(^\text{23}\) in relation to domestic law, in other words, these concepts have a specific European meaning\(^\text{24}\), as the authority to interpret the Convention is granted to an international court set up for that purpose, namely the European Court (Art. 32 ECHR). Although concepts may have their origin in national law, their meaning does not necessary coincide with the meaning that has been attached to identical or comparable provisions in the internal legal systems of the States. In other words, the European Court does not consider itself bound by the qualification under national law that would escape its supervision and wishes thus to confirm the independence of the European Convention (and its supervisory mechanism) with respect to the national legal systems.

Concepts with an autonomous meaning are, inter alia: ‘civil rights and obligations’ (Art. 6(1) ECHR)\(^\text{25}\), ‘tribunal’ (Art. 6(1) ECHR)\(^\text{26}\), ‘criminal charge’ (Art. 6(1) and (2) ECHR)\(^\text{27}\), ‘penalty’ (Art. 7 ECHR)\(^\text{28}\), ‘home’ (Art. 8 ECHR)\(^\text{29}\), ‘association’ (Art. 11 ECHR)\(^\text{30}\), ‘property’ (Art. 1 Protocol No. 1)\(^\text{31}\) and ‘victim’\(^\text{32}\) (Art. 34 ECHR).

The autonomous interpretation method leads to a harmonisation of the enforcement standards concerning fundamental rights in the various Member States (which is only one of the objectives of the European Convention)\(^\text{33}\), and thus avoids that the level of protection would vary too much from country to country and that not only the legal uniformity but also the equality in law of the legal subjects of the various Member States would be jeopardised\(^\text{34}\). The autonomous interpretation method is closely linked to the evolutive interpretation (infra) and with the principle of effectiveness (supra) and as such with a teleological interpretation.


\(^{26}\) ECtHR, Jean-Louis Didier v. France, Decision of 27 August 2002, § 3.

\(^{27}\) ECtHR, Phillips v. UK, Judgment of 5 July 2001, § 35.

\(^{28}\) ECtHR, Jamil v. France, Judgment of 8 June 1995, § 30.

\(^{29}\) ECtHR, Mguéladzé v. Georgia, Judgment of 24 July 2007, § 80.

\(^{30}\) ECtHR, Popov a.o. v. Russia, Decision of 6 November 2003.

\(^{31}\) ECtHR, Former King of Greece a.o. v. Greece, Judgment of 23 November 2000, § 60.

\(^{32}\) ECtHR, Societatea de vânătoare “Mistreţul” v. Romania, Decision of 4 May 1999.


5. EVOLUTIVE INTERPRETATION

The European Convention is a “living instrument” which must be interpreted in the light of present-day conditions. The substance of the rights evolves in the case law by virtue of evolutive opinions in society, meaning that the terms and concepts used in the European Convention have to be interpreted in the light of the views in present-day democratic society and not from the viewpoint of 1950’s society, when the European Convention was adopted. The evolutive method of interpretation consequently leads to a diminished importance attached to the historical meaning of the European Convention and the Protocols, symbolised by the travaux préparatoires as an additional source of interpretation. The dynamic or evolutive interpretative method is one of the most important principles of interpretation of the European Convention, and its importance is drawn from the emphasis placed upon the object and purpose of the Convention. By failing to maintain a dynamic or evolutive approach, the European Court would run the risk of the Convention becoming a bar or impediment to improvement and innovation.

The evolutive or dynamic interpretive method has been applied by the European Court both to the material rights and freedoms included in the European Convention and the Protocols, for example Art. 3 ECHR, Art. 5 ECHR, Art. 6 ECHR, Art. 8 ECHR, Art. 2 Protocol No. 1 and Art. 3 Protocol No. 1.

In applying the evolutive or dynamic approach, the Strasbourg judges enter the borderline area between interpretation and modification of the European Convention by a judge. The evolutive method should therefore be applied with the greatest caution and requires thorough scrutiny. In making this assessment, increasing attention is paid to common European standards, derived from other European or international treaties or soft law that have been endorsed by a majority of the ECHR Member States or from other relevant convergent national and international case law, although as appears from Stras-

38 ECtHR, Christine Goodwin v. UK, Judgment of 11 July 2002, § 74.
40 ECtHR, Guzzardi v. Italy, Judgment of 6 November 1980, § 95 (the concept of deprivation of liberty).
41 ECtHR, Salesi v. Italy, Judgment of 26 February 1993, § 19 (the notion of civil rights and obligations).
42 ECtHR, Dudgeon v. UK, Judgment of 22 October 1981, § 60 (sexual acts between homosexuals).
43 ECtHR, Leyla Şahin v. Turkey, Judgment of 10 November 2005, §§ 136-137 (recognition that institutions of higher education existing at a given time come within the scope of the first sentence of Article 2 of Protocol No 1).
44 ECtHR, Matthews v. UK, Judgment of 18 February 1999, § 39 (the concept of legislature).
How to Interpret the European Convention on Human Rights

bourg case law, the evolutive interpretation need not necessarily rely on an established consensus, but may also be based on an emerging or continuing international trend\(^{45}\) (infra).

6. RULE OF LAW

The principle of rule of law\(^{46}\) is explicitly mentioned in the Preamble to the ECHR, in which it is qualified as an element in the collective heritage of the European countries and is one of the fundamental principles of a democratic society and consequently inherently present in all the provisions of the European Convention\(^{47}\).

Although the rule of law criterion was initially only sporadically used as an instrument to assess whether a restriction was foreseeable\(^{48}\), in more recent Strasbourg case law it is also used as an independent, qualitatively stricter assessment standard, which to a certain extent is independent of the particulars of a case and is therefore an abstract assessment standard (although the link with the foreseeability requirement is still formally intact).

The principle of the rule of law and the principle of lawfulness not only require that a Member State observes and applies in a foreseeable and consistent manner the legal norms or regulations it has enacted, but it must also ensure the legal and practical conditions for their implementation. The obligation to uphold the legitimate trust of the citizens in the State and in the law, that is inherent to the rule of law, requires that Member States eliminate the dysfunctional provisions in their domestic legal system and rectify extra-legal practices\(^{49}\). On the other hand, national courts should for example not under any circumstances be prepared to allow life-endangering offences to go unpunished. A prompt and effective response by the authorities in investigating the use of lethal force is essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts\(^{50}\).

\(^{45}\) ECtHR, Christine Goodwin v. UK, Judgment of 11 July 2002, §§ 84-85 (a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals).


\(^{48}\) Limitations to certain rights are possible provided they have a legal basis, which implies that the interference should have a basis in domestic law and that that law is accessible and predictable. Cf. ECtHR, Sunday Times (n° 1) v. UK, Judgment of 26 April 1979, §§ 47-49. Further refined inter alia in: ECtHR, Silver a.o. v. UK, Judgment of 25 March 1983, §§ 85-90.

\(^{49}\) ECtHR, Broniowski v. Poland, Judgment of 22 June 2004, § 184.

\(^{50}\) ECtHR, Öneryildiz v. Turkey, Judgment of 30 November 2004, § 96.
One of the qualitative requirements of the rule of law implies that in case of a restriction of a Convention right guarantees and effective control measures must also be embedded in the national law against arbitrary interferences by public authorities in the rights guaranteed by the ECHR, particularly if the bodies of the executive authorities as a result of or by virtue of the law have considerable discretionary authorities. It would be contrary to the rule of law, i.e. one of the basic principles of a democratic society enshrined in the ECHR, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. The latter is certainly the case if the State’s authority is exercised secretly, in other words, if the risk of arbitrary action is evident. The existence of adequate and effective safeguards against abuse, including in particular procedures for effective scrutiny by the courts, is all the more important since a system of secret surveillance designed to protect national security entails the risk of undermining or even destroying democracy on the ground of defending it. The principle of lawfulness and the principle of rule of law, for example, imply that measures affecting fundamental human rights, even in the case of national security, must be subject to some form of adversarial proceedings before an independent body that has the competence to review the motives for the decision. The individual must after all be able to challenge the executive’s assertion that national security is at stake. While the executive’s assessment of what poses a threat to national security will naturally be of significant weight, the independent authority must be able to react in cases where invoking that concept has no reasonable basis in the facts or reveals an interpretation of national security that is unlawful or contrary to common sense and arbitrary. Failing such safeguards, the police or other State authorities would be able to encroach arbitrarily on rights protected by the Convention. In the event of a dispute on civil rights and obligations or on the wellfoundedness of criminal proceedings, access to a court is a fundamental right.

With respect to the rights containing an escape clause, the use of the principle of the rule of law overlaps to a certain extent the criterion of necessity in a democratic society and provides the Strasbourg Court with an assessment standard, whereby the national margin of appreciation, contrary to its role in the necessity criterion, plays a lesser role or even none at all.

7. DEMOCRACY

The concept of democracy\(^{57}\) is explicitly mentioned in a number of ways in the European Convention and in the interpretation of the Convention, the values associated with the concept of ‘democracy’ are used in a number of cases\(^{58}\). The notion of democracy was included in the Preamble to the European Convention, which states that fundamental rights and freedoms are best protected through an effective political democracy. The concept of democracy is for example also visible in certain rights, and it also offers a restriction possibility with regard to certain rights and freedoms in the ECHR\(^{59}\). The idea of democracy is therefore an essential part of the European public order.

In its case law the Strasbourg Court has posited more than once that democracy appears to be the only political model that contemplated by the European Convention and, consequently, the only model compatible with it\(^{60}\). Although the conception of democracy in the early Strasbourg case law was a starkly drawn contrast with totalitarianism, this was, according to an observer in later case law, more subtly contrasted with the absence of adequate safeguards against arbitrary exercises of power even by more benign welfare states, which included such notions as the separation of powers and the principle of accountability\(^{61}\).

A number of Convention provisions have been identified in Strasbourg case law that are characteristic of a democratic society. A democracy is inter alia characterised by the recognition of the interests protected under the right to a fair trial (Art. 6 ECHR)\(^{62}\), the right to life (Art. 2 ECHR)\(^{63}\), the prohibition of torture and inhuman and degrading treatment or punishment (Art. 3 ECHR)\(^{64}\), the prohibition of slavery and forced labour (Art. 4 ECHR)\(^{65}\), the freedom of thought, conscience and religion (Art. 9 ECHR)\(^{66}\) and in exercising its functions in relation to education and to teaching, the State’s obligation to respect the right of parents to provide their children with education and teaching in conformity with their own religious and philosophical convictions (Art. 2 Protocol No. 1)\(^{67}\).


\(^{58}\) ECtHR, Soering v. UK, Judgment of 7 July 1989, § 87.

\(^{59}\) Art. 8 ECHR, Art. 9 ECHR, Art. 10 ECHR, Art. 11 ECHR and Art. 2 Protocol No. 4 provide that a restriction or interference can be justified only if it is shown that this is necessary “in a democratic society”.

\(^{60}\) ECtHR, Refah Partisi (The Welfare Party) a.o. v. Turkey, Judgment of 13 February 2003, § 86.


\(^{62}\) ECtHR, Airey v. Ireland, Judgment of 9 October 1979, § 24.

\(^{63}\) ECtHR, McCann, Farrell and Savage v. UK, Judgment of 27 September 1995, § 147.

\(^{64}\) ECtHR, Soering v. UK, Judgment of 7 July 1989, § 88.

\(^{65}\) ECtHR, Siliadin v. France, Judgment of 26 July 2005, § 82.


\(^{67}\) ECtHR, Folgerø a.o. v. Norway, Judgment of 29 June 2007, § 84.
With respect to the organisation of a democracy, the European Court clearly attaches great importance to the participation of citizens in policy. The right to vote and the right to stand for elections (Art. 3 Protocol No. 1) have repeatedly been described by the Court as a central or crucial element or a characteristic principle of a democracy¹⁶. In a democracy the right to vote is not a privilege, rather universal suffrage is a basic principle¹⁷. Moreover, in a democratic system a government is accountable first and foremost to the parliament⁷⁰. Secondly, the actions and omissions of governments should be subject to the close scrutiny not only of the legislative and judicial authorities but also of the press and public opinion. The dominant position of governments necessitates that should they come under harsh criticism, they, above all, should display restraint before resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of their adversaries or the media⁷¹.

In a number of judgments the emphasis is placed on the fact that the freedom of expression has particular relevance if this is aimed at contributing to the development of the rule of law and democracy in certain Member States⁷². Political parties and other associations too play a very important role in a democratic system and restrictions with respect to political parties should therefore be strictly interpreted⁷³. In its case law, the Court has on numerous occasions affirmed that only convincing and compelling reasons can justify restrictions on the freedom of association (Art. 11 ECHR) and that all such restrictions are subject to rigorous supervision by the Court⁷⁴. The European Court has ascertained that policy measures in a number of former East Bloc countries aimed at curbing influences of a communist nature, are in accordance with the ECHR⁷⁵.

However, a democratic society as a whole – and therefore distinct from political aspects – is characterised by a certain tolerance, broadmindedness and pluralism⁷⁶. Freedom of expression (Art. 10 ECHR) is one of the essential foundations of a democratic society and one of the basic conditions for the progress of this societal vision and for each individual’s self-fulfilment⁷⁷. The public has a right to be well informed on political solutions to conflicts

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¹⁶ ECtHR, Hirst (n° 2) v. UK, Judgment of 6 October 2005, § 58.
¹⁷ ECtHR, Hirst (n° 2) v. UK, Judgment of 6 October 2005, § 59 (it is partly for this reason that a system where the right to vote was denied to all prisoners, regardless of the crime for which they were convicted and regardless of the length of the sentence, was regarded as a disproportionate restriction of Art. 2 Protocol No. 2).
⁷⁰ ECtHR, Matthews v. UK, Judgment of 18 February 1999, § 52.
⁷¹ ECtHR, Castells v. Spain, Judgment of 23 April 1992, § 46.
⁷² ECtHR, Marônek v. Slovakia, Judgment of 19 April 2001, § 56 (it concerned was a form of expression which was apparently made “in good faith, that the resolution of the problem was important for strengthening the rule of law in the newly born democracy”).
⁷⁵ ECtHR, Rekvényi v. Hungary, Judgment of 20 May 1999, § 41 (with regard to the obligation imposed on certain categories of public officials including police officers to refrain from political activities in order to depoliticise the services concerned and thereby to contribute to the consolidation and maintenance of pluralistic democracy).
⁷⁷ ECtHR, Handyside v. UK, Judgment of 7 December 1976, § 49.
in a democratic society and this requires that the public should be able to receive a variety of communications, messages or views, to choose between them and be able to form its own opinion on the basis of these different communications, messages or views expressed, for what sets democratic society apart is this pluralism of ideas and information. In a number of cases in which Turkey was convicted of a breach of Art. 10 ECHR, an essential point for the Court was that the publications subject to state interference actually appealed to find a solution to the Kurdish question by peaceful means. The press fulfils an essential role in a democratic society and acts as public watchdog by providing information on issues of serious public concern.

8. PROPORTIONALITY

The principle of proportionality, according to which a reasonable relationship must exist or a fair balance must be struck between several competing interests, though not mentioned in the text of the European Convention itself, is nevertheless inherently present in the whole European Convention. Restrictions of a fundamental right will be permitted in a number of situations on condition that the principle of proportionality is taken into account and there is a reasonable relationship between the seriousness of the restriction or interference of the fundamental right on the one hand and the gravity of the legitimate aim which has prompted the interference on the other. The more imperative the legitimate aim is, the fewer problems there will be in justifying the intervention. The principle of proportionality is part of a broader concept, by virtue of which it must be decided whether a fair balance was realised between the demands of the general interest of the community and the requirements of the protection of the fundamental rights of the individual. Moreover, a restriction, in addition to the fact that it must be proportional, should be relevant and sufficient to achieve the intended aim (pertinence criterion). Consequently, the pertinence criterion is a separate criterion.

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78 ECtHR, Çetin a.o. v. Turkey, Judgment of 13 February 2003, §§ 57, 61-64.
79 ECtHR, Yaşar Kemal Göklçeli v. Turkey, Judgment of 4 March 2003, § 38.
84 ECtHR, Dudgeon v. UK, Judgment of 22 October 1981, § 54 (the justification advanced by the respondent State for the prohibition of homosexuals relations between adults, was relevant but not sufficient to retain the legislation).
The proportionality principle can be viewed as the reverse side of a State’s margin of appreciation (infra). The stricter the principle of proportionality is applied, the narrower the margin of appreciation left to the discretion of the Contracting States. Proportionality testing is considered as a correction and restriction of the State’s margin of appreciation\textsuperscript{85}.

The principle of proportionality or the fair balance test are, depending on the Convention provision in question, used, among other things, in connection with the necessity testing in the context of the classic escape clauses relating to the right to privacy (Art. 8 ECHR), the freedom of religion (Art. 9 ECHR), the freedom of expression (Art. 10 ECHR), the freedom of assembly and association (Art. 11 ECHR) and the freedom of movement (Art. 2 Protocol No. 4), but also with regard to differently formulated (limitations in) other articles, such as the right to liberty and security (Art. 5 ECHR), the right to marry and to found a family (Art. 12 ECHR), the non-discrimination principle (Art. 14 ECHR) and the right to property (Art. 1 Protocol No. 1), as well as the derogation clause (Art. 15 ECHR) and the inherent rights, whereas a stricter version is used with respect to the right to life (Art. 2 ECHR)\textsuperscript{86}. In order to determine whether a State is bound by a positive obligation in a certain case, an assessment of whether there is a proper balance between the general interest of society and the interest of the individual applicant(s), must be made. The issues at stake do not usually relate to cases in which there is a conflict between individual freedom and harsh government action, but to the question of where exactly the boundary between conflicting group or individual interests lies in normal and civilised governmental management of society. The weighing usually relates to conflicts between individual interests of persons or groups of persons vis-à-vis higher legitimate interests such as the environment, the maintenance of the fish stock, the construction of roads and the expansion of harbours or airports, the levy of taxes and duties that may serve the general public interest\textsuperscript{87}.

In the context of the proportionality testing it is occasionally examined whether a similar result could have been achieved by means of alternative and lighter measures\textsuperscript{88}. If a State


\textsuperscript{86} Even with absolute rights regular use is made of elements of proportionality. These serve as a method of interpretation to better define a specific condition for the application of a treaty right. In Art. 4 ECHR, after first stating that no one shall be held in slavery or servitude (§ 1) and that no one shall be required to perform forced or compulsory labour (§ 2), the third paragraph states inter alia that “any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention” and “any work or service which forms part of normal civic obligations” cannot be regarded as forced labour. In a Belgian case this wording has lead the European Court de facto to perform a proportionality assessment, whereby it has balanced the societal interests linked to the Belgian pro bono system and the restriction resulting from it in respect of trainee lawyers. ECtHR, Van der Mussele v. Belgium, Judgment of 23 November 1983, § 37.

\textsuperscript{87} E.g. ECtHR, Hatton a.o. v. UK, Judgment of 8 July 2003, §§ 119, 121-126 (noise nuisance from aircraft versus socio-economic airport policy).

\textsuperscript{88} E.g. ECtHR, Olsson (n° 1) v. Sweden, Judgment of 24 March 1988 (a complete ban parental access rights between mother and child may be necessary in the interest of the health of the child, but if through a limitation of the parental access rights the same result can be achieved, then this is more appropriate); ECtHR, Campbell v. UK, Judgment of 25 March 1993, § 48 (possibility of opening of correspondence of prisoners deemed disproportionate; the argument of the respondent State that this was motivated by fear of presence of prohibited items in the letters, was dismissed under the argument that the prison authorities had had the option to proceed with the opening of the correspondence in the presence of the detainee).
has adapted its legislation since the restriction or interference such that its legal subjects are granted a wider legal protection, this may, it is true, indicate that the original situation was disproportional, but this fact alone does not form a decisive argument to establish a violation of the European Convention. It is therefore insufficient to merely demonstrate that in casu alternative and less far-reaching methods can be used or that they are even applied in one or more of the other Contracting States to achieve the same objective, to provoke a conviction. The use of this technique or doctrine can be considered as one of the most objective forms of proportionality testing.

In testing the proportionality of measures, the judicial practice in other Contracting States is sometimes taken into account as a relevant factor (comparative or consensus method) (infra). Usually the judicial practice of the other Contracting States is invoked to justify an approach that deviates from the position taken by the respondent State, whereas in a minority of cases the absence of a European consensus with respect to certain aspects may form a restrictive factor in the interpretation of the European Convention. The comparative method is occasionally combined with the evolutive method (supra). Factors such as morals and national security that are closely linked to the special environment of national societies may perhaps be less open to evolutive interpretation than the factors of a more technical and economic nature.

9. REFERENCE TO INTERNATIONAL STANDARDS

The European Court has no jurisdiction to rule on alleged violations of international treaties (other than the European Convention and its protocols) and general principles of international law, but it is obliged to take into account the relevant principles of international law that are applicable in the particular sphere, while interpreting the European Convention. It cannot examine the principles or the international instrument concerned and then

89 ECtHR, Inze v. Austria, Judgment of 28 October 1987, § 44 (from the simple finding that meanwhile amendments to inheritance law have been proposed by a respondent Government, it cannot be inferred that the previous rules were contrary to the European Convention, but it is an indication that there were other means available to the respondent State to achieve the aim of the protection of agriculture).
90 ECtHR, Mellacher a.o. v. Austria, Judgment of 19 December 1989, § 53. But see ECtHR, Chahal v. UK, Judgment of 15 November 1996, §§ 131-133 (where, in order to establish a violation of Art. 5(4) ECHR, attention was paid to the methods in Canada, where judges were allowed to assess sensitive security information, which allow on the one side to meet legitimate security concerns about the nature and sources of intelligence information and yet accord the individual a substantial measure of procedural justice).
find autonomous violations of the said principles or instruments. They can only be used as a tool in the interpretation of the Convention and the protocols.

In practice, there is a clear and tendency of the Court to make reference to other relevant human rights treaties or instruments that have been adopted both under the auspices of or within the Council of Europe and by other international institutions and organs, irrespective whether they are binding or not and irrespective whether the respondent State concerned is a party to a treaty or convention or not. In view of the fact that the European Convention is interpreted in the light of the public international law in general, references to judgments of other international judicial or quasi-judicial bodies and international treaties and instruments which are sometimes not immediately or directly related to international human rights can be found more frequently in the case-law of the European Court.

10. MARGIN OF APPRECIATION

10.1. Definition

The term margin of appreciation indicates the policy freedom or discretion available to States, subject to European supervision, when they take legislative, executive or judicial action, in view of their specific political, economic, social and cultural situation, with regard to the way they will implement the rights and freedoms under the ECHR and with regard to the evaluation of factual situations. The national margin of appreciation is therefore

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93 ECtHR, Dickson v. UK, Judgment of 4 December 2007, §§ 20, 31 (European Prison Rules); ECtHR, Kalashnikov v. Russia, Judgment of 15 July 2002, § 97 (reports ECPT).
95 ECtHR, Öneryıldız v. Turkey, Judgment of 30 November 2004, §§ 59, 71, 90, 93 (recommendations and resolutions of the Committee of Ministers and the Parliamentary Assembly).
100 The margin of appreciation doctrine is rooted in the case law of the French Conseil d’Etat and in administrative law of continental legal systems. In international law, it was first used and developed by the Strasbourg Court. The concept cannot be found in the ECHR or in the Travaux Préparatoires, but was included in the proposals of the European Movement. B. Simpson, Human Rights and the End of Empire. Britain and the Genesis of the European Convention, Oxford, Oxford University Press, 2004, 676-677.
nothing more than the amount of latitude left to national authorities once the appropriate level of review has been decided by the Court. By means of the margin of appreciation theory, a certain discretionary authority is introduced into the European Court’s evaluation, in particular where sensitive aspects of socio-economic politics or morals are involved, for which there is no European consensus.

The subsidiary character of the Strasbourg supervisory mechanism (supra) forms the legal basis for the margin of appreciation theory, such that the doctrine of the national appreciation margin has its origins in the European Convention itself. The doctrine reflects the primordial role the national (judicial) organs are deemed to play in the protection of the rights and freedoms in the European Convention. The theory of the margin of appreciation can be viewed as the natural product of the division of powers between the European Court and the national judicial institutions. It is likewise the expression of ‘judicial self-restraint’.

10.2. Evolution

The Strasbourg Court implicitly applied the margin of appreciation doctrine for the first time in the context of the right to education (Art. 2 Protocol No. 1) and the non-discrimination principle (Art. 14 ECHR) with regard to a complaint on the grounds of alleged unequal treatment between French and Dutch speakers with respect to the language of instruction in schools. In the Belgian Linguistic Case (1968) the Court, referring to the subsidiary nature of the supervisory mechanism, indicated that the Member States have a certain margin of discretion in assessing whether their educational system implied a certain acceptable or unacceptable distinction in treatment under Art. 14 ECHR. It was not until 1971 (the Vagrancy case) before the European Court began to make explicit reference to the theory of the margin of appreciation, this time with regard to the right to freedom of correspondence (Art. 8 ECHR). In the aforementioned Belgian case that related to the freedom of correspondence of detained vagrants, the Court argued that the competent Belgian authorities “did not transgress in the present case the limits of the power of appreciation which Art. 8(2) of the Convention leaves to the Contracting Parties for the purpose of the prevention of disorder or crime, the protection of health or morals, and the protection of the rights and freedoms of others”.

104 The margin of appreciation doctrine was first developed in the case law of the Commission. E.g. ECommHR, Greece v. UK, No. 176/56, Decision of 2 June 1956, Yearbook, Vol. II, 176..
105 ECHR, Belgian Linguistic Case, Judgment of 23 July 1968, §§ 5, 10.
The margin of appreciation theory was further refined in the Handyside case (1976), in which the central question was whether interference in the applicant’s right to freedom of expression as a result of a conviction for the publication of a so-called obscene school book intended for teenagers was justified in the light of the escape clause under Art. 10(2) ECHR.

In this case the Strasbourg Court held that the national governments have a margin of appreciation in their evaluation of whether a certain measure “is necessary in a democratic society” in particular since there was a “pressing social need” justifying the restriction or interference in the interest of “morals”:

“[I]t is not possible to find in the domestic law of the various Contracting States a uniform European concept of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by a rapid and far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements […]. It is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion ‘necessity’ in this context”\(^{107}\).

The former does not mean that the discretion is unlimited. As the Court held:

“Nevertheless, Article 10 para. 2 […] does not give the Contracting States an unlimited power of appreciation. The Court, which […] is responsible for ensuring the observance of those States’ engagements (Article 19) […], is empowered to give the final ruling on whether a ‘restriction’ or ‘penalty’ is reconcilable with freedom of expression as protected by Article 10 […]. The domestic margin of appreciation thus goes hand in hand with a European supervision”\(^{108}\).

The Handyside case is considered as the key judgment with regard to the application of the doctrine of the margin of appreciation in conjunction with the “necessity in a democratic society”. The requirement that a restriction of a basic right has to be necessary in a democratic society occurs again in the so-called limitation or escape clauses of Art. 8 ECHR (right to privacy), Art. 9 ECHR (freedom of religion), Art. 10 ECHR (freedom of expression), Art. 11 ECHR (freedom of assembly and association) and Art. 2 Protocol No. 4 (freedom of movement)\(^{109}\).

The European Court finally broadened the application of the margin of appreciation doctrine to the full context of the Convention, repeatedly emphasising in this regard that governments have a margin of appreciation in evaluating whether a balance between the

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\(^{108}\) ECtHR, Handyside v. UK, Judgment of 7 December 1976, § 49.

\(^{109}\) ECtHR Chassagnou a.o. v. France, Judgment of 29 April 1999, § 75.
rights of the individual and the interests of society has been taken into account when imposing a restriction on a Convention right. Currently, the margin of appreciation is at the heart of virtually all major cases that come before the Court, whether the judgments refer to it explicitly or not. By positioning the margin of appreciation theory within a global balancing act, the doctrine was thus expanded to all Convention rights, such as Art. 5(1) ECHR (regarding the question of whether a person is of unsound mind and may as such be detained)\(^{110}\), Art. 6 ECHR (in evaluating the restrictions of the right of access to a court)\(^{111}\), Art. 14 ECHR (in evaluating to what extent differences in otherwise similar situations justify a different treatment)\(^{112}\), Art. 3 Protocol No. 1 (e.g. in evaluating the restrictions to the right to vote and to stand for elected)\(^{113}\), with the exclusion of the non-derogable rights\(^{114}\).

10.3. Application

The scope of application of the national margin of appreciation, i.e. the moment and the way in which the national margin of appreciation is applied, cannot or can scarcely be defined, since, by nature, it is contextually bound\(^{115}\). The interaction between the elements and factors involved makes it indeed difficult, if not virtually impossible to determine clear application principles\(^{116}\).

Nevertheless, as appears from analysis of case law, the margin of appreciation doctrine is on the whole applied in the following main situations or categories, depending on the nature and the content of the Convention provisions in question, whereby account must be taken that the distinction between some situations or categories is not always clear and in some cases even overlaps. Although the area of application of the margin of appreciation doctrine is partially clarified in the case law, it is more difficult to obtain a clear picture of the precise degree of evaluation freedom granted to the national authorities by the European Court. Much depends on the question of whether the national authorities are in a better position than the European Court to form an opinion on the need for a measure that has a negative impact on the Convention rights.

\(^{110}\) E.g. ECtHR, Luberti v. Italy, Judgment of 23 February 1984, § 27.
\(^{111}\) E.g. ECtHR, Osman v. UK, Judgment of 28 October 1998, § 147.
\(^{112}\) E.g. ECtHR, Petrovic v. Austria, Judgment of 27 March 1998, § 38.
\(^{113}\) E.g. ECtHR, Gítonas a.o. v. Greece, Judgment of 1 July 1997, § 39.
\(^{114}\) The non-derogable rights are: the right to life (Art. 2 ECHR), the prohibition of torture (Art. 3 ECHR), the prohibition of slavery (Art. 4(1) ECHR), the prohibition of retroactive application of criminal law (Art. 7 ECHR), the right not to be tried or punished twice (Art. 4 Protocol No. 7.) and the prohibition of the death penalty (Art. 1 Protocol No. 6 and Protocol No. 13).
10.3.1. Restrictions on rights in which the margin of appreciation can be applied

Provisions that require a balancing of interests or proportionality testing

The margin of appreciation doctrine is applied in cases in which the Convention provision imposes a balancing of interests and/or proportionality testing between the individual interests of the applicant and the general interest of society.

This concerns Art. 8 ECHR (right to privacy), Art. 9 ECHR (freedom of religion), Art. 10 ECHR (freedom of expression), Art. 11 ECHR (freedom of assembly and association) and Art. 2 Protocol No. 4 (freedom of movement). Then again, in assessing an interference in the right to property (Art. 1 Protocol No. 1), the Contracting State must maintain a fair balance between the requirement of promoting the general interest and the protection of the fundamental rights of the individual and this fair balance test applies both to the ‘enjoyment clause’ (Art. 1, first sentence)\(^{117}\), as well as to the ‘deprivation clause’ (Art. 1, second sentence)\(^{118}\) and the ‘regulation clause’ (Art. 1(2))\(^{119}\). In assessing the prohibition of discrimination (Art. 14 ECHR), upon establishing prior thereto that the distinction in treatment is aimed at realising a lawful aim and that the distinction is pertinent to achieving that aim, the means utilised (making a difference in treatment) is examined to determine whether it is apparently proportionate to the intended lawful aim, and that the proportionality criterion is only fulfilled if there is a reasonable balance between the protection of the general interest and the impairment of the individual rights of the European Convention\(^{120}\).

Proportionality analysis also comes into play in evaluating whether derogation measures taken by the respondent State are strictly necessary in the light of the seriousness of the public emergency declared by the government (Art. 15 ECHR)\(^{121}\).

Finally, proportionality testing occurs in analysing whether an inherent or implicit limitation of a Convention right or freedom is acceptable. This is the case, among other things, with respect to the right to a fair trial, at least certain aspects (Art. 6(1) ECHR)\(^{122}\), the right to marry (Art. 12 ECHR)\(^{123}\) and the right to free elections (Art. 3 Protocol No. 1)\(^{124}\).

\(^{118}\) ECtHR, Aka v. Turkey, Judgment of 23 September 1998, § 44.
\(^{120}\) ECtHR, Petrovic v. Austria, Judgment of 27 March 1998, § 38.
\(^{121}\) ECtHR, Ireland v. UK, Judgment of 18 January 1978, § 207.
\(^{122}\) ECtHR, Osman v. UK, Judgment of 28 October 1998, § 147 (right of access).
\(^{123}\) ECtHR, Cossey v. UK, Judgment of 27 September 1990, § 46.
\(^{124}\) ECtHR, Gitonas a.o. v. Greece, Judgment of 1 July 1997, § 39.
Provisions worded in vague terms

The margin of appreciation doctrine is relevant in evaluating vague terms and expressions that occur in many of the Convention provisions, such as: the term ‘persons of unsound mind’ (Art. 5(1)(e) ECHR)\(^{125}\), ‘respect’ for private life, family life, home and correspondence (Art. 8(1) ECHR)\(^{126}\), ‘morals’ (Art. 8(2) ECHR, Art. 9(2) ECHR, Art. 10(2) ECHR, Art. 11(2) ECHR and Art. 2(2) Protocol No. 4)\(^{127}\), ‘public emergency threatening the life of the nation’ (Art. 15(1) ECHR)\(^{128}\) and ‘public interest’ (Art. 1 Protocol No. 1)\(^{129}\).

Provisions entailing positive obligations

The majority of the Convention rights, as appears from the case law, not only entail a duty to abstain but also positive obligations\(^{130}\). The Court does however stress that States may first themselves decide the way in which and the means they intend to employ to comply with these obligations and they enjoy a certain margin of appreciation. But in imposing a restriction on the right to access to a court (Art. 6 ECHR) the essence of that Convention right may not, for instance, be affected\(^{131}\). A reasonable degree of proportionality between the means used and the intended aim must be taken into account\(^{132}\).

With respect to certain rights that entail positive obligations, the margin of appreciation takes, as it were, the form of organisational freedom in respect of the Contracting States in regulating certain areas of competence of governmental care (organisation of the judicial system, structuring the educational system and organisation of the election system)\(^{133}\). In the case of other forms of positive obligation, for example, in the context of Art. 8 ECHR, among other things, with regard to the placement of minors (where a concrete assessment is made whether the State has taken appropriate and measures in order to secure

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\(^{125}\) ECtHR, Luberti v. Italy, Judgment of 23 February 1984, § 27.

\(^{126}\) ECtHR, Cossey v. UK, Judgment of 27 September 1990, §§ 37, 40.


\(^{128}\) ECtHR, Aksoy v. Turkey, Judgment of 18 December 1996, § 68.

\(^{129}\) ECtHR, National and Provincial Building Society a.o. v. UK, Judgment of 23 October 1997, §§ 80-81.

\(^{130}\) E.g. ECtHR, Belgian Linguistic Case, Judgment of 23 July 1968 (with regard to Art. 2 Protocol No. 1); ECtHR, Marckx v. Belgium, Judgment of 13 June 1979, §§ 31, 53, 61 (with regard to Art. 8 ECHR); ECtHR, Airey v. Ireland, Judgment of 9 October 1979, §§ 25 (with regard to Art. 6 ECHR) and 32 (with regard to Art. 8 ECHR); ECtHR, Young, James and Webster v. UK, Judgment of 13 August 1981, § 49 (with regard to Art. 11 ECHR); ECtHR, A. v. UK, Judgment of 23 September 1998, § 22 (with regard to Art. 3 ECHR); ECtHR, Osman v. Turkey, Judgment of 28 October 1998, §§ 115-116 (with regard to Art. 2 ECHR); ECtHR, Vgt Verein gegen Tierfabriken v. Switzerland, Judgment of 28 June 2001, § 45 (with regard to Art. 10 ECHR).

\(^{131}\) ECtHR, Airey v. Ireland, Judgment of 9 October 1979, § 25.

\(^{132}\) ECtHR, Ashingdane v. UK, Judgment of 28 May 1985, § 57.

\(^{133}\) E.g. ECtHR, Waite and Kennedy v. Germany, Judgment of 18 February 1999, § 59 (with regard to the examination of restrictions on the right of access to court ex Art. 6 ECHR); ECtHR, Matthews v. UK, Judgment of 18 February 1999, § 63 (with regard to Art. 3 Protocol No. 1); ECtHR, Efstratiou v. Greece, Judgment of 18 December 1996, §§ 28-29 (with regard to Art. 2 Protocol No. 1).
for example, the reunification of parents and children\textsuperscript{134}), there is again less question of organisational freedom, but the margin of appreciation is more closely linked to the concrete proportionality testing.

10.3.2. Restrictions on rights in which the margin of appreciation cannot or can only scarcely be applied

A considerable number (of elements of) Convention provisions are described in such detailed terms that there is scarcely any scope for balancing and thus margin of appreciation. For instance, the margin of appreciation doctrine plays no role with regard to most aspects of the right to personal liberty (Art. 5 ECHR) and the right to a fair trial (Art. 6 ECHR) (but see supra). Both Convention provisions play a crucial role as requirements of the rule of law. The nature and the importance of the rights included in the Convention provisions in a state governed by the rule of law consequently leave little scope for experiments or diversity on the substance of the provisions by the individual Contracting States. The rights ensured under both provisions assure a number of specific procedural guarantees, the application conditions of which are described in detail in both articles. The formulation of both rights accordingly leaves no scope for differences of opinion per state on the method of implementation of these guarantees\textsuperscript{135}. On the other hand, it is the task of the European Court to monitor the observance of these specific conditions and it is scarcely tenable to maintain that the argument whereby the domestic court is better placed to judge, would be applicable to issues relating to compliance with procedural guarantees. The rule, also to be found in escape clauses, prescribing that a restriction of a right or freedom (Art. 8-11 ECHR and Art. 2 Protocol No. 4) must be prescribed by or in accordance with the law is another example of an instance where the margin of appreciation is irrelevant.

10.3.3. Rights and cases in which the margin of appreciation plays no role

The theory of margin of appreciation plays no part in assessing certain rights and freedoms or aspects of rights and freedoms in the context of the European Convention. For example, there is no margin of appreciation when it concerns the non-derogable rights\textsuperscript{136}. Such rights and freedoms are deemed to be so fundamental that they have been drafted in strict wording that allows no margin of appreciation whatsoever\textsuperscript{137}, even to the extent

\textsuperscript{134} ECtHR, Eriksson v. Sweden, Judgment of 22 June 1989, § 71.

\textsuperscript{135} P. Mahoney, “Marvellous Richness of Diversity or Invidious Relativism?”, \textit{H.R.L.J.} (Special Issue) 1998, 5. The above explains why in the assessment of the term ‘reasonable time’ (ex Art. 6 ECHR) there is no possibility of state discretion.

\textsuperscript{136} See supra, note 114.

\textsuperscript{137} J. Callewaert, “Is there a Margin of Appreciation in the application of Articles 2, 3 and 4 of the Convention?”, \textit{H.R.L.J.} (Special Issue) 1998, 8-9.
that these rights entail positive obligations. The existence of or possibility of a reference to
the State’s margin of appreciation would lead, after all, to the unacceptable consequence
that the provisions in question would leave room for national discretion or balancing of
interests in the application of these rights. Therefore, the principle of proportionality will
not be used with regard to the prohibition of torture, inhuman or degrading treatment or
punishment (Art. 3 ECHR).\footnote{ECtHR, Saadi v. Italy, Judgment of 28 February 2008, § 127. Nonetheless, the principle of fair balance has been relevant in some case-

law. See e.g. ECtHR, Soering v. UK, Judgment of 7 July 1989, § 89 (where an individual may be extradited where the danger of ill-treatment abroad sufficiently diminishes).}

The margin of appreciation doctrine plays no role whatsoever in determining the facts in
a certain case, but only in the later evaluation of these same facts. The theory of the mar-
gin of appreciation of a state may consequently only play a role once the facts have been
ascertained with sufficient clarity by the European Court. Problems in gathering evidence
may as a consequence not be formulated in terms of margin of appreciation for a state.\footnote{ECtHR, Klaas v. Germany, Judgment of 22 September 1993 (different versions of the facts adduced by the respondent State and by the
applicant, without the European Court making reference to and relying on the margin of appreciation).}

It sometimes happens that in cases in which rights and freedoms are at issue to which
the theory of the margin of appreciation may normally speaking be applied, in view of the
fact that they fall within one of the above-mentioned categories, still no mention is made
of a national margin of appreciation. These cases have a common characteristic in that the
presence or absence of a breach of the right or freedom concerned was clear or evident
in the eyes of the European Court. An example of such a situation concerns the numerous
cases in which, in the view of the European Court, there was a clear violation of Art. 8 ECHR
(protection of private and family life, home and correspondence) and/or Art. 1 Protocol No.
1 (protection of property) as a result of houses and even entire villages being burned down
in south east Turkey by Turkish security forces.\footnote{E.g. ECtHR, Mentes a.o. v. Turkey, Judgment of 28 November 1997, § 73 (clear violation of Art. 8 ECHR following the burning of a com-
plete village in South Eastern Turkey by Turkish security forces); ECtHR, Akdivar a.o. v. Turkey, Judgment of 16 September 1996, § 88 (clear
violation of Art. Protocol No. 1 following the burning of a house with household in South Eastern Turkey by Turkish security forces).}

10.4. Factors determining the extent of the margin of appreciation

The margin or scope of appreciation of the national governments can, according to the
case law, vary.\footnote{This has been said for the first time in: ECtHR, Engel a.o. v. Netherlands, Judgment of 8 June 1976, § 72. Further: ECtHR, K. and T. v.
Finland, Judgment of 27 April 2000, § 135.} In its case law, the European Court does not at any point provide a clear
overview of the factors that determine the extent of the margin of appreciation with re-
spect to the Contracting States. The scope of the margin of appreciation that is left to the
Contracting States will, according to the case law, vary according to elements such as the
nature of the relevant right or freedom, the importance of the right or freedom in ques-
tion to the applicant, the nature of the activity that is involved in the case\textsuperscript{142}, the nature of the justification on account of the State\textsuperscript{143} and the presence of a clear consensus within the countries in the Council of Europe\textsuperscript{144}. The impact of these factors is nevertheless only relative, which may result in one factor leading to the strengthening or the neutralization of another factor.

10.4.1. Presence or absence of a European consensus

In certain cases the Strasbourg Court allows a wider and in others a narrower margin of appreciation. In cases where there is a clear consensus (common ground)\textsuperscript{145} within the countries of the Council of Europe with regard to a certain issue, this will result in a more restricted margin of appreciation and to a stricter evaluation by the European Court of the alleged interference\textsuperscript{146}. The existence of a large diversity of legal approaches within the member States with regard to the settlement of a certain problem can again lead to a wider margin of appreciation\textsuperscript{147}.

The latter is, for instance, the case in issues on which there are different views within society and which are associated with matters of an ethical or morally sensitive nature, such as the beginning of life or the wearing of a headscarf. In a French case, the European Court held that the issue of when the right to life begins comes within the margin of appreciation which the Court generally considers that States should enjoy in this sphere, notwithstanding an evolutive interpretation of the Convention, a living instrument which must be interpreted in the light of present-day conditions, given that, firstly, the issue of such protection has not been resolved within the majority of the member States themselves and in France in particular, where it is the subject of debate, and, secondly, that there is no European consensus on the scientific and legal definition of the beginning of life\textsuperscript{148}.

A wider margin of appreciation results in the conclusion that the application of a common standard leads to different results in different Contracting States. In other words, the

\textsuperscript{142} ECtHR, Rasmussen v. Denmark, Judgment of 28 November 1984, § 40.
\textsuperscript{143} ECtHR, Sunday Times (n° 1) v. UK, Judgment of 26 April 1979, § 59.
\textsuperscript{144} ECtHR, Rasmussen v. Denmark, Judgment of 28 November 1984, § 40.
\textsuperscript{146} ECtHR, Rasmussen v. Denmark, Judgment of 28 November 1984, § 40.
\textsuperscript{147} The mere fact that a country does not conform to a European common denominator is not enough to establish a violation of the European Convention, particularly when the subject of the dispute is closely linked to cultural and historical traditions. See ECtHR, F. v. Switzerland, Judgment of 18 December 1987, § 33.
\textsuperscript{148} ECtHR, Vo v. France, Judgment of 8 July 2004, §§ 82, 84.
same facts that constitute a Convention breach in one Contracting State could constitute a legitimate restriction or interference of that same Convention right in another Contracting State. In a Turkish case, the absence of a uniform conception concerning the regulation of the wearing of religious symbols in educational institutions was also established, in view of the diversity of the approaches taken by national authorities on the issue. It is, after all, not possible to discern throughout Europe a uniform conception of the significance of religion in society and the meaning or impact of the public expression of a religious belief will differ according to time and context. Rules in this sphere will consequently vary from one country to another according to national traditions and the requirements imposed by the need to protect the rights and freedoms of others and to maintain public order. The foregoing prompted the European Court to state accordingly that the choice of the extent and form such regulations should take must inevitably be left up to a point to the State concerned, as it will depend on the specific domestic context.\footnote{ECtHR, Leyla Şahin v. Turkey, Judgment of 10 November 2005, § 109.}

A European consensus can be derived on the basis of an exercise in legal comparison of national law and legal practice or on the grounds of existing international treaties and other texts. A case against Iceland involved a complaint concerning compulsory membership of a professional organisation for taxi drivers. According to the applicant, this was a breach of the freedom of association (Art. 11 ECHR). In its judgment the Strasbourg Court stated that such obligatory membership does not exist in the vast majority of the Contracting States and that according to a number of international texts there is a growing consensus, also at international level, in favour of the assertion that the freedom of association also implies the freedom not to join an association. The exceptional situation in Iceland would therefore, according to the European Court, have to withstand rigorous testing in the context of the escape clause of Art. 11 ECHR. It was ruled in this context that the compulsory membership was imposed by law, whereby a refusal to join would most probably lead to revocation of the applicant’s license to drive a taxi. He was accordingly subject to a form of coercion which, as was observed earlier, is rare within the community of member States. The obligatory membership should consequently be considered as incompatible with Art. 11. It was finally held that, despite Iceland’s margin of appreciation, the compulsory membership was disproportional and consequently constituted a breach of Art. 11 ECHR.\footnote{ECtHR, Sigurdur A. Sigurjonsson v. Iceland, Judgment of 30 June 1993, § 41.}

10.4.2. Nature of the aim sought with the interference

The scope of the margin of appreciation can vary according to the nature of the legitimate aim pursued under that is invoked by the respondent State to justify the restriction of the Convention right. For instance, the European Court has accepted a wider margin
of appreciation where restrictions serving to protect national security are concerned\textsuperscript{151} or in cases in which the decision to interfere or restrict is taken in the context of a public emergency or if urgent state action is necessary\textsuperscript{152}. The differentiated margin of appreciation, according to the nature of the legitimate for restriction, can best be illustrated in the context of the case law concerning freedom of expression (Art. 10 ECHR). The importance of freedom of expression is emphasised in numerous judgments\textsuperscript{153}, as a result of which the national margin of appreciation was restricted. Grounds for restriction such as the protection of morals and national security have in the past nevertheless led to (more) limited European supervision and thus to a broader margin of appreciation for member States\textsuperscript{154}, albeit that with respect to both legitimate aims, the European Court has in relatively recent past on occasion clearly exercised a stricter supervision\textsuperscript{155}. The legitimate ground for restricting the protection of the authority and the impartiality of the judiciary, despite regular reiterations in Strasbourg case law that an interference motivated on that ground should be subject to a thorough and strict supervision\textsuperscript{156}, for a long time\textsuperscript{157} found favour in the eyes of the Court\textsuperscript{158}. It would seem rather, in view of the foregoing, that the desire and will of the European Court to exercise an in-depth supervision fluctuates over time. The Court says that in evaluating the margin of appreciation, account is taken of the nature of the legitimate for restriction but its judgments tell a somewhat different story and give the impression that the evaluation is ultimately not very straightforward, a fact that is simultaneously injurious to the consistency of case law and consequently to the legal certainty of the member States’ subjects\textsuperscript{159}.

10.4.3. Nature of the right or of the activities of the applicant

The margin of appreciation can be influenced by the nature of the right or freedom. States are generally granted a broader margin if restrictions to the right to property (Art. 1

\textsuperscript{151} ECtHR, Leander v. Sweden, Judgment of 26 March 1987, § 59.

\textsuperscript{152} ECtHR, Brannigan and McBride v. UK, Judgment of 26 May 1993, § 43 (with regard to Art. 15 ECHR); ECtHR, X. v. UK, Judgment of 5 November 1981, § 41 (with regard to the urgent detention of a mentally ill person under Art. 5(1)(e) ECHR).

\textsuperscript{153} ECtHR, Handyside v. UK, Judgment of 7 December 1976.

\textsuperscript{154} With regard to the protection of morals, see e.g. ECtHR, Müller a.o. v. Switzerland, Judgment of 24 May 1988; with regard to the legitimate aims of national security/protection of public order, see e.g. ECtHR, Chorherr v. Austria, Judgment of 25 August 1993.

\textsuperscript{155} With regard to the protection of morals, see e.g. ECtHR, Open Door and Dublin Well Woman v. Ireland, Judgment of 29 October 1992 and ECtHR, Scherer v. Switzerland, Judgment of 25 March 1994; with regard to the legitimate aims of national security/protection of public order, see e.g. ECtHR, Observer and Guardian v. UK, Judgment of 26 November 1991.

\textsuperscript{156} ECtHR, Sunday Times (n° 1) v. UK, Judgment of 26 April 1979.

\textsuperscript{157} In a Belgian case, the Court did at last perform a thorough and rigorous review, though the legitimate aim invoked by the Belgian State didn’t seek to protect the authority and impartiality of the judiciary but the the reputation or the rights of others. Cf. ECtHR, De Haes and Gijsels v. Belgium, Judgment of 24 February 1997.

\textsuperscript{158} E.g. ECtHR, Barfod v. Denmark, Judgment of 22 February 1989 and ECtHR, Prager and Oberschlick v. Austria, Judgment of 26 April 1995.

Protocol No. 1) are concerned than when restrictions to the right of freedom of expression (Art. 10 ECHR) are involved. In the majority of the cases relating to the right to property, the Strasbourg Court grants the respondent State a wide margin of appreciation, whereas with regard to the freedom of expression the Court almost invariably stresses the importance of a free press in a democratic society.

The importance of the right or freedom concerned (or the activities concerned) for the well-being of the applicant can also affect the extent of the margin of appreciation and hence to the European supervision. If the activities of the applicant relate to the essence of the right concerned or the right is of decisive importance for the well-being of the applicant, the national margin of appreciation will be narrower. In a British case, the European Court, in determining the scope of the margin of appreciation allowed to the State, emphasised the importance of a right to respect for the home with a view to the personal security and the well-being of the applicants\textsuperscript{160}, whereas in another case, on granting a wider evaluation margin to the State, the European Court stated that the contested interference claimed by the applicant did not form an obstacle to the applicant leading a private life of his own choosing\textsuperscript{161}. The scrutiny of the European Court will especially be stricter and the national appreciation margin narrow if it concerns restrictions that relate to intimate aspects of the private life of persons, such as maintaining sexual contacts in private between consenting adults\textsuperscript{162} and the parental rights and the access of parents to children in care, whereas the national margin of appreciation is wide(r) with respect to the decision of the authorities to place children into care\textsuperscript{163}.

In the event two rights or freedoms in the ECHR or in one of the Protocols collide, the European Court also grants the States, that must reconcile these two fundamental rights, a wide margin of appreciation\textsuperscript{164}.

10.4.4. General constitutional policy, socio-economic policy, agricultural policy, environmental policy, housing policy, fiscal policy, spatial and urban planning policy

The general policy context, to which the interference or the restriction relates, plays a certain role in determining the scope of margin of appreciation. If the contested measure forms part of a more general (and legitimate) socio-economic and fiscal policy, a spatial and urban planning policy, an agricultural, housing or the environmental policy, then the Contracting State (national legislature) generally disposes of a wider margin of appreciation.

\textsuperscript{160} ECtHR, Gillow v. UK, Judgment of 24 November 1986, § 55.
\textsuperscript{161} ECtHR, Leander v. Sweden, Judgment of 26 March 1987, § 59.
\textsuperscript{162} ECtHR, Dudgeon v. UK, Judgment of 22 October 1981, § 52.
\textsuperscript{163} ECtHR, K. and T. v. Finland, Judgment of 12 July 2001, § 155.
\textsuperscript{164} ECtHR, Evans v. UK, Judgment of 10 April 2007, §§ 77 (right of women to become mothers vs. right of men not to become a father).
The importance of this factor is noticeable in some cases concerning the right to property (Art. 1 Protocol No. 1, alone or in combination with Art. 14 ECHR)\textsuperscript{165}, the freedom of expression with regard to competition and commercial advertising (Art. 10 ECHR)\textsuperscript{166}, albeit that the margin is more restricted if the freedom of expression is not purely commercial and forms part of a broader discussion of public interest\textsuperscript{167}, and the right to private and family life with respect to spatial and urban planning and environmental policy (Art. 8 ECHR)\textsuperscript{168}. In such cases it may be assumed that national governments are, owing to their direct and continuous contact with the vital forces of their respective countries, generally better positioned to take account of a set of local factors and to judge local needs and conditions\textsuperscript{169}.

For instance in a case concerning measures to be taken to restrict noise nuisance caused by aircraft, it was certainly not, in its own words, the European Court’s task the national authorities’ assessment by regardless whatever other opinion as to what the best policy should be in this difficult social and technical sphere. In this case, this is an area on which the Contracting States enjoy a wide margin of appreciation\textsuperscript{170}. In cases in which a state finds itself in a period of transition between an earlier and new regime or state structure, these countries are granted a wide margin of appreciation in taking transitional measures that restrict a right or freedom\textsuperscript{171}.

11. FOURTH INSTANCE DOCTRINE

The European Court is not a court of appeal or a court of “fourth instance” with respect to the decisions taken by domestic courts\textsuperscript{172}. The European Court’s task is limited to guaranteeing that the Contracting States fulfil their obligations under the European Convention (in accordance with Art. 19 ECHR) and hence to determining whether decisions made under national law comply with the European Convention\textsuperscript{173}.

\textsuperscript{165} ECtHR, Mellacher a.o. v. Austria, Judgment of 19 December 1989, § 45 (housing policy); ECtHR, Gasus Dosier- und Fördertechnik GmbH v. Netherlands, Judgment of 23 February 1995, § 60 (tax policy); ECtHR, Stec a.o. v. UK, Judgment of 12 April 2006, §§ 52 and 66 (social policy).

\textsuperscript{166} ECtHR, Markt Intern Verlag GmbH and Klaus Beermann v. Germany, Judgment of 20 November 1989, § 33.

\textsuperscript{167} ECtHR, Hertel v. Switzerland, Judgment of 25 August 1998, § 47 (information was part of discussion about health risks due to the use of microwave ovens).

\textsuperscript{168} ECtHR, Gillow v. UK, Judgment of 24 November 1986, § 56 (housing policy); ECtHR, Powell and Rayner v. UK, Judgment of 21 February 1990, § 44 and ECtHR, Hatton a.o. v. UK, Judgment of 8 July 2003, 2003, §§ 100-101 (reduction of aircraft noise leading to nuisance for residents).

\textsuperscript{169} ECtHR, Handyside v. UK, Judgment of 7 December 1976, § 48.

\textsuperscript{170} ECtHR, Hatton a.o. v. UK, Judgment of 8 July 2003, §§ 100-101.

\textsuperscript{171} ECtHR, Kopecky v. Slovakia, Judgment of 28 September 2004, §§ 37-38 (transition from communist to democratic regime).

\textsuperscript{172} ECtHR, Baumann v. Austria, Judgment of 7 October 2004, § 49.

\textsuperscript{173} ECtHR, Kemmache v. France (n° 3), Judgment of 24 November 1994, § 44.
The Court may not therefore intervene on the basis of claims that domestic legal institutions have made an ‘error of fact’ or an ‘error of law’, unless it believes that the errors or transgressions may have led to a violation of the European Convention\textsuperscript{174}. Complaints claiming that a domestic court should have reached a different decision will be declared inadmissible as being manifestly illfounded. The interpretation and application of domestic substantive and procedural law is primarily the preserve of the national courts and tribunals\textsuperscript{175}.

Article 6 ECHR guarantees the right to a fair hearing, but it does not lay down any rules on the admissibility of evidence or the way it should be assessed. The decision to admit or refuse evidence is consequently a matter which must be regulated by national law and it is, in principle, up to national courts to assess the evidence presented\textsuperscript{176}. The European Court will not therefore review the facts as these have been ascertained by the domestic court, unless it has drawn arbitrary consequences from the evidence\textsuperscript{177}. It is not, in principle, the task of the European Court to assess itself the facts which have led a national court to take one decision rather than another and to thus replace the judgment of the national courts by its own\textsuperscript{178}. In this context the Court will not therefore assess whether witness’ statements were accepted as evidence in the proper manner, but rather it will investigate whether the proceedings as a whole, including the way evidence was gathered, were fair\textsuperscript{179}.

**CONCLUSION**

The European Court has, in conformity with Article 32 of the European Convention, the task of interpreting the Convention. On the one hand it is interpreting the European Convention, being an international treaty, in accordance with the international rules on the interpretation of treaties enshrined in the Vienna Treaty on the Law of Treaties, while on the other hand, its allegiance to traditional public international law has not deterred the Court from developing a number of original methods of interpretation and application for the European Convention. While over the years the European Court has developed a voluminous case law on the principles of interpretation and application it uses, its case law

\textsuperscript{175} ECtHR, Baumann v. Austria, Judgment of 7 October 2004, § 49.
\textsuperscript{176} ECtHR, Schenk v. Switzerland, Judgment of 12 July 1988, §§ 45-46.
\textsuperscript{177} ECtHR, Van Mechelen v. Netherlands, Judgment of 23 April 1997, § 50.
\textsuperscript{178} ECtHR, Kemmache v. France (n° 3), Judgment of 24 November 1994, § 44.
is very casuistic and it is therefore very difficult – if not impossible – to deduce clear rules as to the exact appliance of these rules and principles. Overall, through the use of certain Convention-specific techniques (evolutive and autonomous interpretation) the Court has mostly been able to detach itself from the meaning of the original 1950 Convention text and has been able to give protective effect (principle of effectivity) to the rights and freedoms under the European Convention, while being careful – through the use of other techniques, such as the doctrine of the margin of appreciation, to be (perceived as) moderate in its decision-making.
At the outset it must be stressed that the nature and object of the judgment of the European Court of Human Rights is quite different from that of a Court of Cassation, a Conseil d’État, and even a Constitutional Court. I will limit myself here to mentioning three aspects of this: the jurisdiction of the Court (1), the means of access to the Court (2), and the question of its relationship to Convention standards, especially by way of interpretation (3).
I. THE JURISDICTION OF THE COURT AND THE PRINCIPLE OF SUBSIDIARITY

The jurisdiction of the Court is clearly defined in Article 32 of the European Convention on Human Rights. It shall extend “to all matters concerning the interpretation and application of the Convention”. This means that the Court is called upon both to “declare the law” of the Convention and to “apply the law” in individual situations. In other words, the Court must exercise both a constitutional and a judicial function.2

This requirement of the Convention was already reaffirmed in the Ireland v. the United Kingdom judgment of 18 January 1978. The Court considered that “the responsibilities assigned to it within the framework of the system under the Convention extend to pronouncing on the non-contested allegations of violation of Article 3. The Court’s judgments in fact serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties”3. In the Guzzardi v. Italy judgment of 6 November 1980, the Court went even further. In response to the argument relied on by the Italian Government that the object of the proceedings had disappeared, the Court reiterated what it had said in 1978: “The Court’s judgments also serve ‘to elucidate, safeguard and develop the rules instituted by the Convention thereby contributing to the observance (...) of the engagements undertaken’ by the Contracting States”4, and it added: “The present case does raise – notably with regard to Article 5 – issues of interpretation sufficiently important to call for decision.”5

This jurisdiction of the Court is, however, exercised in accordance with the principle of subsidiarity, a principle which radiates throughout the entire European Convention on Human Rights. For the Court, this principle is essential, as the Court has to respect the democracy and legitimacy of domestic institutions, and it requires from us, therefore, a form of judicial restraint. In other words, no legislation from the bench! When we are saying that the system operates under the principle of subsidiarity, which explains and gives meaning to the rule of exhaustion of domestic remedies, it means that the primary responsibility for securing the rights and freedoms set out in the European Convention on Human Rights lies with the domestic authorities and particularly the judicial authorities. The Court can and should intervene only where the domestic authorities fail in that task.

It further introduces to this fundamental idea that between the national and the inter-

3 ECtHR, Ireland v. the United Kingdom, judgment of 18 January 1978, § 154.
4 ECtHR, Guzzardi v. Italy, judgment of 6 November 1980, § 86.
5 Ibidem.
national judge, in the field of human rights, there is clearly a **common responsibility**. The national authorities assume the first responsibility of the respect of human rights, by all the organs of State, whereas the European Court of Human Rights assumes the last responsibility. It is in fact accepted these days that in order to have credibility the protection of fundamental rights must accept scrutiny from the outside. The Court’s role is that of an outside observer, which exercises third-party control. Conversely, the European Court of Human Rights is not, in any way, a court of fourth instance; it is not, in any way, a superior instance in the sense that it would hold a “superior” position as compared to the domestic courts which would hold an “inferior” position. The European Court of Human Rights should not replace but reinforce the protection of human rights at the national level. This way of thinking about human rights should invite the courts to adopt an attitude of encounter and openness, reflecting the indispensable complementarity between the national and the international legal order in ensuring the implementation of fundamental rights.

**II. MEANS OF ACCESS / APPLICATION**

The means of access to the Court is by individual complaint of a person or a group of individuals who can claim to be the victim of an alleged violation of the Convention, that is to say, who are personally affected by it (Art. 34). *A contrario*, the Court cannot be called upon to pass judgment when the object of the complaint is to question *in abstracto* a body of laws or the case-law of a State. If we are talking about objective review (disputes) vs. subjective review (disputes), or concrete review (disputes) vs. abstract review (disputes), the control of the European Court of Human Rights is certainly of the concrete type. We are seized by complaints which assert alleged violations of the Convention in particular situations. In this respect I share completely Max Weber’s analysis according to which the people’s interests, revealed by the violation to them, help in bringing to the fore judicial questions which are more often than not invisible when screened through abstract norms.

This element determines which type of reasoning is held by the Court and what is the motivation of its judgments. Thus, for example, as S. Van Drooghenbroeck aptly observes, when it comes to the control of proportionality which the Court is often called upon to do, the way in which the interests are balanced depends on whether this control is of a concrete or abstract character. It is either an *ad hoc balancing* “which focuses the control on the unique situation, *hic et nunc*, and which brings about a decision anchored in the totality of the circumstances of the case and its validity is thus confined to the resolution of the
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matters at issue”; or a categorical balancing “where a control of the conventionality of the restrictive norm itself is carried out and not just its application to the applicant in question, given that the decision to be taken will have a normative scope, since it will be applicable to any person in the same type of situation, creating a general and abstract hypothesis of the controlled norm”. The method applied by the Court is certainly of the ad hoc balancing type, in so far as, most of the time, the interests are weighed in a particular case and according to its specific needs, without generalising.

This option comes out of a real choice by the European judge who is led by the wish not to go against the State authorities by condemning, in a general and abstract way, their laws, rules and practices. More fundamentally, this option expresses “the wish to place human rights justice, not in the abstraction of general situations which law-makers have regard for, but in the concreteness of particular cases, irreducible in their singularity”.

That said, nuances must be introduced. Should the Court be “a peace-maker” for particular disputes who, while obeying the precepts of “judicial minimalism”, confines itself to deciding “one case at a time”, in a casuistic way without being burdened with hic et nunc useless, even dangerous, theoretical debates? To quote C. Sunstein: “We might describe the phenomenon of saying no more than necessary to justify an outcome, and leaving as much as possible undecided as ‘decisional minimalism’”. And the same author then characterises the “minimalist” judges as those who “seek to avoid broad rules and abstract theories, and attempt to focus their attention only on what is necessary to decide in particular cases”, in contrast to the maximalists who endeavour “to decide cases in a way that establishes broad rules for the future and [to give] deep theoretical justifications for the outcome”. Or should the Court have a “pedagogical” role, taking as a pretext the selective punctuel disputes which it receives to give to the front-line judges of the ECHR – the State authorities – general directives and clarifications concerning rights and duties that it recognises and imposes? Judicial restraint vs. judicial activism? Judicial minimalism vs. judicial supremacy? There are arguments on both sides.

This debate is certainly to be found within the Court. It relates, in turn, to numerous questions or observations. A form of tension within the Court between the supporters of leading cases – and who could in this regard be qualified as dogmatic – and those who fa-

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Different standards of judicial review.
The nature and object of the judgment of the European Court of Human Rights

your an approach based on the case at hand — and who could in this regard be qualified as pragmatic. The tension could also be related, at least partly, to the nature and especially to the method of the judicial system, that of common law or of the European continental system. Finally, it leads to the emergence of the question of the status of the European Court as a possible “European Constitutional Court”.

III. THE RELATIONSHIP TO STANDARDS (NORMES) AND THE QUESTION OF INTERPRETATION

The common denominator or common grammar of all the judges of the European Court of Human Rights are, of course, the standards of the European Convention on Human Rights. Article 1 of the Convention, according to which the States shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of the Convention is the starting point for the interpretation by the Court of the standards of the Convention.

The interpretation of the rights and freedoms guaranteed in the Convention lies at the heart of the adjudication of the European Court of Human Rights. As stated in Article 32 § 1, already mentioned, “[t]he jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto”. The process of interpretation consists in giving a meaning to a text and in delineating boundaries with a view to the application of that process to specific facts. Interpreting the Convention is thus a complex hermeneutic process; furthermore, the Court does not follow one but several rules of interpretation, depending on the case at hand (evolutive, autonomous, comparative interpretation, margin of appreciation, principle of proportionality, principle of subsidiarity, implied powers, etc.).

The Court’s methods of interpretation have always been guided by the Vienna Convention on the Law of Treaties (Articles 31 and 32), the provisions of which constitute, as Judge Matscher put it, “constraints on judicial interpretation”13. Article 31 § 1 of the Vienna Convention establishes the purposive / teleological method of interpretation, i.e., it gives priority to the object and purpose of treaties as a general rule of interpretation14. The flexibility of the object and purpose have allowed the Court to develop its own method of interpretation15.

FOUNDING JUDGMENTS

In the *Wemhoff v. Germany* judgment of 27 June 1968, the Court found that “[g]iven that it is a law-making treaty, it is (...) necessary to seek the interpretation that is most appropriate in order to realise the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the Parties”\(^{16}\). Such an interpretation – concerning Article 5 of the Convention – is based on international jurisprudence but is also inspired by the Preamble to the Convention, which refers not only to the maintenance but also to the further realisation of human rights and fundamental freedoms, and by Article 1 of the Convention which provides that States “shall secure” the rights and freedoms guaranteed under the Convention. A few years later, in the *Golder v. the United Kingdom* judgment of 21 February 1975, the Court reiterated, concerning the teleological method, that “this is not an extensive interpretation forcing new obligations on the Contracting States: it is based on the very terms of the first sentence of Article 6 § 1 read in its context and having regard to the object and purpose of the Convention, a law-making treaty”\(^{17}\). The *Golder* case has been described as “one of the most creative steps of the Court in the interpretation of any Article of the Convention”\(^{18}\) and “one of the most important cases in the history of the ECHR”\(^{19}\).

THE “EFFET UTILE” THEORY

This case-law has had natural offshoots. The Court has developed the idea of *effective protection* of the rights that the Convention intends to protect. This is the “effet utile” theory which “has become a fundamental cornerstone for the protection of Convention rights and freedoms”\(^{20}\). As the European Court of Human Rights has often stated, it is important to give the rights their full scope since the Convention’s aim is to “guarantee rights that are not theoretical or illusory, but practical and effective”, which explains, among other things, the famous sentence in the landmark *Airey* case: “there is no water-tight division separating [the socio-economic] sphere from the field covered by the Convention.”\(^{21}\)

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\(^{17}\) ECtHR, *Golder v. the United Kingdom*, judgment of 21 February 1975, § 36.
Different standards of judicial review.
The nature and object of the judgment of the European Court of Human Rights

It is in this perspective or against this background that evolutive interpretation has to be considered and understood: “human rights treaties are living instruments, whose interpretation must consider the changes over time and, in particular, present-day conditions”\(^\text{22}\). In other words, the concepts used by the Convention are to be understood in the sense given to them by democratic societies today\(^\text{23}\). The “living instrument” approach to interpretation is the temporal dimension of the principle of effectiveness\(^\text{24}\).

In parallel, the Court has produced different constructions such as, for example, the protection “by ricochet”, the elements inherent in a right or the autonomous concepts systematised in the *Engel* judgment\(^\text{25}\).

The Court has also progressively extended the scope of States’ obligations to protect rights as effectively as possible. So, if States’ obligations are, of course, negative – not to interfere with the rights and freedoms guaranteed – a requirement that States take action is now being added to the requirement that they be passive, which takes the form of positive obligations, or even preventive obligations. In this respect, it is true that positive obligations could extend the scope of control by the European judge, particularly towards economic, social and cultural rights. Finally, from this viewpoint, the jurisprudence of the Court inferred an obligation on States to take appropriate legislative, administrative and judicial measures, in order to prevent the commission of violations of the Convention up to and including in inter-individual relations. This is the horizontal application of the Convention which expands in different directions and we cannot fail to notice its deep effects on the general theory of human rights.

**BETWEEN FLEXIBILITY AND LEGAL CERTAINTY**

Fundamental rights have an open texture and their exact meaning remains still to be determined. Their application is consequently intrinsically linked to a process of interpretation by the judges. Never can a fundamental right determine the conditions of its


\(^{25}\) ECtHR, *Engel and Others v. the Netherlands*, judgment of 8 June 1976.
application. It is general and abstract in nature and acquires a concrete meaning in the particular context in which it is raised.

Legal certainty, what Fuller calls the internal morality of law, is obviously a factor to be taken into account, notably in order to define the nature of the obligations on the States. But, at the same time, one cannot prevent or exclude a flexible interpretation of the Convention which is in line with the fundamental goals pursued by the text. “Rigidity in the operation of a legal system is a sign of weakness, not strength. It deprives a legal system of necessary elasticity. Far from achieving a constitutionally exemplary result, it can produce a legal system unable to function effectively in changing times.”

The Grand Chamber judgment in the case of Scoppola (no. 2) v. Italy of 17 September 2009 summarises the essence of this approach: “[w]hile the Court is not formally bound to follow any of its previous judgments, it is in the interests of legal certainty, foreseeable ability and equality before the law that it should not depart, without cogent reason, from precedents laid down in previous cases (...). Since the Convention is first and foremost a system for the protection of human rights, the Court must however have regard to the changing conditions in the respondent State and in the Contracting States in general and respond, for example, to any emerging consensus as to the standards to be achieved (...). It is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. (...).”

A fine balance is to be found between legal certainty and other, just as important competing values, to which the Court must be equally sensitive: paying attention to the specific circumstances of the case, respecting the pluralism of interests, being aware of the fast evolution of things and ideas – all these values partake of the constraints of argumentation to which lawyers have paid attention to and from which, since Aristotle, they earned the name of “prudents” (prudentes, jurisprudence). In other words, the Court’s action requires both moderation and courage.

CONCLUSION

As legal theorists have observed, “the law must be stable yet it cannot stand still”28. Adaptation and modification have been constant features of the Convention since 1950 and continue to be so today. The Convention is now sixty years old and the Court’s case-

27 ECtHR (GC), Scoppola (no. 2) v. Italy, judgment of 17 September 2009, § 104.
law has been evolving for fifty years, alongside profound changes that have occurred in Europe over recent decades. The Convention has become a pan-European instrument of protection of human rights and, in many countries, has made it possible to achieve a level of respect for fundamental rights that would have been hardly imaginable in 1950 when the Convention was drafted. It would probably not have survived if it had not been regarded as a living instrument that has to be interpreted in line with developments in the society in which we live. The development of law is inseparable from the development of society.
1. INTRODUCTION

The article examines how European human rights standards may contribute to improving human rights protection in Georgia, and what role judicial activism may play in securing the protection of human rights. These issues will be analysed on the basis of the practice of Georgian general jurisdiction courts.

The first part of the article examines the influence the European Convention on Human Rights may have on human rights protection based on European standards in Georgia. The second part of the article deals with the existing Georgian practice of judicial activism and self-restraint in the field of human rights.

1 The article is based on the report delivered by the author at the International Conference “the Judicial Activism and Self-restraint: the Theory and Practice of Constitutional Rights”, organised by the Constitutional Court of Georgia. Batumi, July 13-14, 2010.
2. INFLUENCE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS ON GEORGIAN JUDICIAL PRACTICE

The starting point for examining the influence of the European Convention on Human Rights is that Georgia’s international treaties are an integral part of Georgian legislation, which give natural and legal persons the right to directly invoke these international instruments before national courts. Under Georgian legislation, international treaties stand higher than national legislation (except the Constitution and the Constitutional Agreement).

If it is undisputed that the European Convention can be applied in domestic courts, various representatives of the judicial profession have differing views as to the role of the European Court of Human Rights’ case-law. Some Georgian judges take the view that judges should apply the case-law, as it secures the convention’s correct interpretation and application. Other judges consider that, as Georgia is not a case-law country, there is no need to apply the court’s case-law. The national courts of States Parties to the Convention apply the case-law of the European Court of Human Rights not because it is legally binding on them (the European Court’s judgments are binding only upon respondent states), but because the European Court provides an authoritative interpretation of the provisions of the European Convention.

Without a proper analysis of the case-law of the European Court, it would be extremely difficult to establish the precise contents of the rights prescribed by the Convention in a correct manner and, accordingly, to rightly apply the provisions of the Convention.²

For the purpose of illustrating the above, the example of Article 6, paragraph 1, may be discussed herein. The mentioned provision stipulates that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Unless one looks into the relevant cases adjudicated by the European Court, it is difficult to comprehend what these terms mean – a fair and public hearing, an independent and impartial tribunal, and a reasonable time frame within which such a hearing shall take place and how exactly these principles should be applied in practice.

Therefore, when it comes to applying European human rights standards when administering justice, what is implied is the application of not only the standards articulated in the text of the Convention *per se*, but also the standards that have been established through the European Court’s case-law. Some legal professionals in Georgia, *inter alia*, judges, unfortunately, do not fully realise the role of the European Court’s case-law when administering justice.

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3. ADVANTAGES OF APPLYING EUROPEAN STANDARDS IN THE ADMINISTRATION OF JUSTICE

The application of European human rights standards helps to secure the adoption of proper court decisions. The European standards present certain guidelines for protecting human rights and fostering the maximum protection of those rights.

The application of European human rights standards when administering justice has several significant advantages, and if used, Georgian courts will have the opportunity to ensure human rights protection in compliance with European standards. When administering justice, European standards may be applied as follows:

- to properly interpret general or vague domestic legal norms;
- to prevent any conflict with domestic normative acts;
- to foresee the decisions of the European court;
- to fill the gaps in domestic normative acts;

and two more advantages, which are of particular significance for the present analysis are as follows:

- to develop national human rights standards;
- to render legal credibility to court decisions.

4. EXISTING PRACTICE OF APPLYING EUROPEAN HUMAN RIGHTS STANDARDS IN GEORGIA

A study of Georgian court practice has identified an increase in the application of international acts by Georgian courts. An increasing number of court decisions in Georgia are applying European human rights standards. 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 that may be assessed positively.

If the practical application of the European Convention is analysed 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 to be unsatisfactory.\textsuperscript{3}

The effectiveness of the application of these standards when administering 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.

If analysed, those court decisions in which Georgian general jurisdiction courts have applied European human rights standards will clearly show that their effect on court decisions is mostly negligible.

In most cases, courts apply European human rights standards along with Georgian domestic normative acts. In particular, a Georgian general jurisdiction court examines the norm that 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.\textsuperscript{4} Afterwards, the Georgian court concludes that the rules of conduct established by Georgian domestic normative acts and the European Convention are similar and the court settles the dispute on the grounds of these two acts.\textsuperscript{5}

The general practice of applying European standards by Georgian courts makes it clear that only in a limited number of cases when European standards were applied were human rights protected at a higher level than if they had been secured only on the basis of applying Georgian laws or codes.

Bearing in mind all of the above, one can draw the conclusion that Georgian courts frequently apply European human rights standards in such cases when their application has almost no practical contribution in settling a court dispute. The purpose of applying European standards is not simply to apply them. By applying European standards, Georgian courts protect human rights by higher standards compared to those established by Georgian laws or codes.

In order to improve the situation, it is necessary to take two primary types of measures – the development of a training system for judges and the improvement of the information policy.

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

\textsuperscript{4} 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, 16 May, 2000; Decision N3g-ad-429-k-02 on Administrative and Other Cases, December 18, 2002, N2, 2003, pp. 224; and Decision N3g-ad-405-k-02 on Administrative and Other Cases, February 27, 2003, N4, 2003, p. 847.

\textsuperscript{5} 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.
5. GEORGIAN JUDICIAL PRACTICE ON JUDICIAL ACTIVISM AND SELF-RESTRAINT

One advantage of applying European human rights standards is that it allows for the development of national human rights standards in line with European standards. The development of Georgian legislation on the basis of the European Convention should be regarded as a form of judicial activism.

One factor warranting the interpretation of national legislation in accordance with European human rights standards is that the Convention is regarded as a “living” instrument. Regarding the Convention as such means that its provisions must be interpreted in accordance with changes in society’s way of thinking.6 If the provisions of Georgian legal acts are not construed in line with European standards, then their meaning may “fall behind” the meaning of the rights protected by European standards. The latter are in the process of continuous development, and run parallel to the increasing level of human rights protection standards in general. If national courts do not use European standards to construe national legislative provisions, it may be that these provisions will eventually be interpreted in a narrower manner and, thus, in violation of the rights as defined by European standards.7

The interpretation of Georgia’s domestic normative acts in accordance with European human rights standards will facilitate the harmonisation of human rights protection standards as envisaged by the European Convention and the European court’s case-law, on the one hand, and Georgian legislation, on the other hand. Naturally, such a harmonisation should serve to increase the level of human rights protection standards. The interpretation of Georgian legislation through European human rights standards is especially important with regard to the Georgian Constitution. The interpretation of the Constitution’s provisions in line with the European Convention on Human Rights is alleviated by the fact that the provisions of the Constitution and those of the European Convention are similar. Such a similarity is warranted by the fact that the provisions of the European Convention were taken into account during the process of drafting the Constitution.

Such a similarity is particularly evident when it comes to Article 22, paragraph 3 and Article 24, paragraph 4 of the Georgian Constitution, the provisions of which resemble the relevant provisions of the European Convention. Considering that the European Court has significantly developed and specified the meaning of the Convention’s substantive provisions, the European Convention and the European Court’s case-law may serve as a guideline in the course of interpreting the human rights provisions of the Georgian Constitution.

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In the administration of justice, European human rights standards may be used to fill the gaps existing in Georgia’s domestic normative acts. This may happen when a domestic legal act (such as a law) does not regulate the relevant legal relations (or, in other words, there is a legal gap), while the legal relations at issue are regulated by the European Convention.

It is interesting to examine some examples from the practice of Georgian general jurisdiction courts.

1. The Supreme Court of Georgia applied the standard of the European Convention on Human Rights in one of its decisions on a case relating to the lack of an appeal procedure in a higher court against a deportation decision. The Supreme Court based its decision on the European Convention on May 10, 2001, as the sole legal basis in settling the court case. As a result, the criminal legislation was amended to make it possible to appeal against the deportation decision in a higher court.

2. A case decided on October 10, 2007 by the Tbilisi City Court’s Administrative Board is also of importance. The case dealt with the prisoner’s right to meet with family members more often and with a longer duration than established by the law on imprisonment – i.e. once per month for an hour.

The case Nowicka v. Poland of the European Court, stating that limiting the prison visitation rights of family members to only once per month was a violation of Article 8 of the Convention.

The Tbilisi City Court satisfied the plaintiff’s claim and indicated that the permitted quantity of meetings assigned to prisoners as defined in the Georgian law on imprisonment clearly contradicts Article 8 of the European Convention. It is few in terms of numbers, impinges upon the right of respect of family life, and priority shall be granted to the international treaty with a higher legal status compared to the law.

It is significant that the Tbilisi City Court gave the task to the Ministry of Justice to issue a normative act that will be in compliance with the requirements of Article 8 of the European Convention and will take into consideration the decisions adopted on a disputed issue by the European Court.”

This Tbilisi City Court’s decision deserves a positive assessment.

3. In 2008, the Supreme Court of Georgia heard a case which, inter alia, was related to acknowledging as a co-owner an individual who had been in an unregistered marriage, as requested by the plaintiff. The plaintiff, living with her spouse (before the death of the spouse...
person with whom she lived in an unregistered marriage) from 1993 until 2005, claimed disputed real estate and a large sum of money spent on the renovation of the house owned by her spouse’s son.

The plaintiff’s demand 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 registration as the origin of marriage, Georgia is an orthodox country that acknowledges both the state and the church alike. Hence, a 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 relationships”. The plaintiff also referred to the 1994 decision of the European Court on the case Kroon v. the Netherlands.12 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.”

Ultimately, the Supreme Court did not satisfy the claim. Unfortunately, this court decision should be given a negative assessment. It is clear that there was a contradiction between Georgian legislation, in particular, the civil code, and European human rights standards.

This is a clear example of how the court missed an excellent opportunity to protect human rights by a higher standard and to secure the harmonisation of Georgian law with European human rights standards.

6. CONCLUSION

Several conclusions may be drawn:

a. European human rights standards play an ever increasing role in the administration of justice in Georgia and they are gradually becoming a part of the system of administering justice and judicial thinking;

12 October 27, 1994, Series A No. 297-C.
b. European standards serve as a guideline in the course of interpreting human rights provisions and contribute to increasing the quality of human rights protection. Georgian courts should effectively apply such a function of European standards;

c. European standards may become a motivating factor for judicial activism that will ultimately contribute to the development of Georgian legislation and practice;

d. In order to fully establish the practice of applying European standards by Georgian courts, it is pivotal, on the one hand, to secure a better system of informing judges of European standards and on the advantages of their application and, on the other hand, that judges become more courageous in applying European standards in practice.
Within the scope of a Constitutional Court’s power, a modern state performs one of its most important functions – the protection of fundamental human rights. This function is a direct consequence of the state’s constitutional obligation, according to which: “The state shall recognise and protect universally recognised human rights and freedoms as eternal and supreme human values. While exercising authority, the people and the state shall be bound by these rights and freedoms as directly acting law” (Article 7, Georgian Constitution).

This provision of the Constitution outlines the principles for the state’s attitude towards the fundamental rights and freedoms of an individual as well as the key legal principles of a democratic state. In particular:

Human rights and freedoms are regarded as eternal, inalienable human values that are inherent and natural to people. Therefore, the state cannot deprive an individual of these rights, refuse to respect and protect them;

Every person is entitled to human rights and freedoms, irrespective of citizenship or the lack thereof. Therefore, human rights and freedoms are of universal nature;

As a directly acting law, human rights and freedoms do not need to be specified in national legal acts. In any case, they must be realised, ensured and protected by the state. A state and even the people, who are the carriers of sovereign rights and the source of government, are restricted by human rights and freedoms.
Given the significance of human rights and freedoms, the Constitution envisages the necessary legal guarantees for their protection. The most effective among them is the protection of human rights and freedoms by courts. Under Paragraph 1, Article 42 of the Constitution, “Everyone has the right to apply to a court for the protection of his/her rights and freedoms”.

Court protection is a human right itself. At the same time, it is a necessary guarantee, the means for the protection of all of the other human rights and freedoms. The protection of human rights and freedoms by courts is, first and foremost, performed by general courts within the scope of their competence. The Constitutional Court, however, performs this function by examining the constitutionality of those normative acts that are adopted in relation to the fundamental human rights and freedoms recognised under Chapter II of the Constitution. The Georgian basic law defines the Constitutional Court’s authority in the area of the protection of human rights and freedoms as follows – the Constitutional Court shall “consider, on the basis of a claim of a person, the constitutionality of normative acts in relation to the fundamental human rights and freedoms enshrined in Chapter Two of the Constitution” (Subparagraph F, Paragraph 1, Article 89).

It stems from this that a normative act can fall under the Constitutional Court’s jurisdiction only if there is an organic link, and a direct relationship between this normative act and the fundamental human rights and freedoms recognised under Chapter II of the Constitution.

The existence of this relationship, of an organic link, is clearly seen in the subject of the normative act’s regulation. The subject of the normative act’s regulation (or of its part), falling under the jurisdiction of the Constitutional Court, shall be one of the fundamental human rights and freedoms guaranteed under Chapter II of the Constitution. For example, the Georgian Law on Assemblies and Manifestations, which regulates the relations concerning one of the rights recognised by Article 25 of the Constitution – the right to public assembly; or the norms of the Georgian Code of Criminal Procedure, which regulate the relations concerning one of the rights recognised by Article 42 of the Constitution – the right to fair trial, and so on and so forth.

The legal definition of the Constitutional Court’s jurisdiction clearly outlines that a normative act to be considered by the court must be adopted not generally in relation to human rights, but in relation to “fundamental human rights and freedoms”. At the same time, these “fundamental human rights and freedoms” must be recognised under Chapter II of the Constitution.

Such a definition of the Constitutional Court’s power is, in our view, absolutely logical as a human right against which a normative act’s constitutionality is to be examined, and shall be recognised and envisaged by the Constitution itself. Otherwise, it would be impossible to discuss a disputable normative act’s constitutionality.
The discussion of this aspect of the Constitutional Court’s adjudicative power could finish here, but several issues will arise in this respect that must be answered to ensure the proper perception of the limits of the Constitutional Court’s powers in the area of human rights protection. First, it needs to be identified which human rights belong to the category of “fundamental human rights and freedoms”. Since the legislator uses the term “fundamental”, it is logical to assume that there are also “non-fundamental” rights. Besides, the difference between “rights” and “freedoms” should be specified and, what’s more important, there is a need to explain Article 39 of the Constitution, which implies that Chapter II of the Constitution does not contain an exhaustive list of human rights. This, in turn, creates problems in court practice when taking a decision on the issues concerning human rights recognised by Chapter II of the Constitution.

As regards the interrelation between “rights” and “freedoms”, it can be said that, in the end, they are identical terms from the standpoint of their legal nature and system of guarantees. Both define the boundaries of a person’s social capacities in various spheres of social life, which are guaranteed by the state\(^1\). Some scholars, however, outline the difference between them and try to group rights and freedoms by certain characteristics. They think that most fundamental rights are so-called “rights of freedoms”. They ensure a free area for the activity and behaviour of the people, which the state either does not intrude or intrudes upon specific grounds – only in cases explicitly prescribed by law and in accordance with a corresponding rule\(^2\).

We do not regard this definition as good enough to draw a clear line between rights and freedoms since this definition can be equally applied to rights as well.

Of course, the freedoms are marked with some peculiarities as compared to the rights. The term “freedom” implies a vast opportunity for a person to make an individual choice, and does not specify the outcome of this choice. For example, we can quote constitutional definitions of freedoms: “Everyone has the right to freedom of speech, thought, conscience, religion and belief” (Paragraph 1, Article 19), or “The freedom of intellectual creation shall be guaranteed” (Paragraph 1, Article 23), etc. In contrast to the above, the term “right” defines a specific action of a person. For example, “Every Georgian citizen who has attained the age of 18 shall have the right to participate in a referendum or the elections of the state and self-government bodies” (Paragraph 1, Article 28), or “Everyone shall have the right to receive education and the right to free choice of a form of education” (Paragraph 1, Article 35), etc. We think that such peculiarities are not essential and, therefore, cannot be used as arguments to substantiate the difference between rights and freedoms as two different notions. They may just have educational meaning, but cannot determine any specifics of the Constitutional Court’s adjudicative power de-

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pending on whether a normative act’s constitutionality is examined against the rights or freedoms.

As regards issues related to “fundamental rights” and Article 39 of the Constitution – as I have already noted above, the Constitutional Court considers the constitutionality of normative acts in relation to the fundamental rights and freedoms recognised under Chapter II of the Constitution. However, a question arises – which rights are fundamental human rights and does Chapter II recognise all of the fundamental human rights?

Chapter II of the Constitution – “Georgian Citizenship. Fundamental Human Rights and Freedoms” – defines civil (personal, political, social and economic and cultural) rights of a person, as well as special rights (guarantees) to ensure the protection of these rights and freedoms.

Bearing in mind the title of Chapter II of the Constitution, we should assume that the rights outlined in this chapter are the fundamental rights of a person. Legal literature even notes that “fundamental rights are only those rights which are guaranteed by the Constitution”. Therefore, in Georgia, one cannot find, for example, a fundamental right of labour as the Constitution does not contain the corresponding wording (Paragraph 1, Article 30 of the Constitution only notes that “labour shall be free”)

3 Konstantine Kublashvili, ibid, p.40. At the same time, Article 39 of the Constitution explicitly states that the “Georgian Constitution shall not deny other universally recognised rights, freedoms and guarantees of an individual and a citizen, which are not referred to herein, but stem inherently from the principles of the Constitution”.

Therefore, considering the above said, if a normative act violates any of the fundamental rights, which are not provided in Chapter II of the Constitution, but are otherwise recognised (by, for instance, an international act), the Constitutional Court may consider the disputed normative act’s constitutionality only if it substantiates that the right in question “stems inherently from the principles of the Constitution” and belongs to the category of fundamental rights and freedoms. Otherwise, it will be a matter of an internal normative act’s non-compliance with the requirements of an international legal act. Because this cannot be determined, a dispute on the issue cannot be resolved by the Constitutional Court, as it does not fall within the remit of the Constitutional Court’s powers. Such a dispute can be resolved in general courts, and not in terms of a normative act’s constitutionality, but rather its legality.

In order to determine whether this or that human right, which is not provided in the Constitution, belongs to the category of fundamental rights, the Constitutional Court shall prove that the right in question is an inalienable human right and is inherent to any person, that the state cannot deprive a person of this right or deny its recognition, and that it stems
inherently from the principles of democracy, legal state, social state, division of powers and other principles enshrined in the Constitution⁴.

Therefore, Article 39 of the Constitution shall not be interpreted as providing an opportunity for examining a normative act’s constitutionality against any human right. It only provides for the opportunity to fill a gap that may appear in the regulation of fundamental human rights in the Constitution.

To properly define the essence of the Constitutional Court’s adjudicative power and, accordingly, identify its boundaries, it is necessary to make clear which normative acts can be examined for their constitutionality within this power of the Constitutional Court. Since the legislator does not specify any type of normative acts, we should assume that it implies any effective legal act or sub-law which has been adopted in accordance with the procedure established by the law. This, of course, must not include the Constitution and Constitutional Law because when defining the Constitutional Court’s adjudicative power, the legislator explicitly states that, in this case, an object of constitutional control cannot be the norms of this Chapter, but only the normative acts that are adopted in relation to issues provided in Chapter II of the Constitution. The same holds true for the Constitutional Law, which is an instrument to make amendments or addenda to Chapter II of the Constitution. It is true that this law is also a normative act concerning the issues in Chapter II, but it becomes an integral part of the Constitution and a constitutional norm itself after it has been adopted. As regards the norms in Chapter II of the Constitution, which define fundamental human rights and freedoms, they represent the criteria and system of measurement for examining the constitutionality of normative acts. Therefore, they cannot become an object of adjudication by the Constitutional Court.

Thus, any normative legal act save the Constitution and Constitutional Law may be an object of constitutional control within the scope of the Constitutional Court’s adjudicative power.

However, this definition is not sufficient to define those normative acts that can be controlled by the Constitutional Court in the area of human rights. A normative act shall, at the same time, be adopted in accordance with the established rule and be in force. The Constitution, the Georgian Law on Normative Acts and other legal acts define the rules for drafting, adopting (issuing), publishing, operating, registering and systematizing separate types of normative acts. If a normative act has been adopted in violation of these established rules, then the Georgian Law on Normative Acts renders it invalid (Paragraph 9, Article 25). Moreover, a normative act adopted in violation of established procedures does not lose legal power itself. This issue is considered and decided on by the relevant competent bodies, including the Constitutional Court, within the scope of their respective powers. The Consti-

The Georgian Constitutional Court decides on this issue by means of its independent powers – formal control. However, the Georgian Law on the Georgian Constitutional Court\(^5\) makes the fulfilment of this function compulsory together with the fulfilment of other powers, including when reviewing the constitutionality of normative acts adopted in relation to the issues of Chapter II of the Constitution (i.e. human rights). According to this law, when considering the constitutionality of normative acts adopted in relation to human rights, the Constitutional Court shall not only examine their content’s compliance with the Constitution, but also “ascertain whether the procedure established by the Constitution concerning the adoption/enactment of, signing, promulgating and enforcing of a legislative act and a parliamentary resolution is complied with” (Subparagraph B, Paragraph 2, Article 26).

Two aspects are noteworthy here. The first is that, in such cases, the object of the Constitutional Court’s formal control may be not any normative act, but only Georgian legal acts and the resolutions of the Georgian parliament. The second is that an additional obligation to conduct a formal control within the scope of the adjudicative power lies with the court irrespective of a demand in a complaint. According to Paragraph 2, Article 26 of the Georgian Organic Law on the Georgian Constitutional Court, the conduct of formal control by the Constitutional Court is also obligatory during the implementation of such powers as abstract control, the resolution of disputes on competence between state bodies, the resolution of disputes regarding the constitutionality of referendums and elections, the examination of the constitutionality of international treaties and agreements, as well as norm-control in case of the appeal of general courts. These are those rare cases when the Constitutional Court conducts constitutional control at its own initiative.

We have noted above that within the scope of adjudicative power, the Constitutional Court is obliged to carry out formal control only in regards to Georgian legal acts and parliamentary resolutions. As for other normative acts, they can be examined only in terms of their conformity with the law, as the rules for their adoption/issuance, signing, publication and enactment are not established by the Constitution. Therefore, they fall under the authority of general courts and other state bodies.

If a normative act has been adopted in violation of the procedure established under the Constitution and, at the same time, it does not, by its content, conform with the fundamental human rights and freedoms recognised in Chapter II of the Constitution, the Constitutional Court declares this normative act (or its part) unconstitutional and, therefore, invalid on both grounds. Whereas, if a normative act does not conform with the fundamental human rights and freedoms recognised in Chapter II of the Constitution or has been adopted in violation of the procedure established under the Constitution, the Constitutional Court declares this normative act unconstitutional and, therefore, invalid on one of the above grounds.

A normative act shall be effective to be considered by the Constitutional Court. The term “effective” in this case refers to the time of the act’s operation, which is regulated in detail by Chapter IV of the Georgian Law on Normative Acts. This Chapter of the Law defines the terms and conditions for the enforcement and invalidation of normative acts. A normative act will be considered effective if it has entered into force in accordance with the established procedure and, at the same time, there are no conditions stipulated in the law that renders it invalid. It is only such a normative act that can be reviewed by the Constitutional Court. This requirement, which shall be met by a normative act to be heard in the Constitutional Court, is general and extends to any type of the Constitutional Court’s power, which involves norm-control. However, when examining the constitutionality of normative acts adopted in relation to the fundamental human rights and freedoms recognised in Chapter II of the Constitution, the Constitutional Court also considers invalid, i.e. ineffective normative acts, in cases stipulated in the law. This sole exception from the general rule, which is stipulated in Article 13 of the Georgian Law on Constitutional Legal Proceedings (Paragraphs 2, 3\(^1\) and 6), refers to those cases when a disputed normative act has been annulled or invalidated during proceedings in the Constitutional Court. According to this norm, the annulment or invalidation of a disputable normative act at the moment of hearing a case at the Constitutional Court results in the termination of the case. However, if a disputable normative act concerns the human rights and freedoms recognised under Chapter II of the Constitution, the annulment or invalidation of a disputable normative act will not automatically result in the unconditional termination of the case in the Constitutional Court. The Constitutional Court is entitled to carry on the consideration of the case and determine the issue of the conformity of the annulled or invalidated disputable normative act with the Constitution if the ruling is of the utmost importance for ensuring constitutional rights and freedoms (Paragraph 6, Article 13). This exception to the law is intended to allow the Constitutional Court to identify violations of human rights and to effectively reinstate the violated rights through other legal means. Until 12 February 2002, the legislation on the Constitutional Court lacked such a norm and the annulment or invalidation of a disputable normative act at the time of hearing a case necessarily entailed the unconditional termination of the case, without exception, in the Constitutional Court. Such a rule was a sort of incentive for a body having adopted a disputable act and there were frequent instances of annulling or amending disputable normative acts in the process of legal proceedings in the Constitutional Court, which led to the determination of the proceeding on the case. This practice not only undermined trust in the court, but also actually deprived complainants of the opportunity to recover their violated rights. Therefore, the legislator acted properly when it took into account the court practice’s shortcoming and allowed the abovementioned exception from the general rule by amending the law\(^6\). After this legal innovation, Constitutional Court practice in the area of human rights protection significantly improved.

For illustration purposes, I will quote a case from the practice of the Constitutional Court – **Georgian Citizen Salome Tsereteli-Stevens vs Georgian Parliament (№2/2/425)**.

A Georgian citizen, Salome Tsereteli-Stevens, married US citizen Mathew Ryan Stevens on 9 September 2009. For the registration of the marriage, she was asked to submit together with a certificate on the absence of any circumstances hindering her marriage, as envisaged by Article 118 of the Georgian Civil Code, an approval from the Civil Registry Agency, which was compulsory to submit for citizens who wanted to marry a foreigner. This obligation was stipulated in Paragraph 5, Article 44 of the Georgian Law on the Registration of Civil Acts. Such an approval was obligatory to submit as a failure to do so would result in the refusal to register a marriage, according to Subparagraph B, Paragraph 1, Article 20 of the same law. Tsereteli-Stevens received an approval from the registry and paid a state duty of 120 lari. Only afterwards, she was able to register her marriage in a relevant service of the Public Registry. After the marriage, Tsereteli-Stevens filed a complaint with the Constitutional Court demanding the recognition of the unconstitutionality of the provision of Paragraph 5, Article 44 of the Georgian Law on the Registration of Civil Acts, which required a citizen to obtain approval from the registry to marry a foreigner. The complainant believed that the disputable norm violated her right to the freedom of marriage as guaranteed by Article 36 of the Constitution.

The Second Board of the Constitutional Court admitted this claim for consideration on merits on 25 October 2007. During the hearing on the claim’s merits, parliament approved changes to the Georgian Law on the Registration of Civil Acts on 21 March 2008 and annulled the disputable norm. Nevertheless, the Constitutional Court did not terminate the case, continued its consideration and delivered a ruling, thus satisfying Tsereteli-Stevens’ claim. In its ruling, the Constitutional Court emphasised that, in accordance with Paragraph 6, Article 13 of the Georgian Law on Constitutional Legal Proceedings, “After admitting a case by the Constitutional Court for the consideration of merits, the annulment or invalidation of an impugned act shall not result in the termination of constitutional legal proceedings before the Constitutional Court if the case concerns the human rights and freedoms recognised in Chapter Two of the Constitution”. Therefore, the annulment of a disputable norm did not result in the termination of Case №425 in the Constitutional Court.

As regards the claim’s merits, in its ruling, the Constitutional Court noted that Paragraph 1, Article 36 of the Constitution ensures the freedom of marriage to everyone, including a citizen of another state. It is unacceptable to force a person to marry and set up a family. It is also unacceptable to create any obstacle on the part of the state to those who want to get married by such means that are disproportionate and unacceptable for a democratic society. Since it is unclear from the disputable norm what the legitimate aim was that was necessary for society in pursuing the obligation to obtain the Civil Registry’s approval to

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7 **Georgian Constitutional Court. Resolutions, 2008, Batumi, 2009, pp. 22-33**
John Khetsuriani

register a marriage, the Constitutional Court resolved that the norm was inconsistent with the provisions of Paragraph 1, Article 36 of the Constitution and infringed on the complainant’s freedom of marriage.

In regards to this topic, we deem it necessary to underscore some aspects which, in our view, are of principal importance:

First, the Constitutional Court is authorised to review an annulled or invalidated normative act only if the normative act concerns human rights and it has been annulled or declared void after the admission of the case for consideration on merits, i.e. after the announcement of a recording notice. At any other stage of the constitutional legal proceeding, for example, during a sitting on preliminary issues, the Constitutional Court does not enjoy such an authority and is obliged to terminate the case.

Second, the abovementioned rule is effective not only when the Constitutional Court considers, on the basis of a person’s complaint, the case of the constitutionality of normative acts concerning the fundamental human rights and freedoms recognised under Chapter II of the Constitution (i.e. within the boundaries of the Constitutional Court’s adjudicative power), but also during the implementation of any other power of the Constitutional Court that is associated with norm-control and, at the same time, when a disputable normative act is related to the fundamental human rights and freedoms recognised under Chapter II of the Constitution. Such a conclusion can be drawn from an analysis of the content of paragraphs 2, 3\(^1\) and 6, Article 13 of the Georgian Law on Constitutional Legal Proceedings, which clearly show that an exception provided therein does not refer to one specific power of the Constitutional Court. Thus, the protection of human rights in the Constitutional Court is possible within the framework of other powers too. The abovementioned provision clearly indicates that human rights protection is a priority area for constitutional justice.

In describing the essence of the Constitutional Court’s power in the protection of human rights, the Constitution (Subparagraph F, Paragraph 1, Article 89) says that the Constitutional Court exercises this power on the basis of the claim of a “person”. Thus, the abovementioned normative acts or their separate provisions can be considered by the Constitutional Court within the boundaries of this power if corresponding subjects file a claim with it. The answer to the question as to who a claimant can be in such a case is given in Paragraph 1, Article 39 of the Georgian Organic Law on the Georgian Constitutional Court. This provision defines two circles of claimants, in particular:

a) Georgian citizens, other individuals residing in Georgia and Georgian legal entities, if they believe that their rights and freedoms recognised by Chapter Two of the Constitution are infringed or may be directly infringed upon by a normative act;

b) The Georgian Public Defender, if he/she believes that human rights and freedoms, recognised by Chapter Two of the Constitution, are infringed upon by a normative act.
As this provision shows, the first circle of subjects that may appeal to the Constitutional Court include individuals residing in Georgia and Georgian legal entities. They may challenge a normative act’s constitutionality and appeal to the Constitutional Court on two occasions, in particular:

1) If a disputable normative act has already violated a concrete right of the claimant and the claimant directly suffered harm. In such a case – as it is rightly noted by the Constitutional Court in regard to one case – “a claimant shall provide evidence to the court, proving the fact of an intrusion of rights”\(^8\). The fact of “intrusion” implies that a claimant is the subject of the relations regulated by a normative act, that the implementation of this act directly affected him or her, extended to him or her, and resulted in the violation of his or her right. Therefore, the claimant is a victim due to the normative act’s implementation. The European Convention on Human Rights and Fundamental Freedoms considers such a person a “victim”.

In defining the circle of persons that can appeal to the European Court of Human Rights, Article 34 of the European Convention on Human Rights says: “The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto”\(^9\).

An example of a victim is the claimant from the above-quoted case – \textit{Georgian Citizen Salome Tsereteli-Stevens vs Georgian Parliament}. Tsereteli-Stevens was personally affected by the implementation of disputable norms as she married in accordance with the requirements of the norms that violated her right to marriage, as guaranteed by the Constitution, by means of the state’s disproportionate interference, which is unacceptable for a democratic society.

2) A person can apply to the Constitutional Court for the protection of his or her rights not only when his or her rights have been violated and, hence, they represent “victims of the infringement of rights”, but also in cases when there is a possibility of violating his or her rights and freedoms recognised under Chapter II of the Constitution. These are the cases when a disputable normative act (or a provision) has not affected a person yet, or he or she has not been affected by the implementation of the rules provided in the disputable norm, but there is a high risk that a person will become a direct subject of the violation of rights. Legal literature refers to such persons as “potential victims”\(^10\).

\(^8\)\footnote{Georgian Citizens – Aleksandre Baramidze, Irakli Kandashvili and commandite society Andronikashvili, Saxen-Altenburgh, Baramidze and Partners vs Georgian Parliament, Decision №1/1/43 of the First Board of the Constitutional Court, Tbilisi, 1 March 2007.}


A “potential victim” shall be distinguished from those persons who try to implement the so-called “actio popularis”, i.e., who make a normative act (or part of it) disputable only because it in abstracto violates the human rights guaranteed under the Constitution. Actio popularis is unacceptable under our legislation as well as the European Convention. A subject – a person, in this case, appealing to the Constitutional Court – shall be a victim or a potential victim of the violation of human rights. The question as to who can be considered a potential victim can be determined from the case law of the European Court of Human Rights and the court practice of the Constitutional Court.

According to the European Court of Human Rights, “a risk of future violation in exceptional circumstances can only become grounds for granting the status of a potential ‘victim’ to an individual provided that he or she submits reasonable and convincing opinions about the possible occurrence of a violation that will personally affect him or her”\(^\text{11}\). In this regard, the case law specifically notes that “the law can itself violate the rights of separate individuals if they are affected by its implementation even when there are no concrete measures of applying them”\(^\text{12}\). According to the case law, these are cases when a legislator establishes, for instance, confidential, hidden measures (phone tapping, drawing up secret dossiers). In such cases, it is not obligatory for a person to prove that such measures were used against him or her. Under case law, he or she will anyway be considered a victim of the violation of rights. The Constitutional Court applies the above-quoted precedents of the European Court of Human Rights in its court practice. A clear example of this is the case *Georgian Young Lawyers Association and Georgian Citizen Ekaterine Lomtatidze vs Georgian Parliament (№1/3/407)*\(^\text{13}\).

In this case, the claimants demanded the invalidation of the provision of the Georgian Law on Operative Investigative Activity, which, in contrast to the requirements of Article 20 of the Constitution (the right to privacy), provided for the additional limitation of the secrecy of messages delivered by phone and other technical means.

Given the confidential and surreptitious nature of these measures (phone tapping, etc.) provided by law, the First Board of the Constitutional Court admitted this constitutional claim for the hearing on merits and satisfied the demand in a way that did not ask the claimants to submit concrete facts proving the state’s intrusion in their right to the inviolability of messages delivered by phone or other technical means. In our view, the Constitutional Court absolutely rightly regarded the claimants as subjects eligible to appeal to the Constitutional Court, or to be more precise, as potential victims of the violation of rights, although the court did not duly emphasise this aspect. However, in the decision on another case, the Constitutional Court referred to this case an example and underscored that the claim concerning the case *Georgian Young Lawyers Association and Georgian Citizen Eka-

\(^{11}\) Ibid, p. 804.

\(^{12}\) Ibid, p. 809.

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	terine Lomtatidze vs Georgian Parliament was admitted for hearing on merits because, given the content of a disputable norm, the claimants would find it impossible to provide concrete and convincing evidence of not only a potential violation of rights, but also of actually violated rights. At the same time, the probability was high for the claimant to become a participant in the relations envisaged by the disputable norm.14

The ruling delivered on one case is noteworthy, inter alia, for one thing – in regard to one concrete case (which is interesting itself as it concerns the issue discussed in this paper), the Constitutional Court tried to formulate the standards for the definition of a “potential victim”.

The essence of the case was the following – the constitutional complaint’s authors demanded the invalidation of those norms of the Georgian Code of Civil Procedure and the Georgian Law on State Duties, which caused an increase in the state duties on applying to courts. The claimant believed that this was a violation of the right to apply to courts that was guaranteed by Article 42 of the Constitution. According to the claimants, the state duty itself was not a violation of rights, but the size of the state duty, including the maximum size, might restrict a person’s ability to appeal to courts. In this regard, the Constitutional Court explained the provision of Subparagraph A, Paragraph 1, Article 39 of the Georgian Organic Law on the Georgian Constitutional Court, which allows persons to apply to the Constitutional Court if they believe that “their rights and freedoms recognised by Chapter Two of the Georgian Constitution may be directly infringed upon” by a disputable norm (the so-called “potential victim”). In such cases, according to the Constitutional Court:

a) The court shall study evidence, which proves that a claimant will necessarily become involved in the relations envisaged by the disputable norm in the foreseeable future. This, however, is possible only when there is a direct link between the disputable normative act and a claimant’s rights;

b) In separate cases, the court may also evaluate the interrelation of a claimant and a disputable norm and the possibility of the restriction of the right, when it is objectively impossible to present concrete evidence, the possibility of the violation of rights is apparent from the content of the disputable norm and there is no doubt that a claimant can face the threat of the violation of the right”.

In the ruling delivered on this case, the Constitutional Court noted that “neither in an application, nor in the sitting on preliminary issues, have the claimants substantiated that as a result of the implementation of the disputable norm they would face the possibility of the violation of rights. The claimants talk generally only about the right to apply to court, including an abstract possibility of the violation of their rights ... The claimants themselves

do not intend to appeal to courts in the near future ... They lodged the constitutional claim as lawyers”. Based on these circumstances and taking into account the abovementioned criteria developed by the Constitutional Court, the Constitutional Court did not regard the claimants as “potential victims” and did not admit their claim for the hearing of the merits

It should be noted that the institute of a “potential victim” of the violation of rights appeared in the Georgian Law on the Georgian Constitutional Court, owing to the amendment to the law approved on 12 February 2002. This was definitely a step forward for further improving the protection of human rights by means of courts. This, as well as other legislative innovations, have brought the Georgian legislation closer to European law and ensured the broad application of the European Court of Human Rights’ case law in national constitutional justice.

We have already noted above that the Constitutional Court’s adjudicative power can also be exercised on the basis of a complaint from the Public Defender. The Public Defender is a high official envisaged by the Constitution, who monitors the situation of human rights and freedoms. He or she is authorised to reveal facts of violations of human rights and freedoms and to inform the relevant bodies or persons about them (paragraphs 1 and 2, Article 43 of the Constitution). Given this status of the Public Defender, and also bearing in mind Paragraph 1, Article 89 of the Constitution, it is absolutely understandable that the Georgian Organic Law on the Constitutional Court (Subparagraph B, Paragraph 1, Article 39) and the Georgian Organic Law on the Public Defender (Paragraph I, Article 21) grant the Public Defender the right to appeal to the Constitutional Court with a constitutional complaint if he or she believes that a normative act (or any part thereof) violated the human rights and freedoms recognised under Chapter II of the Constitution.

Given the essence of the abovementioned legislative provision, several circumstances need to be taken into account. In particular, the Public Defender may challenge only those normative acts in the Constitutional Court that regulate the human rights and freedoms recognised under Chapter II of the Constitution. Moreover, the Public Defender is obliged to explain how a disputable normative act conflicts with the human rights and freedoms recognised under Chapter II of the Constitution, although he or she is not required to present concrete facts of human rights violations by a disputable normative act to prove the above said. The Public Defender may appeal to the Constitutional Court with a request to examine the constitutionality of a normative act (or part of it) even when he or she thinks that in abstracto it violates the human rights guaranteed by the Constitution. For example,

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the Public Defender lodged a constitutional complaint with the Constitutional Court on 20 June 2002 demanding that Part 7, Article 162 and Part 4, Article 406 of the Code of Criminal Procedure be declared unconstitutional against the provisions of Paragraph 6, Article 18 of the Constitution, which stipulate that the term of a detainee’s preliminary detention shall not exceed nine months. In contrast to the Constitution, the disputable norms allowed for preliminary detention longer than nine months since, according to these norms, the time spent by a lawyer and a detainee on familiarisation with the case materials was not taken into account in the calculation of the length of preliminary detention. The Constitutional Court, by its decision, satisfied the Public Defender’s constitutional claim and declared the Criminal Code’s disputable norms as unconstitutional18. In this case, the Public Defender limited himself to abstract reasoning for the claim’s substantiation and did not quote any concrete facts of violation of a person’s constitutional rights.

Lali Papiashvili

INTERNATIONAL-LEGAL STANDARDS FOR APPLICATION OF PROCEDURAL COERCIVE MEASURES RESTRICTING FREEDOM

Declaration of personal liberty is not a difficult task and, as a rule, it is less beneficial. What is genuinely hard to achieve is its execution.¹

In the situation when the united European legislative sphere and legal systems are coming together, problems concerning the introduction of directly applicable European standards into the Georgian procedural legislation have become highly significant, as have the compatibility of the national court and investigative practices with Strasbourg case law. Articles 6 and 7 of the Georgian Constitution not only recognize the principle of the direct applicability of international standards in Georgia, but they also require the state authorities to ensure the appropriate guarantees for the realisation of the individual’s right to freedom.

One of the most important institutions in criminal proceedings for assessing how human rights are protected is legislative regulation and the application in practice of preventive measures restricting individual liberty. Not only for the reasons that, without

¹ A.V. Dicey, Law and the Constitution, 10th ed. by E.C.S.Wade, 1959, 221.
providing effective mechanisms for ensuring the personal liberty and security of an individual, the protection of other rights is a mere illusion.\textsuperscript{2} Any deprivation of liberty may also affect a person’s enjoyment of other rights, such as the right to association, movement, and assembly.\textsuperscript{3} It can also directly hinder the realisation of other rights guaranteed by the Convention – from the right to inviolability of a family life and privacy to the right of free expression.\textsuperscript{4} However, the arrest of an individual may simultaneously violate the principles of presumption of innocence and adversarial proceedings, and complicates the carrying out of the appropriate defence for the individual either by a defence counsel or personally by himself.\textsuperscript{5}

Article 5 of the Georgian Criminal Procedure Code (hereinafter, the CPC of Georgia) acknowledges the presumption of innocence. The CPC of Georgia is based on fundamental principles and norms of human rights and international law, and introduces standards and criteria under international law regarding the restriction of liberty and notions such as reasonable assumption, the reasonableness of a term for the restriction of liberty and the promptness of a trial.

However, it is one thing to take into consideration the guarantees of personal liberty set out in national legislation and quite another to carry out a prompt and effective defence through national judiciary in cases when any of the state agencies restrict the freedom of an individual.\textsuperscript{6} This is a crucial reason why the present research paper aims to expose theoretical and practical problems and challenges related to the realisation of European standards in criminal proceedings. The findings will likely provide grounds for specific recommendations and suggestions for introducing additional guarantees for the rights of the participants of the proceedings. Also, they will likely encourage the participants to be more active in the criminal proceedings.\textsuperscript{7}

\begin{itemize}
\item \textsuperscript{5} Dr. Richard Vogler, The Right to Liberty and Security under ECHR and International Law: Arrest: Pre-Trial Detention: Bail and Time Limits, Summer School on Constitutional and Human Rights Law, 9th July 2010.
\item \textsuperscript{7} The present paper does not aim to study legitimacy of restriction of liberty in cases when 1) terrorist acts or the acts against the State are being investigated, or 2) special subjects are being deprived of their freedom; and 3) in cases as stipulated by the CPC of Georgia when the following types of preventive measures are being applied: a) placement in a health care institution for medical examination; b) bail, c) restriction on abandoning a place where search is being carried out. The research does not also explore Habeas Corpus procedures.
\end{itemize}
PRECONDITIONS FOR THE USE OF DETENTION

The right of defence means more than the state authorities’ protecting an individual’s physical freedom in view of the fact that both liberty and personal security are confronted. The notion of “security” forces the relevant public bodies to follow principles of the rule of law and basic regulations governing legal defence when a person’s liberty is being thrown onto the scale. That is why, although a person’s liberty is not an absolute right, legislations establish explicit rules and instances for procedures of arrest and detention and put forward the requirements for guaranteeing liberty, justice and security for ordinary citizens and forbid the voluntary relinquishment of the right of defence or self-defense. Article 5 (3) of the Convention grants everyone the right to be released during the investigation despite the expected length of the sentence and does not stipulate an unconditional pre-trial detention even in case of brief detention, since the presumption of innocence always exists in favour of release. And, presumption in favour of freedom includes the necessity of reduction in the use of imprisonment as a preventive measure, as well as the decrease of its length to the minimum required for the administration of justice, and the imprisonment of the offender, only if there is a genuine requirement for public interest, which, notwithstanding the presumption of innocence, may still outweigh the requirement for individual liberty. Prevention of escape, avoidance of obstruction of justice and inter-

13 De Wilde, Ooms and Versyp v. Belgium, 18.06.1971, par. 65; Winterwerp v. the Netherlands, 24.10.1979, par.37.
15 Giorgi Nikolaishvili v Georgia (Application №37048/04), ruling 13.01. 2009 para 75; see also, Patsuria v Georgia No. 30779/04, § 66-67, 6 November, 2007; McKay v. Great Britain [GC], judgment No 543/03, § 41.
16 According to the Article 9 (pa 3) of the UN International Covenant on Civil and Political Rights: “It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment”. The Tokyo Rules interpret the Article9 (pa 3) and state that “in order to provide greater flexibility consistent with the nature and gravity of the offence, with the personality and background of the offender and with the protection of society and to avoid unnecessary use of imprisonment, the criminal justice system should provide a wide range of non-custodial measures, from pre-trial to post-sentencing dispositions (See Article 2.3). See also, for example, Recommendation No. R (99)22 of the Committee of Ministers concerning prison overcrowding and prison population inflation, adopted by the Committee of Ministers on 30.09.1999 at the 681st meeting of the Minister’s Deputies, par.11 Wafa Shah, overview of case studies relating to pre-trial detention, Fair Trials International- march 2009, submission to the directorate- General for Freedom Justice and Security of the European Commission on Issues relating to Pre-trial Detention, 6.
ference with evidence as well as a clear and serious threat for public order, which cannot be neutralized by any other means, are considered to be necessary grounds for the use of detention/arrest.\textsuperscript{17}

However, since two legal values protected by legislation, that is, individual liberty and legitimate interest of the state to uncover crime, contradict one another in the process of using arrest, Article 12.4 of the Criminal Procedure Code of Georgia stipulates that the legitimate interest for uncovering a crime should be outweighed by a legal value protected by Article 18 of the Georgian Constitution. That is why the CPC states that possibility for the use of an arrest should occur only when there is a probable cause to believe that a person has committed a crime and it is necessary to arrest him for the proper administration of justice and this is the last resort:

a) “to prevent absconding and the obstruction of justice by the defendant;

b) to prevent obstruction in obtaining evidence;

c) to prevent the commission of a new crime by the defendant” (Article 205 (1), CPC of Georgia).”

The Constitutional Court of Spain states that the application of an arrest should be subject to strict necessity and respect for the principle of subsidiarity, which means not only the effectiveness of the use of an arrest, but also the ineffectiveness of a more lenient measure instead. Furthermore, the use of an arrest should be proportional, temporary and it should be subject to review in case new circumstances surface. Besides, the length of detention, as well as the gravity of the offence committed or the probable offence, which may be prevented by using an arrest, should be assessed and determined. As for purposes, they should be directed towards the administration of justice, the prevention of obstructions in the execution of a sentence and the prevention of recidivism danger. The use of the remand/arrest should be inadmissible for punitive reasons, for securing conviction, or even for supporting investigation.\textsuperscript{18}

Consequently, the use of remand/arrest as a procedural coercive measure should be:

- Regarded as an \textbf{exceptional measure} and be used only in instances when it becomes actually impossible to achieve the procedural coercive objective by any other preventive measure. It must not be used for punitive or any other reasons.\textsuperscript{19}

- It should not be \textbf{longer} than required by absolute necessity.

- It should be \textbf{reasonably justified};


\textsuperscript{19} According to the Article 198 (4) of the CPC of Georgia the right to use detention/arrest as a preventive measure is granted only when the purpose of preventive measure can not be achieved by applying more lenient preventive measures.
- It should be **lawful**.
- It should be **proportionate/appropriate** to the legitimate objectives.\(^{20}\) It should be imposed in individual cases and to the extent that is necessary for achieving those legal objectives which justify the use of remand/arrest in custody.\(^{21}\)

In compliance with the principle of proportionality, a judge shall establish:

1. Existence of legitimate public objective;
2. Ineffectiveness of more lenient measures for achievement of such an objective;\(^{22}\)
3. Necessity of custody pending trial for achievement of the objective.

And consequently, despite the existence of legal grounds for the restriction of liberty, detention/arrest shall be deemed unlawful if a harm caused by restriction exceeds the danger which had been evaded. The CPC stipulates the possibility for using more lenient preventive measures.\(^{23}\)

### REASONABLENESS OF A DECISION

The decision should be grounded and based not only on the provision of the CPC of Georgia which authorizes a judge to use an arrest;\(^{24}\) but it should examine all those aspects which justify the use of this measure and its continuation,\(^{25}\) it should be based not only on the gravity of probable penalty\(^{26}\) but it should also take into consideration specific circumstances in which the act had been committed and the personal characteristics of the defendant.\(^{27}\) It is inadmissible to rely on stereotypes,\(^{28}\) anonymous statements or on the evidence obtained through the misuse of investigation techniques.\(^{29}\) Judge and

\(^{20}\) Ibid.

\(^{21}\) ESP-2000-1-008; a) Spain / b) Constitutional Court / c) Plenary / d) 17-02-2000 / e) 47/2000 / f) / g) Boletín oficial del Estado (Official Gazette), 66, 17.03.2000, 66-71 / h) CODICES (Spanish).

\(^{22}\) See also, e.g., Recommendation No. R(80) 11 of the Committee of Ministers of the Council of Europe concerning Custody Pending Trial.


\(^{24}\) As it was the case in Mansur v. Turkey, 08.06.1995, 20 E.H.R.R.535; Право на свободу и личную неприкосновенность в рамках Европейской конвенции о защите прав человека (статья 5), interrights РУКОВОДСТВО ДЛЯ ЮРИСТОВ | ТЕКУЩЕЕ ИЗДАНИЕ ПО СОСТОЯНИЮ НА СЕНТЯБРЬ 2007 г., COUNCIL OF EUROPE, 2008, 40.


\(^{26}\) Kalashnikov v. Russia, 15.07.2002.

\(^{27}\) ESP-2000-1-008 a) Spain / b) Constitutional Court / c) Plenary / d) 17-02-2000 / e) 47/2000 / f) / g) Boletín oficial del Estado (Official Gazette), 66, 17.03.2000, 66-71 / h) CODICES (Spanish).


\(^{29}\) XVIII International Congress of Penal Law, The principle challenges posed by the globalization of criminal justice Istanbul, 20-27
prosecutor must clearly indicate the reasons for the use of the arrest, submit the arguments presented by both parties and the facts of the case, as well as the circumstances ensuring the lawfulness of the arrest and justification. The Spanish Constitutional Court states that all circumstances justifying an arrest or its continuation should be assessed in the decision concerning the imposition or the continuation of the detention. Furthermore, the assessment should correspond to the logical reasoning and those objectives, which justify the use of the arrest. In the course of assessing the circumstances, all information and considerations available at the moment of making the decision, including the rules for logical reasoning, an exceptional nature of custody pending trial and the subsidiarity of the application of the arrest and the proportionality to its aims should be taken into account.

The same point is referred to in Article 198 (5) of the CPC of Georgia giving a list of “other” circumstances or considerations, which should be taken into account while selecting the preventive measure for the defendant. The catalogue contains, for example, the personal characteristic traits of the defendant, his occupation, compensation for loss, and facts confirming whether he had ever breached a preventive measure before. The legislation neither determines the level of importance of either of the considerations nor provides an exhaustive list of the considerations by which it would have obligated the investigatory bodies and the court to take into consideration many other circumstances related to the defendant (e.g. financial status and public standing, social contacts, physical capacity, employment, place of residence, previous criminal records, background) apart from those already mentioned (gravity of a crime, data on defendant’s personality, his age and health conditions). These data could have assisted judicial officials in studying whether the previous offences committed by the defendant could have been compared to the nature and the gravity of the crime for which he was remanded.

At the same time, numerous suggestions have been put forward concerning the use of preventive arrest in cases of serious crimes or crimes which the state authorities believe are of high priority due to a grave criminal situation. It should be noted that the use of probable cause about the activities of specific individuals in a specific criminal organization for the objectives of public prevention policy, which target all those persons who create danger because of their permanent criminal inclinations, is inadmissible. The Convention

30 See Yagci and Sargin v Turkey (1995) para 50; Tomasi v France 27. 08.1992,No 241-A, para 84.
33 See also Васильева Елена Геннадьевна, ВОПРОСЫ УГОЛОВНОГО ПРОЦЕССА В МЕЖДУНАРОДНЫХ АКТАХ, Учебное пособие, 2007 г. Башкирского государственного университета, 136
regards as possible for the state authorities to carry out measures against offences that are concrete and established.\textsuperscript{35}

The seriousness of the crime charged may also be a significant ground for preventive arrest/custody pending trial. However, even in this instance, the gravity of the crime should be examined in unity with other general criteria\textsuperscript{36} so that it is possible to establish the existence of evidence confirming the risk of such a crime’s reoccurrence. Strasbourg case law does not consider the gravity of a crime to be a sufficient precondition for the use of arrest.\textsuperscript{37} Moreover, the European court found that Article 5.3 of the Convention had been violated by British judicial officials by automatically taking the possibility away from the defendant convicted of a serious crime to have an alternative measure imposed on him instead of an arrest as a preventive measure.\textsuperscript{38} Georgian legislation does not link instances of the use of arrest to the gravity of crime and establishes the possibility of its use for all those crimes, which are punishable by the restriction of liberty. In this way, Georgian legislation increases the possibilities for the use of arrest since it grants opportunities for its use to the bodies conducting criminal proceedings in less serious cases. Consequently, the importance of justification for the use of an arrest is getting more significant to avoid a sharp increase in its use, as well as its automatic use for the wider range of crimes. That is why the CPC of Georgia obligates a prosecutor to justify reasonability the use of the remand in his application and the ineffectiveness of the use of a more lenient preventive measure for his case. He must also indicate the essence of the charge and any information or evidence upon which the charge is grounded. However, the CPC of Georgia does not and cannot provide a list of all necessary materials and documents. Practical recommendations for magistrate judges suggest that “copies of all materials and documents necessary for the consideration” of an application should be submitted to the court with the application. Practical recommendations note that the copies of all evidence and documents that are necessary for the comprehensive examination of an application and making a decision shall be submitted to the court. For example, the copy of an arrest record (if a person is or was arrested), the copy of a physical search record, copies of records of immediate actions (urgent measures), the copy of the resolution charging a person, and the copies of all written evidence upon which the charge was grounded. If possible, the documents about criminal records of the defendant and the circumstances set out in Article 198 (4) should be submitted to the court. What additional

\textsuperscript{35} М. де Сальвия, Право на свободу и личную неприкосновенность, в сб. Комментарий к Конвенции о защите прав человека и основных свобод и практика ее применения- под общей ред. В.А. Туманова, Л.М. Энтина, М. изд-во НОРМА,2002, 58.

\textsuperscript{36} See CRO-2006-1-001 a) Croatia / b) Constitutional Court / c) / d) 07-12-2005 / e) U-I-906/2000 / f) / g) Narodne novine (Official Gazette), 2/06 / h) CODICES (Croatian, English). It should be noted that gravity of the crime charged is a criterion which is based on one hand on the expected penalty as envisaged by the Criminal Code of Georgia and on another on it’s the influence on the society. In particular, one and the same act can have different outcomes and it can lead to diverse reactions in different ethnic groups. See, http://www.arab-niaba.org/publications/hr/jordan2/eric2-e.pdf.


\textsuperscript{38} Caballero v the United Kingdom, 08.02.2000, para. 14.
documents should be submitted to the court for each separate case to consider application, i.e. in specific instances, is decided by the prosecutor.39

At the same time, while deciding on the application of preventive measure, the recommendations obligate a judge to pay attention to whether the requirements set out by the legislation were followed:

- during arrest;
- while charging the defendant; and
- while obtaining/fixing evidence.

The judge should also take into consideration the factual (proving) and formal (procedural) grounds and decide what type of preventive measure is necessary and why a more lenient measure cannot be effective for achieving the objectives as stated in Article 171 of the CPC of Georgia.

If the party to the criminal process does not question the compliance with requirements during the arrest, charging or obtaining of evidence, the court nevertheless must assess whether all of the requirements were observed while detaining the person and obtaining evidence in its ruling. However, when the court is assured that there were no violations during these processes, its instruction can be relatively Conventional. But if the party challenges the legality of the arrest, charging and obtaining of evidence, then the court must study why the party believes so, on what grounds the party concludes that violations took place, what particular requirements were not followed and how it materialized.

In this case, the court cannot confine itself with the Conventional direction that the requirements were not met. However, it is not necessary to make extended reasoning. Above all, it should be exhaustive and able to respond to the party’s claims comprehensively. The motivational section should contain a substantiation of the existence of both the factual as well as the formal grounds for the use of the arrest. Let’s see for an example of how the motivational section of the ruling can be formulated:

The court considered the applications submitted by the defence and prosecution and it finds that, for the reasons listed below, bail should be used as a preventive measure:

A fact of material procedural violation in the processes of arrest, charging and obtaining of evidence that would have resulted in the denial of the use of arrest, cannot be confirmed by case materials and documents (and also by records of investigative and procedural actions).

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Pieces of evidence listed in the ruling on the charging of the defendant (they can be listed, for example, as search and identification evidence, etc) and other documents provide sufficient factual grounds (sufficient evidence) justifying the use of an arrest for the crime charged.

Taking into account the gravity of the offence charged (let’s assume it belongs to a serious category), its nature (let’s assume the offence was committed by a group and the defendant played a role in the crime committed) and other factual evidence, the court believes that the circumstances presented by the defence cannot constitute grounds for the use of personal bailout for the defendant since the objectives of the preventive measures cannot be achieved this way and on this stage the use of bail can guarantee the accomplishment of the legitimate aims of the preventive measures.

In light of a new criminal procedure code and the overall significance of this problem it is reasonable that the recommendations emphasise not only the persuasiveness of the reasoning of the motion/application, but also the necessity for proving that a defendant can abscond or obstruct the administration of justice or commit a new crime by factual concrete evidence in the case. It is also very significant to define the proportionality of the term of detention, as well as the rules for its monitoring.

**LAWFULNESS OF THE RULING**

Georgian criminal procedural law grants a wide discretion to police and bodies conducting proceedings for the use of arrest; however, if restriction of liberty is illegal according to domestic legislation and Strasbourg case law, then it can be said that a violation has occurred.⁴⁰ That is why the restriction of liberty must be compatible not only with domestic substantial and procedural legislation⁴¹ but also with international acts, including the requirements stated in Article 5 of the Convention⁴² and its objective to ensure the protection of an individual against arbitrariness.⁴³ Although the Strasbourg Court has not yet defined “arbitrary” for the objectives of Article 5(1), international court practice shows

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that the arbitrary restriction of liberty means not only detention that conflicts with law but it also includes elements of unfairness and inappropriateness, as well as the absence of predictability.\footnote{Albert Womah Mukong v. Cameroon, 458/1991/, 21 JULY 1994, UN Doc. CCPR/C/S1/D458/1991 p. 12 UN HR Committee Communication No 458/1991, Mukong v. Cameroon ( Views adopted on 21 July 1994), in UN doc. GAOR, A/49/40 (vol.II) p.181, para 9.8; See, also Communication No 305/1988, H. van Alphen v. the Netherlands ( views adopted on 23 July 1990), in UN doc. GAOR, A/45/4 (vol.II), p. 115, para 5.8.}

Observing the general principle of juridical accuracy becomes significant when a person’s liberty is at stake. It is important for Criminal Procedural Law, as well as the formal decisions made by the state authorities and their actions, to be acceptable and definite to the extent that they will enable a person, when needed and with the assistance of the appropriate advice, to determine a specific action’s outcomes within the frameworks of a sound mind.\footnote{See Gusniski v Russia, No. 70276/01, §§ 62 and 68, ECHR 2004 IV; Ladenti v Poland, No.11036/03, §§ 53 and 56, 2008w.; Kavka v Poland, No. 25874/94, § 49, 9 January, 2001; Lukanov v Bulgaria, decisión 20 March, 1997 Reports 1997 II, § 44.} It is impossible to talk about the lawfulness of the deprivation of liberty if a law does not provide explicit and exhaustive rules for this procedure.\footnote{Право на свободу и личную неприкосновенность, в сб. Комментарий к Конвенции о защите прав человека и основных свобод и практика ее применения- под общей ред. В.А. Туманова, Л.М. Энтина, М. изд-во НОРМА,2002, 69.} That is why the Strasbourg Court assesses the procedure of the restriction of liberty according to what extent the law is comprehensive and refined.

In the opinion of the Spanish Constitutional Court, the lawfulness of the remand pending trial requires the existence of reasonable evidence that a crime was committed, the constitutional-legal lawfulness of the objective of the restriction of liberty and the compatibility with its essence; and, taking it as an exceptional measure, which is subject to subsidiarity and is proportional with abovementioned objectives.\footnote{ESP-1995-2-025 a) Spain / b) Constitutional Court / c) Second Chamber / d) 26-07-1995 / e) 128/1995 / f) / g) Boletín oficial del Estado (Official Gazette), 22.08.1995 / h)

The state must strictly observe the principle of lawfulness in relation to all cases of the restriction of liberty,\footnote{See Brogan v UK( 1988)11 EHRR 117, Engel v. the Netherlands(1976) 1EHRR 647, Askoy v Turkey(1966)23 EHRR 121.} which suggests:

1. Existence of legal grounds for the restriction of liberty and the definition of scope and objectives of the norm authorizing the use of arrest.\footnote{See, e.g., Lukanov v Bulgaria, 20.03.1997,24 E.H.R.R.121.} Detaining an accused in the absence of a specific legal ground or specific law that will regulate such situation may result in the indefinite continuation of the term imposed without legal sanction – this is not compatible with the principles of legality and protection from the arbitrariness that are characteristic of both the Convention and rule of law.\footnote{Ramishvili and D. Kokhreidze v Georgia, Application № 170406, 13.01.2009, para 106; see also, Gigolashvili v. Georgia, no. 18145/05, §§ 32-36, 8 July 2008; Ječius v. Lithuania, no. 34578/97, §§ 60-64, ECHR 2000 IX; Grauslys v. Lithuania, no. 36743/97, §§ 39-41, 10 October 2000; Baranowski v. Poland, no. 28358/95, §§ 53-58, ECHR 2000 III; Khudoyorov v Russia, appl. №6847/02, 08.11.2005, §§ 146-147).}
2. Necessity of the restriction of liberty.51 Using legal authority when the deprivation of liberty is not necessary is considered to be unlawful and the arbitrary use of power; it is arbitrary in the parts of the motivation or the result.52

3. Observance of the procedural requirements – the restriction of liberty should be in accordance with the grounds established by the procedural legislation, and objective throughout the entire continuation of the term imposed.53

Violations of procedural requirements resulting in the unlawfulness of the arrest can be categorized in several groups for convenience:

1. Deprivation of liberty is in compliance with the requirements established by legislation on the stages of its review and court hearing, but violations of the criminal procedural requirements did occur at the moment of deprivation;54

2. Deprivation of liberty was lawful at the moment of arrest, but there were no legal grounds for its use during later stages.55 For example, there were substantial violations of procedural requirements in the process of deprivation, or the term was prolonged unreasonably;56

3. Deprivation of liberty is lawful in terms of legal grounds and implementation but its objective is unlawful. It is inadmissible to use legal power for the achievement of the illegal objective,57 to restrict liberty on the grounds established by the CPC if there is no appropriate intention for the implementation of the said law,58 if it aims to prevent a new crime, which is the aim of the sanction imposed after a fair trial and on the grounds of a court ruling59, for punitive60 or other reasons.61

52 See Caballero v. the United Kingdom, 08.02.2000; Y. Aydin, The delimitation of the scope of one of the guarantees of personal security set out in the European Convention on Human Rights, 7.
54 See Van Der Leer v The Netherlands (Series A, No 170; Application No 11509/85) ECHR (1990) 12 EHRR 567, 7 BMLR 105, 21.02. 1990.
56 See K.-F. v. Germany, 27.11.1997; Engel and others v. the Netherlands, 05.06.1976; Labita v. Italy 06.04.2000.
60 Ch. Morgenstern, Pre-trial/remand detention in Europe: Facts and Figures and the Need for Common Minimum Standards, ERA Forum, N9(2009), 538. Detention will be used as an exclusive measure and never will be obligatory or used for punitive reasons – “Recommendation No. R(80) 11 of the Committee of Ministers of the Council of Europe concerning Custody Pending Trial, Recommendation Rec(2006)13 of the Committee of Ministers to member states on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse (Adopted by the Committee of Ministers on 27 September 2006 at the 974th meeting of the Ministers’ Deputies)
Thus, the arrest can be used only in case there is a high probability that the defendant will be found guilty of the crime charged and will be sentenced.62

4. The principle of proportionality is violated.63

The court emphasises that “according to Article 5 (4) of the Convention, the concept of the legality of an arrest is not limited to the fulfilment of the requirements prescribed by law; this also refers to the reasonable suspicion which served as the grounds for arrest, the legality of the objective pursued by the use of the arrest and the reasonableness of the ruling”.64

Thus, the restriction of liberty is considered to be legal, if

• an act, which represents the grounds for arrest, is punishable under the Criminal Code of Georgia,65
• there is a reasonable assumption that the abovementioned act was committed by the defendant;
• there is the reasonable assumption that a person will obstruct the administration of justice;
• objective of the arrest is to bring a defendant before the court.

PROBABLE CAUSE (REASONABLE DOUBT)

International law and Georgian legislation envisage two main instances in criminal procedure for the use of the arrest as a measure for procedural coercion - before a crime is committed and after it has been committed and links both of them to probable cause and reasonable assumption.

Firstly, an arrest carried out by the police that aims to support the investigation and gather evidence if the case so requires. In this instance, the person detained should be brought before a court without delay.

The second case is linked to an arrest carried out after the judge enters the process, the objective of which is to keep the defendant in custody under the investigation bodies’ su-

63 See Steel and others v the United Kingdom, 23.09.1998 §54 reports 1998-VII.
64 See Ramishvili and Kokhreidze v Georgia, Application № 170406, 13.01.2009, para. 124.
persecution. The person arrested in this stage has the right to be heard in a reasonable time or released if the motives that served as the grounds for his detention ceased to exist.\(^{66}\)

Although Strasbourg case law puts a great emphasis on each ground for the deprivation of liberty set out in Article 5.1 (c), it nevertheless stresses the standard of reasonable assumption [“reasonable suspicion”].

In what case assumption should be considered reasonable; what amount of evidence should be proven or to what circumstances the evidence should be related; is it necessary for the use of the arrest to submit such a volume of evidence to prove the defendant’s participation in the crime? All of these issues are linked with the use of detention.

As already mentioned, the Law of Georgia on Police, as well as the CPC of Georgia, stipulate the possibility for the use of preventive measure only on the grounds of probable cause that the person will escape and will not appear before court, or he/she will destroy the necessary information and commit a new crime. According to Article 3 (11) of the CPC of Georgia, probable cause is “is a body of information or facts that in corroboration with all of the circumstances of the given criminal case would be sufficient for a reasonable person to conclude that a person has probably committed a crime; an evidential standard for conducting investigative activities directly prescribed by this code and/or imposing a preventive measure”.

In relation to the nature of doubt, which authorises the use of detention/arrest, the Convention deems necessary that three circumstances should exist, namely the commission of a crime, the probable cause to believe that it is necessary to avoid the crime commission and the risk of escape.\(^{67}\) According to the Fourth Amendment to the US Constitution, it is inadmissible to restrict liberty without probable cause, which must be based on those facts and circumstances that are substantial and sufficient for a reasonable person to believe that another person (defendant) has committed or is committing a crime.\(^{68}\) This also means that probable cause should be related to:

1) commission of such an act, which contains elements of the crime as stipulated by the Criminal Code.\(^{69}\) However, it does not imply the unquestionable establishment of a fact that a crime was committed;

2) commission of a crime by the person restricted of liberty; since “if there is no probable crime, then there is no main objective for the use of detention – administration of

\(^{66}\) M. de Сальвия, Право на свободу и личную неприкосновенность, в сб. Комментарий к Конвенции о защите прав человека и основных свобод и практика ее применения- под общей ред. В.А. Туманова, Л.М. Энтина, М. изд-во НОРМА,2002, 62

\(^{67}\) Ibid., pg 59.


justice, or detaining a person when there is no crime does not serve the achievement of a legitimate objective. At the same time, when there is the fact of the committing of a crime, but there is no link between this crime and the person, it means that an arrest in this case is not directed toward the achievement of a legitimate purpose”.

3) Since Article 171 (1) of the CPC of Georgia allows for the use of arrest in cases of crimes punishable by imprisonment, “the person authorised to arrest must be certain that he is detaining the person who has committed the crime but apart from that he has to know that the crime committed is punishable by imprisonment under the criminal code”.

4) Escape of a defendant, non-appearance before court, destruction of important information for the case or commission of a new crime.

Since assumption and doubt are subjective attitudes of an individual and they have not been exhaustively defined by a legislator, the fact whether anyone becomes doubtful or suspicious is dependent on a totality of various objective and subjective circumstances in every specific case.

The CPC of Georgia does not provide a list of grounds for “probable cause”. The grounds may be various but even in case when there is good faith doubt it must be in the first place objective, reasonable, substantiated and invite a person who has become doubtful to believe that the person has committed a crime. It is inadmissible to interfere with anyone’s liberty only on the grounds of personal feelings. The only single instance that a person can flee unlike other grounds stipulated by the CPC cannot cause doubt that he has committed a crime.

The investigative bodies should indicate those pieces of evidence which are sufficient “for charging let alone convicting a person” in the motion filed for the use of an arrest. The requirement for “probable cause” is met when there are facts and information on the grounds of which it is possible to make an impartial conclusion that the defendant could have committed the crime. That is why evidence proving the guilt of the defendant is not required”.

70 Constitutional Court of Georgia, Decision, №2/1/415, 06.04.2009
71 Ibid.
72 At the same time, it should be noted that in a case of Nikolaishvili the Court found that the use of arrest violated the Convention. Since the Appellate Court justified pre-trail detention of the applicant apart from forwarding an argument concerning strictness of the sanction and pointed to the investigation of a criminal case brought against the applicant’s brother in the same period, which did not have any links to this case. Such consideration of the case not only ran counter to the objectives of evaluation of the reasonableness of the applicant’s detention on the grounds of the Article 5(3) of the Convention, but it also avoided essence of permissible exclusion under the Article 5 (1, “c”) of the Convention. As for the statement made by the Appellate Court that the applicant was “insincere”, this is unsubstantiated statement, which is not based on concrete circumstances in the case (para. 74).
73 Ibid, Constitutional Court of Georgia, Decision, №2/1/415, 06.04.2009.
presumption of innocence under Article 6 (2)\textsuperscript{76} does not imply that evidence should be sufficient for convicting a person or proving his guilt\textsuperscript{77}. Furthermore, the Strasbourg Court uses the “lower level of reasonableness” in relation to particularly serious crimes such as terrorism\textsuperscript{78}. However, it does not justify the interpretation of the concept of reasonableness so narrowly when a person’s liberty and inviolability protected by Article 5(3) are encroached\textsuperscript{79}.

Thus, probable cause is substantiated by an objective link between the crime and the defendant, and when there are circumstances and data, which are sufficient to warrant the belief that a crime has been committed and this crime was committed by the person who is detained. To have a “reasonable doubt” means the existence of such facts and information that would have satisfied an objective observer that the person concerned has committed a crime. Although what may be regarded as “reasonable,” depends upon all of the circumstances of the case\textsuperscript{80}. At the same time, one of the necessary elements for the reasonableness of suspicion [probable cause] is its genuineness and \textit{bona fides}\textsuperscript{81}. A likewise approach was formulated by the US Supreme Court in Brinegar’s case:” 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 offence has been or is being committed”.\textsuperscript{82}

In order to assess the reasonableness of a police officer’s conduct, the US Supreme Court deemed necessary to focus on the interests of the government that allegedly justified the intrusion upon the constitutionally protected interests of the private citizen. The officer had to point to specific, and articulate facts, which taken together would have reasonably justified his interference. In the court’s opinion, while assessing the reasonableness of the intrusion, the judge should have used an objective standard – whether the facts available to the officer at the moment of the intrusion would warrant a person of reasonable caution in the belief that the interference was appropriate.\textsuperscript{83} At the same time, the requirement for reasonable assumption should be met at the moment of arrest, but if detention is being continued then the arrest test changes its nature\textsuperscript{84}.

\textsuperscript{77} Ibid. See also M. W. Janis, R. S. Kay, A.W. Bradley, European Human Rights law, Text and materials, third ed. 2008,608,652
\textsuperscript{78} В. Золотых, Заключение Под Стражу По Решению Суда», Интернет-журнал Ассоциации юристов Приморья «ЗАКОН» http://proknadzor.ru/ Обобщение практики применения ст. 108 УПК РФ.
\textsuperscript{80} Fox, Campbell and Hartley v. the United Kingdom 30.08.1990, 14 E.H.R.R.108.
\textsuperscript{82} Brinegar v. United States, 338 U>S>160,68 S.Ct.1302(1949).
\textsuperscript{83} Terry v, Ohio, 392 U.S. 1 (1968).
Consequently, even when the arrest has been carried out before the crime is committed it is inadmissible for prejudice, personal opinion⁸⁵ or fear that a defendant with a criminal past will again commit a crime to the form grounds for his detention. Criminal offences committed by the defendant in the past may trigger a probable cause, but they cannot be the single ground.⁸⁶ Additionally, the probable cause should link with the defendant’s present activities.⁸⁷

Even more so, the use of the restriction of freedom grounded on formulaic formulations without gathering the appropriate evidence for them should be inadmissible. The Strasbourg Court believes that using the formulaic argumentation for the arrest in the fill-out papers by the judges is inadmissible practice. The Strasbourg Court ruled that a violation of Article 5 occurred in the case of Nikolaishvili against Georgia, where the use of an arrest against the defendant was justified on the basis of the following circumstances: “[in accordance with the requirements of procedural legislation] after I considered the reasonableness of the motion/request for the use of an arrest and the motions submitted by the parties I made the conclusion that the evidence gathered – [reference to evidence obtained in June and July 2003 – see, Para. 8] – bring forth sufficient doubt that Giorgi Nikolaishvili committed an offence. Evidence is obtained in compliance with criminal procedures. The arrest and indictment of Nikolaishvili were conducted in full compliance with procedural law. I believe that [reference to prosecutor], a motion/request for the use of an arrest is substantiated, and has a relevant legislative ground. Therefore, if Nikolaishvili, charged with a less serious crime, is released, the risk of the obstruction of the investigation and the failure to appear before court have been grounded...”

The Strasbourg Court stressed that “in order to administer justice appropriately national judicial instances should with sufficient accuracy establish the motives that serve as grounds for their decisions”.⁸⁸ However, at the same time, it should not be understood as if it were required to respond to each argument.⁸⁹

Thus, for conducting an arrest, the CPC of Georgia requires a certain link to be established between the defendant and the action which is allegedly a crime; and a sufficient basis for confirming that the action concerned contains elements of that crime for which the CPC of Georgia stipulates the use of the arrest⁹⁰ and a probable cause to believe that

⁸⁵ See Caballero v United Kingdom, 8.2.2000 ( application No. 32819/96).
⁸⁶ Fox, Campbell and Hartley v. the United Kingdom 30.08.1990, 14 E.H.R.R.108.
⁸⁹ Jgarkava v Georgia, Application № 7932/03, 24.02.2009; para. .71; See also (Van de Hurk c. Pays-Bas, 19 avril 1994, § 61, série A no 288).
there is the danger of the obstruction of justice. However, the grounds should be interpreted narrowly since they are an exception to the most basic guarantee of individual freedom.

The probable cause standard ensures the admissibility of the restriction of individual freedom when the suspicion is reasonable and excludes arbitrariness. It forms an essential part of the safeguard against the arbitrary restriction of the individual’s freedom.

1. RISK OF ABSCONDING OF A PERSONA

Risk of absconding belongs to one of the main and most used grounds for the use of an arrest. It is based more on the seriousness of an offence and the strictness of penalty than on objective data and information that would provide us with grounds for suspicion that a real threat exists.

“Absconding means a future danger that the person concerned will avoid investigation, continue criminal activities, commit a crime to escape police, if nothing else and destroy evidence when the chance occurs. Eventually, it will create a mass of difficulties for the administration of justice if it is still possible.”

There are no general criteria for establishing the risks of absconding. Hence, the existence of the danger should be determined through the analysis of all of the circumstances of the case and an assessment of each fact. In order to assess the danger of absconding, it is necessary to look at the crime’s essence and its seriousness, the gravity of the possible penalty, the factual circumstances of the case and the defendant’s personal character. The circumstances, which may provoke the defendant to flee, should be re-examined. At the same time, as time passes, and the defendant’s stay in custody increases the risk of his absconding from trial may also decrease. The conditions that made up grounds for the defendant’s arrest initially may change at the time of the con-

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91 It means escaping/hiding and avoiding to appear before the court, later engagement in criminal activities – committing a new crime, obstructing gathering of information and creating a danger for execution of a sentence.
94 М. де Сальвия, Право на свободу и личную неприкосновенность, в сб. Комментарий к Конвенции о защите прав человека и основных свобод и практика ее применения- под общей ред. В.А. Туманова, Л.М. Энтина, М. изд-во НОРМА, 2002, 66.
95 Decision of the Constitutional Court of Georgia, №2/1/415,06.04.2009.
97 See Melnikova v. Russia 2007, ECHR Application №24552/02 ( 21.06.2007).
tinuation of his arrest since new developments may reduce the danger of absconding.\textsuperscript{98} That is why the reasoning of the decision for the defendant’s arrest requires that specific circumstances be indicated. This enables officials to establish at a later stage whether the defendant will be pushed to flee after a certain period has passed in given circumstances. Finally, the fact that an indictment has already been formed does not create enough grounds for believing that the risk of escape is real since the continuation of detention can be justified only if the charges are supported by serious indictments representing an appellate claim’s subject.\textsuperscript{99}

At the same time, crossing state borders without obstructions (indeed, crossing borders has actually become easy since visa-free travel agreements were concluded among many states and travellers were allowed to receive entry visas at some border checkpoints) does not create the danger of absconding. So, in order to establish the genuineness of this kind of danger, it is required that all of the characteristic circumstances of the defendant either demonstrate the existence of danger or decrease the danger to a minimum to make the use of an arrest unjustifiable.\textsuperscript{100} Even more so, the danger of absconding tends to decrease with time.\textsuperscript{101}

The sketch kind of substantiation of belief based on a scant amount of evidence that the defendant may abscond may be satisfactory for the initial term of restriction on freedom, but it will not suffice after a certain lapse of time in circumstances when judicial officials have greater possibilities to obtain additional information.\textsuperscript{102}

The assessment of the risk of absconding only on the basis of the gravity\textsuperscript{103} of the crime committed and without studying other circumstances related to the given case, such as a defendant’s previous criminal records, the impact of incarceration and prison life on him, etc.,\textsuperscript{104} is considered to be unreasonable and in violation of his personal freedom. At the same time, simple referrals to previous criminal records to prove the existence of danger for recidivism, is insufficient.\textsuperscript{105} It is also inadmissible to assess the danger of absconding with the help of the gravity of a possible penalty or general social danger, which the crime concerned, is believed to pose. These factors are important for one of


\textsuperscript{100} Yagci et Sargin 52, Mansur, 55.


\textsuperscript{102} Makarova v Russia 15217/07. 12 March 2009.

\textsuperscript{103} For example, some of the states in the US consider seriousness of crime to be one of the most important grounds for the use of arrest. Either this is linked to presumption of absconding or it forms a ground for mandatory arrest in those states which do not allow release on bail because of seriousness of charge.


\textsuperscript{105} Mutter c. France, 44.
the purposes of the penalty, namely general prevention, and require from the judicial officials that they establish the guilt of the defendant in the course of a fair trial where the defendant’s rights will be respected and protected.\textsuperscript{106} Hence, while discussing and deciding the continuation of the term of the arrest based on the risk of absconding, it is necessary to take into consideration the following circumstances:

- Personal characteristic features of the defendant\textsuperscript{107} - the defendant’s stark hatred to incarceration;\textsuperscript{108} appearance before the bodies conducting the proceedings when he is summoned and without delay;\textsuperscript{109}
- His financial resources; property, which the defendant has to leave behind if he absconds; family status;\textsuperscript{110}
- Defendant’s contacts abroad and in the country where he was arrested;\textsuperscript{111}
- Seriousness of expected penalty;
- Special conditions of pre-trial detention;
- Level of guarantees, which ensure the defendant’s appearance before the court,\textsuperscript{112} etc.

The Spanish Constitutional Court notes that, in order to gauge the existence of the risk of absconding, other important information should be studied apart from the gravity of a crime and the seriousness of a penalty.\textsuperscript{113} The court emphasises two criteria developed in the case law of Spain related to the problem of legal grounds and the conditions of detention. These two criteria identify the probable cause for the absconding of the defendant and his committing a crime:

1. Nature and gravity of the offence charged, seriousness of the expected penalty, the personal characteristic features of the defendant and the circumstances of the case.

2. Length of period from factual restriction of freedom until a decision about the continuation of the term is made. Requirement of the review of personal and concrete circumstances as time passes.\textsuperscript{114}

\textsuperscript{106} Ibid.
\textsuperscript{108} Stögmuller v. Austria, 10.11.1969, 1 E.H.R.R 155.
\textsuperscript{113} Decision of the Constitutional Court of Spain, April 15, 1996. T. Mamukelashvili, R. Tushuri, Decisions of the Constitutional Courts of European States in Relation To basic Human Rights, Tbilisi, 2004, 130.
However, taken separately, none of these circumstances can justify the restriction of freedom. Danger should be assessed en masse in each specific case and it should be studied to what extent each of these circumstances provides grounds for suspicion that the defendant will abscond because the circumstances may cease to exist or they may be regarded as unreasonable or they may not reflect the defendant’s actions.\footnote{See Stögmuller v. Austria, 10.11.1969, 1 E.H.R.R.155; Letellier v. France 26.06.1991, 14 E.H.R.R.83.} It is certain that a decision, which uses stereotyped phrases in its reasoning of the existence of the danger of absconding, contravenes the European court’s practice.\footnote{See Jablonski v Poland (Appl. No. 33492/96, 21.12.2000; Yaşıcı and Sargin v. Turkey Appl. No. 16419/90 and 16426/90, 8.06. 1995).} While using an arrest, courts should determine the specific circumstances indicating the danger of absconding and assess it according to the principle of proportionality.\footnote{See Wemhoff v. the Federal Republic of Germany 27.06.1986, 1E.H.R.R.55; Letellier v. Austria, 10.11.1969, 1 E.H.R.R.155; Letellier v. France 26.06.1991, 14 E.H.R.R.83; Ambruszkiewicz v Poland Appl. No. 38797/03, 4.05.2006.} The E CtHR has repeatedly noted that “if the sole justification for continuing the deprivation of liberty is a danger of flight … but it is possible to obtain from the defendant guarantees that would ensure his appearance [at the pending trial], he must be released before the trial”\footnote{See Wemhoff v. the Federal Republic of Germany 27.06.1986, 1E.H.R.R.55.} and the guarantees for his appearance at the trial should be obtained.\footnote{See Wemhoff v. the Federal Republic of Germany 27.06.1986, 1E.H.R.R.55; Stögmuller v. Austria, 10.11.1969, 1 E.H.R.R.155; Letellier v. France 26.06.1991, 14 E.H.R.R.83; Ambruszkiewicz v Poland Appl. No. 38797/03, 4.05.2006.} However, if it impossible to get such guarantees, or they are regarded as incompatible, the court shall not use severe measures if the same legitimate aim can be achieved by less severe preventive measures,\footnote{So, when there are grounds for the detention as prescribed by law, the court should respect a principle of proportionality and use more lenient preventive measure if the latter permits achievement of the same legitimate aim [CRO-2007-3-012 a) Croatia / b) Constitutional Court / c) / d) 20-12-2007 / e) U-III-4286/2007 / f) / g) Narodne novine (Official Gazette), 1/08 / h) CODICES (Croatian, English).} such as [Article 198.1 of the CPC of Georgia] residing in a particular place, submitting identification documents to the relevant bodies, reporting to the police periodically,\footnote{Decision of the Constitutional Court of Croatia, 2 December, 1998; T. Mamukelashvili, R. Tushuri, Decisions of the Constitutional Courts of European States in Relation To Basic Human Rights, Tbilisi, 2004, 130. See also, Stögmuller v. Austria 10.11.1969, 1 E.H.R.R.155.} etc. At the same time, it is necessary to observe the principle of proportionality. The measures ensuring appearance before the judicial bodies and the proper conduct of the accused while alternative preventive measure is imposed must be realistic and manageable. Besides, they must not be too difficult to be obeyed so that the main sense of release (return to freedom) is not lost.\footnote{Право на свободу и личную неприкосновенность в рамках Европейской конвенции о защите прав человека (статья 5), interights РУКОВОДСТВО ДЛЯ ЮРИСТОВ | ТЕКУЩЕЕ ИЗДАНИЕ ПО СОСТОЯНИЮ НА СЕНТЯБРЬ 2007 г.,COUNCIL OF EUROPE, 2008, 45–46.}
RISK OF INTERFERENCE WITH COURSE OF JUSTICE

The risk of interference with the course of justice is one of the main and, potentially, the most widely applicable ground. Interference can mean putting pressure on witnesses, destroying evidence, colluding with accomplices by a defendant and so on.

It is not easy to predict a defendant’s behaviour with absolute exactness. Therefore, while deciding on the preventive measure to be used, the defendant’s probable behaviour should be determined. However, the risk of obstruction with the administration of justice cannot be considered via abstract review. The court cannot take into account the risk *in abstracto* without those factual circumstances, which would prove the genuineness of the danger. The resolution of the defendant’s likely behaviour should be built on facts and evidence established objectively, specific circumstances of the case rather than mere intuitive doubts. Although the threat is an element of assessment of expediency of restriction of freedom it cannot be established on the grounds of unreasonable and abstract statements. The suspicion that the defendant will put pressure on witnesses, destroy evidence, change evidence in order to impede or mislead investigations is not regarded as sufficient and reasonable.

The existence of risks should rely on specific facts and circumstances and as is the case with other circumstances, these facts and circumstances should be checked for reasonableness and admissibility. The court should establish specifically what kind of action, concerning whom, and what means or techniques for the obstruction of the administration of justice it deems as grounded. For example, a complicated investigation increases the risk of concealing or destroying evidence. Specific features concerning concrete cases that may justify detention should also be taken into account. However, it should be noted that in the course of inquiry this risk tends to decrease. The existence of this kind of risk should be based on specific facts and circumstances, and as is the case with other evidence, these facts and circumstances should also be checked for reasonableness and admissibility. For example, a complicated investigation tends to increase the risks of con-

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124 See Smirnova v. Russia, nos.46133/99 and 48183/99, §63, ECHR 2003-IX (extracts); Nikolov, cited above, §73.
125 Patsuria vs Georgia, № 30779/04, 6 November, 2007, par. 71.
127 See Wemhoff v. the Federal Republic of Germany 27.06.1986, 1E.H.R.R55.
130 See Wemhoff v Germany (Appl. No. 2122/64, 27.06.1968; in the case, Kalashnikov v. Russia 15.07.2002 the Court held that a resolution on the use of arrest pending trial (pre-trial detention) had no indications to the facts, which could have proven existence of genuine threat of obstructing justice at that moment. Reasonableness of the risk of interference with justice has significantly decreased in the course of investigation and after the collecting of evidence. Право на свободу и личную неприкосновенность в рамках Европейской конвенции о защите прав человека (статья 5), Interights РУКОВОДСТВО ДЛЯ ЮРИСТОВ | ТЕКУЩЕЕ ИЗДАНИЕ ПО СОСТОЯНИЮ НА СЕНТЯБРЬ 2007 г.,COUNCIL OF EUROPE, 2008, 41
cealing or destroying evidence. Special features related to the defendant’s conditions, which may justify detention, should also be taken into account.\textsuperscript{131} However, it should be noted that in the course of the inquiry this risk tends to decrease. Hence, it would be difficult to decide on the use of an arrest on the ground of the risks of putting pressure on witnesses after all of the investigative actions and interrogations have been completed.\textsuperscript{132} Even more so, the continuation of the term for this reason cannot be regarded as justified after the process is over.\textsuperscript{133}

A. Necessity to Prevent Crime

In separate cases, the court uses imprisonment as the ground for the deterrence of an individual from committing a new crime. This, in turn, implies special recidivism, as well as crimes aimed at preventing justice from being served, such as the disposing of evidence, intimidating witnesses, etc. The above is especially relevant to crimes where one element is a special subject and the crime is related to the performance of official duties by a person. However, bearing in mind the principles established under the Criminal Code of Georgia and international acts, in deciding an issue of imprisonment, the court should consider the appropriateness of other alternative measures of punishment, as “in relation to a crime associated with the performance of a person’s official duty, the threat of obstructing justice on the grounds of special recidivism is unsubstantiated when a person’s labour contract has been terminated. A hypothetical possibility that this person will get another job is not a sufficient reason to apply imprisonment as a punishment measure”.\textsuperscript{134}

At the same time, when applying the above-mentioned ground for imprisonment, the court, on the basis of the submitted evidence, shall determine what corroborates the assumption that the threat of the accused relapsing into a crime exists; what is that particular crime that must be prevented through the punitive measure used and why other measures of punishment (for example, dismissal from his position, holding of electronic monitoring, prohibition to perform a certain type of activity or to be at a certain location, etc) are ineffective in achieving the same goal. Given that the Criminal Code of Georgia prohibits the punishment of a person for his thoughts, intentions or illegal aims and wishes, in this case, as well as in the restriction of the constitutional right of a person, it must be based on concrete factual circumstances and evidence that openly indicate the existence of the intention to commit a new crime. The restriction of freedom is justified

\textsuperscript{131} See W v. Switzerland. 26.01.1993, 17 E.H.R.R.R.60
\textsuperscript{132} See Nevmerzhitsky v Ukraine (2005).
if it is aimed at preventing a concrete crime. It is for this reason that the Hungarian Constitutional Court deemed a provision of the Criminal Code of Georgia to be disproportionate and, accordingly, unconstitutional, to the aim set by a lawmaker, which provided for the detention of a person to deter him from committing a new crime.\textsuperscript{135} The Strasbourg Court has a similar approach. It has repeatedly noted that the detention of a person on this ground requires that those facts and circumstances be outlined in the case, which substantiate that such a threat is based on actually existing circumstances.\textsuperscript{136}

Although the accusation against a person of committing a grave crime is, in separate cases, regarded as a legal ground for imprisonment to prevent a new offence, it should be stressed that as international practice and case law have shown, it is unacceptable to restrict the fundamental right of an individual based only on abstract threats, stereotypes or fears.\textsuperscript{137} In order to discuss the observance of the principles of proportionality and legality, concrete factual evidence must exist, the probability of a threat must be evaluated based on the entirety of the circumstances of the case, the personality of the accused and his past must be taken into account. However, as has already been noted, a person’s previous conviction, his inclination towards crime is a significant though insufficient ground for the deprivation of liberty, especially when committed crimes differ by their nature and severity.\textsuperscript{138} A court decision must show what action may be taken by a person in case he is not detained and if it is expected in the near future.

\section*{B. Necessity to Maintain Public Order}

It is obvious that separate categories of crimes, given their severity and the public reaction to them, may trigger public unrest and disorder. However, this is regarded to be a substantial motive for the restriction of liberty only in case if it is based on facts that the release of that person will inevitably entail disorder, and the threat of such a development is real.\textsuperscript{139} Moreover, the length of the restriction of freedom must not contain elements of punishment.

The European Convention also provides for the detention of a person to defend public order, which, normally, is aimed at protecting society from a real and concrete threat taking into account the personality of the accused person. At the same time, in contrast to the Criminal Code of Georgia, Strasbourg case law provides a broad definition of “public order” and implies not only the protection of society from the accused but

\textsuperscript{135} Ibid, Decision of Constitutional Court of Hungary 08-09-1999, p.24.
\textsuperscript{136} See Smirnova vs. Russia, 24.07.2003.
\textsuperscript{137} See I.A. vs. France 23.09.1998.
\textsuperscript{139} See Kemmache, 52 Tomasi, 91; I.A.c. France, 104
also the protection of the accused from society and from retaliation on the part of the participants in the proceedings. However, such cases belong to the category of exceptional cases and they cannot rely on either accusation alone or the expected severity of the punishment. A threat must not be abstract. There must be concrete factual circumstances indicating the existence of such a threat and the ineffectiveness of other measures to prevent it. The nature of the crime, the circumstances in which it was committed, the psychological state of the accused and the victim must also be indicated. The nature and degree of the crime must be accurately determined. This is quite a subtle and evaluative category as a threat emanating from one and the same action can be differently perceived by different ethnic or religious groups, and various social groups. Violation of public order can be regarded as a sufficient and relevant ground for the deprivation of a person’s liberty only in case it is based on facts clearly indicating that the release of the detainee can really trigger public disorder.

In contrast to the Convention, the Criminal Code of Georgia envisages additional grounds for the restriction of the freedom of a person as a punitive measure. In particular, if:

a) a person is caught when committing a crime or immediately after committing a crime;
b) a person was seen at the scene of crime and a criminal proceeding has been instantly instituted against him to detain him;
c) a clear trace of the crime has been detected on a person, near a person or on a person’s clothes;
d) a person went into hiding after committing a crime but then he was identified by a witness;
e) a person is on a wanted list.

Thus, despite suspecting a person of committing a crime, the necessity to prevent a person from repeating a crime or going into hiding constitute the grounds for the restriction of freedom. The restriction of freedom even in such a case will be lawful only:

1. If it is aimed at instituting a criminal prosecution against the person, and
2. If it is ensured that the person will appear to courts for the aim of “considering an issue regarding the conduct of a proceeding within a reasonable term and the possibility of his release”.

140 Dummont-Maliverg v. France, 31.05.2003, par.64.
141 See Minimum standards for the Rights of the Accused During Arrest/ Detention- http://www.arab-niaba.org/publications/hr/jordan2/eric2-e.pdf, 1
142 М. де Сальвия, Право на свободу и личную неприкосновенность, в сб. Комментарий к Конвенции о защите прав человека и основных свобод и практика ее применения- под общей ред. В.А. Туманова, Л.М. Энтина, М. изд-во НОРМА,2002, 58, 65
DURATION OF DETENTION

Georgian legislation sets a maximum of nine months for the restriction of a person’s freedom. According to the Georgian Constitutional Court, this term, as established under Article 18 of the Georgian Constitution, includes the pre-trial detention of the accused and “does not include the term of detention of the indicted individual before court delivers its decision on the punishment for the concrete crime”. The new criminal code reduces the term for the detention of the accused and brings it into line with the court’s above-mentioned decision. As a result, the maximum length of the pre-trial detention of a person at the stage of the investigation is 60 days. The criminal code no longer envisages the possibility of remitting the case for an additional investigation and, accordingly, the additional extension of the duration of the detention by court; does not establish an initial minimum term for the detention, thus contributing to the use of the reasonable term of detention in each individual case. At the same time, the code envisages the further extension of the length of the detention limit to a “reasonable term” on the basis of a substantiated request on behalf of the defence and a one-off mediation on behalf of the prosecutor. At the same time, the criminal code does not define a limited length or the number of such extensions [in case of a request from the defence].

When assessing the legality of the extension of the proceedings and the length of the detention at the initiative of the accused, the Strasbourg court noted that “a very small segment of hearings have been extended upon the requests of applicants, which were rather articulate and this has somewhat impeded the pace of the hearings. However, the resulting impediments have never been of a significant size and their duration ranged between one and two months (see paragraphs 10, 12-14, 19-20). Therefore, the court does not regard that the applicants’ actions have not affected the duration of the hearing. Moreover, most of the applications submitted by the applicants regarding the postponement of hearings, especially those submitted at an the initial stage of the hearings, represented the ordinary implementation of their procedural rights aimed at obtaining needed evidence without which it would have been impossible to prepare the case for hearing on its merits”. 143

As already noted above, the detention shall be used only in case it serves a legitimate aim and when its duration is proportional to its aim. 144 Therefore, international law attributes special importance to both the use of detention and the issue of its duration. However, it is unacceptable to abstractly determine the reasonability and legality of the term of detention. The reasonability of the term must be evaluated on a case by case

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143 Kharitonashvili v Georgia, sited above, par. 42
144 Wafa Shah, overview of case studies relating to pre-trial detention, Fair trials international - March 2009, submission to the directorate-General for Freedom Justice and Security of the European Commission on Issues relating to Pre-trial Detention, 3
basis, taking into account the concrete circumstances of a case and such elements as the nature of the crime (crossing borders, organised crime, terrorism, etc.), the number of the accused, difficulties related to the investigation, the complexity of legal issues, the behaviour of the accused. However, the above-mentioned circumstances can justify the extension of the term only in case the entities conducting the hearing display “due diligence.” International and Georgian practice prove that a significant amount of violations of Article 5.3 result from the lack of due diligence on the part of the bodies conducting the hearing which may be attributed to management-related objective circumstances or the failure by a separate participant to properly perform their duties. Therefore, when extending the term, the court takes into account and checks the substantiation of the assumption of the possibility of the accused relapsing into the crime, on the one hand, and the “due diligence” conducted by the bodies holding the proceedings, on the other hand”.

“The length of the restriction of freedom shall not exceed a reasonable term. It is acknowledged that it is impossible to translate this concept into concrete days, weeks, months or years or any other periods corresponding to the severity of crime. At the same time, this notion is not subject to abstract control as the reasonability of the terms must be assessed on a case by case basis taking into account the concrete properties of each case. The restriction of freedom is justified until the concrete circumstances of the case indicate public interest which, irrespective of the presumption of innocence, outweighs respect of personal freedom. The court assesses the reasonableness of the length of the proceedings in light of the circumstances of the case and having regard to the following criteria – the complexity of the case, the conduct of the applicant and the relevant authorities, and the importance of what is at stake for the applicant in the litigation (see, Mikulić v. Croatia, no. 53176/99, §38, ECHR 2002 I).”


146 Право на свободу и личную неприкосновенность в рамках Европейской конвенции о защите прав человека (статья 5), Interights, РУКОВОДСТВО ДЛЯ ЮРИСТОВ | ТЕКУЩЕЕ ИЗДАНИЕ ПО СОСТОЯНИЮ НА СЕНТЯБРЬ 2007 г., COUNCIL OF EUROPE, 2008,44


148 See, for instance, Nikolashvili v Georgia [par. 78], where the court, when assessing a 10 month pre trial detention of the applicant, noted that such a long duration of detention indicates that the government failed to hear the case with due diligence, which is of utmost importance when assessing the legality of pre trial detention against the requirements of paragraph 5, article 5 of the Convention.


152 Kudla, 110.

REGULARITY OF REVISION OF DURATION OF TERM

When a person is detained, the issue of the extension of the term, according to international standards, must be reviewed in accordance with the legislation or at a reasonably short regularity as established by court, until the date of the hearing on the merits of the case has been set. To this end, the body conducting the proceedings shall, at a regular periodicity, present the court with the grounds available to it, which justify the restriction of freedom and the accused must have the automatic right to be brought before the court at regular intervals for a periodic, systematic review of the restriction of his freedom. At the same time, the intervals between the reviews must be short [the nature of detention itself “requires short time spans between two applications for release], as in view of the assumption under the Convention such detention is to be of strictly limited duration. Since it rests on the need for a quick investigation, an interval of one month is deemed to be reasonable”.

Court control on the legality of the restriction of freedom must not only be immediate, but also automatic. It must not depend on the submission of an application by a person whose freedom is restricted. Such an approach would have essentially changed the nature of a guarantee. The Criminal Code of Georgia does not establish an obligation to carry out an automatic periodic control and, therefore, reveals the need for the harmonization of the code with the requirements of the Convention. However, the Court noted in the Patsuria case that, “while the Criminal Procedure Code in this wording does not require the authorities review legality of continuation of arrest on their own initiative at regular intervals, according to a disputable paragraph 17 of the Article 140 of the CPC the applicant could demand reconsideration of a challenged measure during detention in case of any new circumstances.”

A term of detention can be extended only in case “there is an unbroken causal link between the original sentence and the re-detention”. The above-mentioned statement makes clear that the interests of the investigation prevail over the presumption of innocence and a departure from it is justified by the inability to complete the investigation.
or the excessive complexity of the case.\textsuperscript{162} That’s why the court must consider in light of all of the circumstances of the case and substantiate the necessity and expediency of the extension of the detention term of the accused, the existence of legal and factual, procedural and material and legal grounds for the extension of the detention term and their “relevance” and “sufficiency” for an extension. “\textit{Ruling of the court on continuation of a term should contain “appropriate” and “sufficient” argumentation and it should be related to specificity of the given case in order to justify restriction of freedom}\textsuperscript{163} In other words, any period of continuation of arrest notwithstanding its length requires appropriate motivation from the competent national authorities that are obliged to be “exceptionally attentive” while using these procedures.”\textsuperscript{164}

The court must demonstrate how it arrived at the conclusion that the reason for the extension of the term still exists. The reason for the extension of the term must be proportionate to the aim pursued by this extension. A detailed study of the circumstances of the case must not reveal that the extension of the detention results in a constitutionally unacceptable disproportion between the legitimate aim of detention and the provision of law; in this particular case – between its entire duration and its necessity. The court has a lot of other instruments at its disposal to ensure that an accused be brought before court, including the possibility of the repeated use of a detention measure against the accused at a later stage of the proceedings.\textsuperscript{165}

Even though a well-founded assumption is a necessary prerequisite for the extension of the detention term, this may not be sufficient,\textsuperscript{166} after a certain time, to justify the continued detention, because the allegation that an accused committed the crime may prove to be wrong,\textsuperscript{167} the suspicion about the culpability of the accused may be dispelled, and instituting a criminal prosecution against him may established as inexpedient due to his family or his own health and so on and so forth. That’s why the court shall, after a certain period, make sure that the restriction of freedom is necessary by examining other circumstances relevant to the case under consideration and convincingly corroborate the necessity of further the extension of the term of the accused’s detention;\textsuperscript{168} it must check whether investigative bodies conduct the investigation with “due diligence”,\textsuperscript{169} and how the detained person behaves. At the same time, while a

\begin{footnotesize}
\begin{enumerate}
\item Pg. 104.
\item See Jecius v. Lithuania, No. 34578/97, § 93, ECHR 2000-IX.
\item Patsuria vs Georgia, application № 30779/04, 6 November, 2007, Par. 62, see also Jablonski v. Poland, no. 33492/96, §80, 21 December2000.
\item CRO-2007-3-012 a) Croatia / b) Constitutional Court / c) / d) 20-12-2007 / e) U-III-4286/2007 / f) / g) Narodne novine (Official Gazette), 1/08 / h) CODICES (Croatian, English).
\item Право на свободу и личную неприкосновенность в рамках Европейской конвенции о защите прав человека (статья 5), Interights, РУКОВОДСТВО ДЛЯ ЮРИСТОВ | ТЕКУЩЕЕ ИЗДАНИЕ ПО СОСТОЯНИЮ НА СЕНТЯБРЬ 2007 г., COUNCIL OF EUROPE, 2008, 40.
\item See Punzelt. the Czech Republic (Appl. No. 31315/96, 25.04.2000. para 73; v Germany (Appl. No. 2122/64, 27.06.1968.
\end{enumerate}
\end{footnotesize}
suspect may validly be detained at the beginning of proceedings on the basis of a confession, it necessarily becomes less relevant with the passage of time, especially where no further evidence is uncovered in the course of the investigation.\textsuperscript{170}

Unless a court takes a substantiated decision on the extension of the detention term based on a detailed study of the circumstances of the case, this procedure may turn into a mere injustice instead of guaranteeing protection from injustice and the defence of the rights of an accused.\textsuperscript{171}

As already noted above, detention at the initial stage of the investigation may be justified only by the nature of the crime and the severity of the expected punishment, the necessity to institute criminal prosecution and to avoid a crime, and the absence of a place of permanent residence.\textsuperscript{172} However, none of the above circumstances are sufficient for prolonging the term of detention.\textsuperscript{173} **Automatic prolongation of a term of the arrest** ... only because of presumption determined by law based on gravity of a charge and a hypothetical risk of flight, commission of a new crime or agreement, is not consistent with the paragraph 3 of the Article 5 of the Convention.\textsuperscript{174}

An assumption that the accused may go into hiding, which is based on schematic, scarce evidence, may be sufficient for the initial detention, but not after the possibility emerges to further support it with evidence. The states are charged with the obligation to seek additional evidence.\textsuperscript{175}

It is necessary that the reasons justifying the detention exist throughout the entire length of the restriction of freedom.\textsuperscript{176} In this case, Melnikova vs Russia, the Strasbourg court noted that the “absence of a permanent place of residence may justify the use of detention, but only at the initial stage of investigation. The threat that an accused may go into hiding decreases along with the time spent in detention; the gravity of the accusation and the severity of the expected punishment\textsuperscript{177} do not in themselves justify the prolongation of detention, the state shall take a detailed examination and assessment of the “emerged circumstances” in order to legitimate the extension of detention. A mere repetition of the previously indicated grounds at later stages of the investigation

\textsuperscript{170} Labita v Italy, 159.
\textsuperscript{171} Право на свободу и личную неприкосновенность европейские стандарты и российская практика. Под общ редю А.В. Деме-невой. Екатеринобург, Урал ун-та, 2005, 29
\textsuperscript{172} Melnikova v. Russia 2007, ECHR Application №24552/02 ( 21.06.2007).
\textsuperscript{174} Patsuria vs Georgia, application № 30779/04, 6 November 2007w. Par. 67, Also see Nikolov v. Bulgaria, no.38884/97, § 70, 30/01/ 2003.
\textsuperscript{175} Alexsandr Makarov v Russia 15217/07, 12.03.2009.
will not justify the detention. Similarly, trite phrases like “the nature of crime attributed to an accused and the circumstances of the case”, without indicating the concrete motives of the detention, is insufficient for the substantiation of the extension of detention. Neither is it sufficient a manner of taking a decision – a paper form with suggestions typed in advance – which indicates that the decision of a local court concerning the detention of an applicant is not taken in accordance with the appropriate legal rules. The practice of a court to rely on circumstances typed in a paper form reveals the lack of “special attention” on the part of local entities. The court is obliged to check not only the compliance of detention with national procedural legislation, but also to examine the substantiation of the suspicion which served as a ground for detention, as well as the lawfulness of the detention. Similar guarantees should be in place where the second level of jurisdiction is available for such cases.

Such issues as the health of the accused, is having under-age dependants, the availability of alternative preventive measures, may also be important in deciding the lawfulness of detention. As soon as the threat that the defendant can abscond, obstruct justice, endanger public order and security or commit a new crime is eliminated, the person must be immediately released. Therefore, the extension of the term is acceptable when there are essential reasons for the extension and these reasons are related to the personality of the accused due to which the extension of detention may be unjustified even in relation to crimes falling under the categories of grave and extremely grave crimes. It is not possible to specify the particular point at which further reasons will be necessary to justify the continued detention - each case must be assessed on its merits in order to determine the point at which the prosecution must show more than a reasonable suspicion that the accused committed the offence in question.

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179 See also, Belevitskiy vs Russia, No 72967/01, para. 111, 01.03.2007.21.06.2007 Applic. No. 24552/02.
180 See Nikolaishvili v. Georgia, para 73, see, Patsuria vs Georgia, No. 30779/04, para. 74, 06.11.2007, G.K. v. Poland, № 38816/97, § 84, 20.01.2004.
181 Nikolaishvili vs Georgia; see also Brogan et al vs the United Kingdom, para. 65.
183 21.06.2007 Applic. No. 24552/02.
186 Право на свободу и личную неприкосновенность в рамках Европейской конвенции о защите прав человека (статья 5), interights РУКОВОДСТВО ДЛЯ ЮРИСТОВ | ТЕКУЩЕЕ ИЗДАНИЕ ПО СОСТОЯНИЮ НА СЕНТЯБРЬ 2007 г., COUNCIL OF EUROPE, 2008,40.
CONCLUSION

Although the new Criminal Procedure Code of Georgia establishes the most limited terms for detention, declares principles of the presumption of freedom and legality, it introduces a uniform standard for detention for all categories of the accused and provides for the application of detention to those categories of crimes for which the code envisages the restriction of freedom as a punishment. The introduction of a test based on necessity is a welcomed act, but, on the other hand, it also implies the introduction of uniform standards for people with serious diseases, pregnant women and minors.

The Code does not define a maximum length of detention by a court, thus allowing a judge to detain an accused at the initial stage for 60 days or for the entire duration of the investigation [Paragraph 3, Article 205 stipulates that the term of the pre-trial detention of the accused shall not exceed 60 days before the pre-trial hearing.] After the expiration of this term, the accused shall be released except in cases envisaged in Article 208.3. However, what “pre-trial hearing” implies – the opening of the hearing or the delivering of the decision at the hearing regarding the punitive measure in accordance with Article 205 – is unclear. The given wording provides the grounds to conclude that the detention of a person from the opening of a session until the decision of the punitive measure [which comprises a maximum of 24 hours] is groundless, which has been repeatedly pointed out by the Strasbourg Court.\(^\text{187}\)

By effectively guaranteeing everyone’s right to personal liberty and security at all times, states will also promote their own internal security, without which human rights cannot be enjoyed to the full.\(^\text{188}\) The above implies, along with the strict legal regulation of the grounds and rules for the restriction of freedom, the limitation of a circle of persons who are authorized to restrict freedom and grant this right to only employees of the body responsible for conducting the investigation, who perform operative functions, are tasked with protecting public order, and carry out investigations or criminal prosecutions. It rules out any possibility of detention on the part of private persons even in the cases envisaged in Article 171 of the Criminal Code of Georgia [including, for example, when a person is caught red-handed] and thus ensures the establishment of additional protection guarantees.

At the same time, as noted above, for maintaining a genuine balance between the security of the state and personal freedom, it is necessary to ensure that any deprivation of freedom during a criminal prosecution is based on exclusive grounds, is an exceptional measure, objectively justified and reasonably long.\(^\text{189}\) As the study of court practice re-

\(^{187}\) See, for instance, Ramishvili and Kokhreidze vs Georgia, application No. 170406, 13.01.2009.
\(^{189}\) Y. Aydin, The delimitation of the scope of one of the guarantees of personal security set out in the European Convention on Human
veals, an upward trend, though insignificant, is still observed in applying detention [in 2009, the indicator stood at 51.1 percent, while it reached 52.6 percent in the first quarter of 2010. In 2008, it comprised 45.3 percent]. Courts use pre-trial detention rather often and this measure is also frequently applied to minors, the elderly and sick persons and detentions are often based on so-called trite substantiations lacking comprehensive and detailed arguments. In frequent cases, unfortunately, judges share scarce arguments presented by the prosecution, do not consider concrete factual circumstances, do not detail in their decisions the circumstances that serve as grounds for the probable cause that a defendant may abscond or obstruct the administration of justice, and they also do not substantiate the necessity and proportionality of applying detention. Their decisions often lack a detailed and deep critical analysis of the materials of the case. In the absence of all of this, the guarantees established under the law lack any sense and lose practical meaning, which has been repeatedly pointed out by the European Court as well.\(^\text{190}\)

Along with detention, the new code establishes the possibility of using other punitive measures commensurate with the aim of detention, provides a possibility of applying several measures simultaneously and, at the same time, establishes only a sample list of these measures thus facilitating the development of the so-called “judge law”, on the one hand, and a decrease in detention cases to the minimum, on the other hand. This further increases the need for the substantiation of the detention and its length.

Article 206 [as well as Article 207] provides in detail the criteria for the consideration of the admission of a request related to detention and obliges judges to examine the factual and formal (procedural) grounds of the request. However, it says nothing about a judge’s obligation to provide a detailed substantiation of the decision on the merits of the request, based on the factual circumstances of the case. In particular, Paragraph 6 of Article 206 states that “the decision on the application, change or nullification of detention shall indicate the date and the place of the decision, the names of the judge, prosecutor, accused and his lawyer, the essence of the presented charge, the instructions on the application, and the change or denial of detention. Moreover, it shall precisely indicate the essence of the decision and the addressee of the decision, which official or entity is responsible for the implementation of the decision, the rule of its appeal, the signature of the judge and the seal of the court”. Thus, the code does not formally establish the obligation to substantiate a decision.

As noted above, according to practical recommendations for Magistrate Judges, “A judge shall substantiate which factual or procedural circumstances [or both] exclude the use of detention or which factual or procedural circumstances [or both] justify the suf-

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ficiency of, say, the use of bail for ensuring the aims of detention”.\textsuperscript{191} At the same time, to substantiate the use of a particular punitive measure, it provides the following sample wording for the motivation part of a court decision: “essential procedural violations during the detention of an accused, the institution of criminal prosecution against the accused, and the obtaining of evidence, which would result in the denial of detention, are not established from the case materials [protocols of the relevant investigative and other procedural actions].

The evidence indicated in the resolution on instituting a criminal prosecution against the accused [a list of, for example, search and identification protocols] and other materials provide factual circumstances [sufficient evidence] that are sufficient to use detention against the accused”.\textsuperscript{192}

Therefore, a judge has no formal obligation to consider the evidence indicated in the request of the parties and presented by them at the hearing and has no obligation to substantiate the threat that the accused may go into hiding or obstruct justice, according to the above-mentioned criteria.

The issue becomes more urgent due to the fact that although, by establishing neither the minimum term of detention nor the periodicity for reviewing detention, the new code envisages the introduction of higher standards in the process that imply the possibility for determining the individual term of detention based on the circumstances of the case. At the same time, it creates the possibility for the automatic use of detention for 60 days in any case. Even though the Strasbourg case law does not consider a two-month detention to be a violation, it emphasises the link between the length of the term and the issue of the conscientious performance of duties by investigative bodies and determines that it is unacceptable to restrict freedom for the purposes of facilitating an investigation, to apply detention for the entire term of the investigation, etc.

The new Code does not envisage a list of grounds for the continuation of detention and in contrast to the current Code does not set out all of the criteria for the extension of detention, such as the complexity of the case, the change of the degree of severity of charge, etc. At the same time, the prosecution is no longer formally obliged to substantiate the necessity for extending the detention and to prove that the investigation was conducted with due diligence by investigative bodies, as the code no longer provides for the extension of detention. Therefore, it no longer provides for such issue as which documents should serve as the basis for extension, how many days prior to the expiration date the court should consider the issue of the prolongation of detention or what procedure the court should apply.

\textsuperscript{191} Practical recommendations for magistrate judges on the main issues of criminal justice process, 24.12.2007, 22.
\textsuperscript{192} Ibid., p. 21
Article 206.8 of the CPC of Georgia grants the defence the right to apply to court at any time with the request to change the detention, provided that the request is connected with new circumstances, which were not known at the time when the detention was applied. Accordingly, the code does not envisage any revision of the detention unless new circumstances are uncovered. The issue is further complicated as it is unclear what will be regarded as new circumstances by the court. In particular, it is unclear whether the court will mull over the issue of changing the punitive measure if new circumstances were found during the initial 15 days, when everyone was interrogated and all of the evidence obtained could potentially be blocked by the accused and within the following 15 days, an investigation into the case did not take place. A literal analysis of the article shows that the burden of proof for the detection of new circumstances rests with the defence whereas “habeas corpus implies that a person who appeals with the request of control shall first submit prima facie evidence and a defendant authority, which bears the burden of proof, shall substantiate the legality of the decision on detention”.

The Georgian Constitution defines differentiated maximum terms for the deprivation of liberty [9 months, 48 hours, 24 hours], though it says nothing of the reasonability of the detention, which differs from the requirement of observing the maximum terms. The CPC of Georgia repeats this provision, but does not fill the existing gap. Thus, although the code determines the limits of the length of detention before the pre-trial hearing as well as the entire length of the proceeding, the above does not rule out the use of an unreasonable term of detention in the criminal proceeding on the grounds of its short length, as it is concrete circumstances of the case and not a mechanic length of the term that determines the reasonability of the term.

The new code significantly decreases the length of detention as a punitive measure and by the deregulation of the initial minimal length of detention allows the subject conducting the proceeding to take into account the circumstances of the case and the personality of the defendant and to establish a proportional and fair term, but it does not determine the compulsory periodicity for reviewing the length of detention, thus enabling a court to use the detention for the entire period of the investigation. This conflicts with international standards and ECtHR case law. That’s why it is of the utmost importance to introduce effective mechanisms for the monitoring of the terms of detention and to reasonably restrict the discretionary authority of the prosecution - to establish a reasonable periodicity for reviewing the terms of detention. Especially considering that the code envisages the extension of the investigation and the criminal proceeding even beyond the limits established under the code on the basis of a request from the accused to ensure the aims of a fair court trial.

194 See Article 18 of the Constitution.
Thus, although the new CPC of Georgia rests on the principle of the presumption of freedom of a person, defines the principle of using an arrest and detention on exclusive grounds, the fulfilment of international obligations and standards in the criminal proceedings will still largely depend on the decency of persons conducting a proceeding and the due performance of the discretionary rights granted to them, on the one hand, and on the amendment of the code to improve procedural legislation or the establishment of uniform court practice in accordance with international requirements, on the other hand.
PAPERS PRESENTED AT THE
BLACK SEA REGIONAL CONFERENCE ON
THE IMPORTANCE OF DISSenting
AND
CONCURRING OPINIONS IN
THE DEVELOPMENT OF JUDICIAL
REVIEW
1. DISSENTING/CONCURRING OPINION – GENERAL OBSERVATIONS

There is an essential difference between the decisions issued by constitutional courts in Europe and those of the Anglo-American type. The former are issued “impersonally” by the court as a whole, whereas in the latter, individual judges make their personal contributions. In the first case, the decision itself does not show whether it was adopted unanimously or...
by a majority of votes. Moreover, it is absolutely unclear in any decision the way an individual judge actually voted. In the second case, however, it is not only evident when a majority or unanimous decision was adopted and how individual judges voted, and the judges who do not agree with the majority add their interpretation of the decision in either:

- a concurring opinion when a judge agrees with the ruling but differs as to its reasoning, or
- a dissenting opinion when a judge objects to the ruling itself.

At first, the dissenting/concurring opinion was recognised only in the United States, as well as in other Common Law- or American-based countries of the British Commonwealth, Central and South America, Scandinavia and Japan. After many theoretical and political objections, the dissenting/concurring opinion became gradually accepted in countries with Continental (European) legal systems. Although individual European constitutional/judicial review systems departed from the decision-making mode characteristic of the Austrian style, they remained half similar to an American type of decision-making that introduced dissenting/concurring opinion into Constitutional Court decisions (especially in constitutional/judicial review systems introduced by new democracies).

As far as publication is concerned, a distinction may be made between the two types of dissenting/concurring opinions:

- open, published together with the respective decision;
- anonymous, only added in writing to the internal part of the case.

Some constitutional judicial review systems do not accept dissenting/concurring opinions, but keep the voting results secret, without publishing either the voting results or the names of the judges. The dissenting/concurring opinion is known above all in Croatia, Germany, Greece, Hungary, Portugal, Slovenia, Chile, Spain, Georgia, as well as in Argentina, Canada, Norway, Macedonia, Montenegro, Serbia, Bosnia and Herzegovina, Poland, Estonia, Romania, Moldova, Bulgaria, Azerbaijan, Turkey, Ukraine, and Armenia.

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5 e.g. Austria, Belgium, France, Ireland, Italy.
6 Paragraph 4, Article 19 of the Constitutional Court Act.
7 Paragraph 2, Article 30 of the Federal Constitutional Court Act. In addition, some Provincial Constitutional Courts adopted the dissenting opinion, e.g. Bavaria (Paragraph 5; Article 25 of the Constitutional Court Act; Article 4 of the Rules of Procedure of the Constitutional Court), Berlin (Paragraph 2, Article 29 of the Constitutional Court Act), Bremen (Paragraph 3, Article 13 of the Rules of Procedure of the Constitutional Court), Hamburg (Paragraph 4 and 5, Article 22 of the Constitutional Court Act; Articles 27 and 28 of the Rules of Procedure of the Constitutional Court), Niedersachsen (Paragraph 2, Article 11 of the Rules of Procedure of the Constitutional Court).
8 Paragraph 3, Article 93 of the Constitution; Articles 35 to 38 of Act No. 184/1975.
9 Paragraph 2, Article 90 of the Constitutional Court Act No. 2/1979.
10 Paragraph 5, Article 40 of Rules of the Court.
as well as at the Inter-American Court. In Portugal, however, the publication of votes with names is a matter of judicial tradition as the decisions issued by the Constitutional Court also strictly include names. On the other hand, much attention was aroused by the frequent occurrence of the dissenting/concurring opinion in Spain, where this practice appeared in both forms (dissenting opinion, concurring opinion). The dissenting/concurring opinion is, however, not recognised by the Court of Justice of the European Community in Luxembourg, but was recognised by the European Commission\textsuperscript{13} and is recognised by the European Court of Human Rights in Strasbourg\textsuperscript{14}.

2. SOME NATIONAL SYSTEMS IN DETAIL

In Austria, some scholars advocate the introduction of a separate opinion in order to improve the legal quality of decisions with the possibility of separate opinions, and that the majority of relationships open to hearing the court have become more unpredictable in their entirety. Finally, from the theoretical point of view, it is important to note that in areas where the law provides discretion to the judge (which is particularly true for constitutional justice), where the judge must exercise discretion in a legitimate manner, such personal views should also be disclosed. In a democratic system, the creation of open decision-makers is fundamental because only in this way can we achieve more responsible behaviour, which mostly means that behaviour can be controlled.

The Court of Justice in Luxembourg, although not allowed for separate opinions, but some reform efforts within the court, has also spoken in favour of imposing a “dissenting opinion”.

Rather, it is permissible to use the separate opinion at the European Court of Human Rights and it is used in practice to a relatively broad extent. The European Convention for the Protection of Human Rights and Fundamental Freedoms (signed in Rome on 4/11-1950):

- introduced a separate opinion to the decisions of the European Commission on Human Rights (Paragraph 1, Article 31): If the commission had not reached a solution, it drew up a report on the facts and its position on whether the facts show that the affected state violated its obligation under this convention. The report may indicate the views of all of the members of the commission.

\textsuperscript{13} Paragraph 1, Article 31 of the \textit{European Convention on Human Rights and Basic Freedoms}.

\textsuperscript{14} Paragraph 2, Article 51 of the \textit{European Convention on Human Rights and Basic Freedoms}.
It is currently reflected in the decisions of the European Court of Human Rights (Paragraph 2, Article 51): If a judgment does not reflect the same opinion of the judges in whole or in part, each judge is entitled to create a separate opinion.

The theory concludes that the specific functions of the both the abovementioned European courts and their composition did not allow direct the consequences of their practices to be reflected in the consideration of separate opinions in national legal orders.

In Germany, separate opinion (abweichende Meinung) is not unknown in judicial history. However, the overwhelming majority in constitutional courts welcomed the introduction of separate opinion, as did a clear majority of federal supreme courts. But separate opinion was refused from collegiate courts with a narrow majority. Regardless, separate opinions were nevertheless considered to be desirable for the future. Despite some high expectations, the practice of separate opinions was not extended so much. In the German constitutional judicial system, only the amended Federal Constitutional Court Act of 21/12-1970 formally introduced separate opinion (Paragraph 2, Article 30 of the Federal Constitutional Court Act). Any judge may give a separate opinion or dissenting opinion to the individual decision of the chamber or, where appropriate, a concurring opinion regarding the reasoning of the decision. Additionally, the names of the judges who gave separate opinions and their votes may also be published. From separate opinion, some people expected an improvement in the Constitutional Court’s image, arguing that in this way legal aspects will be comprehensively set out, while others pointed to the weakening of the court by endangering public respect for the institution.

The regulation of separate opinions in constitutional courts in the German states (Laender) is as follows:

At the Bavarian Constitutional Court, each member of the court was able to deliver a separate opinion on the grounds of the concrete adopted decision. The opinion was attached to the intern part of the file. If the decision was published, the separate opinion was also published, but without giving the names of the judges (Article 7 of the Rules of Procedure of the Bavarian Constitutional Court of 23/5-1948). However, this option was only rarely used. Under the Law of the Constitutional Court of Bavaria of 19/5-1990, every judge is entitled to give his separate views on the decision or his reasoning in writing. Separate opinions without noting the author are published together with the decision (Paragraph 5, Article 25). A judge who wants to give a dissenting opinion is obliged to inform the court about his intention as soon as possible – at the latest before the signing of the decision by the participating judges (Paragraph 1, Article 4 of the Rules of Procedure of 18/12-1990). Any separate opinion should be submitted to the president of the court three weeks after the delivery of the decision. At the request, the president may extend this period for a further three weeks (Paragraph 2, Article 4 of Rules of Procedure).

According to the Constitutional Court of the Land Berlin Act of 8/11-1990 any member of the court may express a separate view on the decision or its reasoning in the form of a
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Separate opinion. Such separate opinion shall be attached to the decision’s reasoning. The decision may indicate the proportion of votes (Paragraph 2, Article 29).

Separate opinion is admissible also at the Constitutional Court of the Hanseatic Free City of Bremen. According to the Rules of Procedure of 17/3-1956, each member of the court may give a separate opinion to the reasoning of the decision (Paragraph 3, Article 13). In principle, such written opinions are not component parts of procedural documents. But any judge may request his separate opinion to be delivered together with the opinion of the plenary court.

According to the Hamburg Constitutional Court Act of 2/10-1953, a separate opinion is allowed from any member of the court. The separate opinion shall be attached to the decision (Paragraph 4, Article 22). In its decisions, the Constitutional Court may indicate the proportion of votes (Paragraph 5, Article 22). The Rules of Procedure of the Constitutional Court of 11/2-1983 provide that any dissenting opinion shall be submitted to the president of the court within three weeks after hearing the reasoning of the decision (Article 27 of the rules). If the judge intends to give a dissenting opinion, this must be communicated in the consultations as soon as possible. The decision must also be signed by the judge who gave a separate opinion. The separate opinion shall be signed by the author himself. Other judges may join the separate opinion. The separate opinion is accompanied to a written decision (Article 28 of the rules). If given, the dissenting opinion shall be announced after the announcement of the decision. Also the name of the judge – the author – a separate opinion shall be called. The separate opinion is communicated to the participants and all interested in the same manner as the decision.

Following the Rules of Procedure of the Constitutional Court of the Land Niedersachsen of 19/10-1988 an outvoted judge’s opinion may be provided anonymously at his own request (Paragraph 2, Article 11).

With the introduction of separate opinion, the independent personality of the judge shall be promoted, to whom the right is given to abandon the anonymity of secret consultations. Additionally, it should strengthen the reputation of the court itself on the basis of a comprehensive presentation of all legal aspects that are important for concrete decision. In such a way, different professional views come to light. The outvoted judge should not be limited to express his belief. Furthermore, theoreticians – proponents of separate opinion – expect from the judge a “separate explanation”, some greater transparency and openness in constitutional jurisprudence. Finally, the submission of a separate opinion to the case presents itself as an open (democratic) process.

Although the institution of separate opinion, in practice, was exercised less than expected, we cannot ignore that this institution was welcomed especially among the younger generation of German judges who had the tendency to withdraw from the anonymity of the decision-making process. Moreover, the publication of separate opinions has not caused any serious crisis to the German Federal Constitutional Court.
The prevailing German literature is richest in this area, trying to establish general principles that are important for the publication of separate opinions and their contents:

- A separate opinion stated for publication should be limited to cases of principle interest;
- Dissenting opinions should not be wrongly interpreted as a means of polemics against the main plenary decision and its reasoning;
- A separate opinion has not a function of the contest and battle with the majority view, but it is intended to be presented against the majority opinion, his arguments convincing and accurately as possible.

**Italy**: The dissenting opinion is considered to be incompatible with the principle of the collegiality of the court. This does not exclude the possibility that, in given cases, separate opinions of individual judges would not have come to the fore in scientific publications or in press releases. They say that the reasons for the different treatment of separate opinion in Italy and in Germany are mainly of a political nature.

Under the **Spanish Law No. 2 / 1979 of the Constitutional Court** of 3/10-1979, the president and judges may create separate opinions, which were represented in the consultation both in terms of the decision and its reasoning. Dissenting opinions are part of the main decision and are together with the main decision published in the Official State Gazette (Paragraph 2, Article 90). Such practice has been welcomed because it shall contribute that the decision-making process has become easier to understand. Furthermore, it should help to consolidate the court’s authority.

The **Portuguese Law No. 28/1982 on the Organisation, Work and Proceedings of the Constitutional Court** of 15/11-1982, provides that judges who were outvoted in the decision or its reasoning have the right to create a separate opinion (Paragraph 4, Article 42).

**Greece**: The Greek Constitution of 1995 allows for separate opinion. The judicial minority opinion is published without indicating the identity of the judge – the author of such an opinion (Paragraph 3, Article 93 of the Constitution). The Greek Law No. 345/1976 on the Special Supreme Tribunal under the 110th Article of the Constitution states that in terms of the third Article 93 of the Constitution and implementing laws issued in this regard (Law No. 184/1975, Articles 35-38) provide for the recording of the minority opinion (Paragraph 2, Article 19 of the act). The constitutional command to publish a dissenting opinion has also been considered as the expression of the principle of publicity.

The **Constitutional Law on the Constitutional Court of the Republic of Croatia** states that a Constitutional Court judge who expressed a dissenting opinion shall provide the opinion in writing (Paragraph 4, Article 19 of the law).

The **French legal system** does not allow for the publication of separate opinions. The court decisions are not a source of law because such collective decisions are taken when implementing the law. The personalization of the opinions of judges would give to the judi-
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ciary itself too much authority. Of course, courts are now the creators of law and they have very strong power in terms of legal interpretation, but their own constitutional position has not changed.

In Ireland, the publication of separate opinions is not allowed with regard to decisions concerning the constitutional validity of regulations since 1937.

The possibility of a separate opinion is explicitly determined by the Act on the Constitutional Court of Chile (Paragraph 2, Article 31).

3. DISSenting AND CONCURRING Opinion IN SLOVENIAN Practice

3.1 Slovenian Practice until 1991

According to past legal theory, the dissenting opinion of a Constitutional Court judge had no power of decision and did not affect the normative act, which was subject to review of constitutionality and legality. However, the separate opinion was nevertheless important for the legal system and social relations as a whole. Separate opinion was taken as a tool – calling upon all members of the Constitutional Court to discuss once again and to try all of the facts and reasons for adopting the appropriate decision. This was almost the preventive importance of separate opinions realised during court sessions. When the separate opinion was published in the Official Gazette, it was also possible to talk about its broad and general sense. The Constitutional Court decision and dissenting opinion as well should contain the grounds for adopting the appropriate decisions and of separate opinion. Through such a separate opinion, the willingness of the members of the Constitutional Court to accept public responsibility for the position expressed in the opinion is also reflected, especially if this position has not met public approval. Separate opinion was considered important for the legal sciences to create certain positions to individual legal institutions and principles. In addition, it was welcomed to help ensure that the constitutional decision may be taken with greater care and interest. The reasons given in a separate opinion do not (in any way) reduce the importance and impact of the Constitutional Court (main) decision.

The federal, republican and provincial constitutions of the Yugoslav Federation of 1974 stipulated that a member of the Constitutional Court has the right and duty to express a dissenting opinion in writing, and to explain and to justify it.

The Slovenian Constitution of 1974 (Paragraph 2, Article 420) provided that a member of the Constitutional Court who expresses a dissenting opinion has the right and the duty to express that opinion in writing and to submit it to the court. In the then Law on Proceedings
before the Constitutional Court of the Republic of Slovenia (Official Gazette, No. 39/74 and 28/76), there were no provisions relating this matter. In the Constitutional Court of Slovenia Act (Official Gazette, No. 39/63), which expired on 8/1-1975, the last paragraph, Article 67 provided that the court may decide to publish a dissenting opinion with the consent of the judge who gave it. Based on the legislation of 1963, separate opinion was published only once with the main decision.

A vote against the proposed resolution did not automatically mean that the voter also expressed his dissenting opinion to the decision which was taken. A member of the Constitutional Court who voted for the proposed solution, but did not agree in whole or part, was able to express his dissenting opinion. The dissenting opinion was attached to the minutes of the deliberation and the voting in writing. The minutes, however, indicated that such a voter gave a dissenting opinion. According to the then-Slovenian constitutional and legal order, the court itself was not bound to publish such a separate opinion together with its decision.

From 1974 to 1990, the separate opinion did not have to be published together with the decision of the Constitutional Court in the practice of the Slovenian Constitutional Court.

3.2 Current Slovenian Practice

Separate opinion has been regulated by Paragraph 3, Article 40 of the Slovenian Constitutional Court Act (Official Gazette of the Republic of Slovenia, No. 64/07 – official consolidated text). Additionally, provisions of the Constitutional Court Rules of Procedure (Official Gazette of the Republic of Slovenia, No. 86/07) are relevant as well.

The Constitutional Court Act:

Chapter 5 (Deciding) (Paragraph 3, Article 40): A judge who does not agree with the decision or reasoning of a decision may declare that he will write a separate opinion that must be submitted within the period determined by the Rules of Procedure of the Constitutional Court.

The Constitutional Court Rules of Procedure:

Chapter 8 (Separate Opinions), Article 71 (Type and Purpose): (1) A Constitutional Court judge who does not agree with the decision adopted at a session of the Constitutional Court may submit a separate opinion that may be either a dissenting opinion if he disagrees with the operative provisions or a concurring opinion if he disagrees with the statement
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of reasons. A separate opinion may be submitted by a group of judges, or a Constitutional Court judge may join the separate opinion of another Constitutional Court judge. (2) A separate opinion may only be submitted by a Constitutional Court judge who has declared after the voting on the decision that he will submit such an opinion. Joining a separate opinion is also possible without prior declaration thereof. (3) The purpose of a separate opinion is to present the arguments that the Constitutional Court judge stated in the discussion and decision of a case and which dictated his decision.

Article 72 (Time Limit for the Submission of Separate Opinions): (1) Separate opinions must be submitted within seven days from the day when the Constitutional Court judges receive the text of the decision determined by the Redaction Commission, which is confirmed and signed by the Secretary General. (2) The Constitutional Court may determine a time limit for submitting separate opinions, which is shorter or longer than seven days if so required by the nature of the matter decided upon. Immediately after the final vote, the Constitutional Court decides on the extension or reduction of such a time limit by a majority vote of the Constitutional Court judges present. (3) Separate opinions are submitted to other Constitutional Court judges, who may comment on such within three days. A Constitutional Court judge who has submitted a separate opinion may reply to such comments within three days. (4) If a separate opinion is not submitted within the time limit referred to in the first or second paragraphs, it is deemed that the Constitutional Court judge is not submitting a separate opinion.

Article 73 (Serving and Publication): (1) A separate opinion is sent together with the decision or order to which the separate opinion refers. If, in accordance with an order of the Constitutional Court, the decision or order is sent immediately, the section stating the composition states which Constitutional Court judges have declared that they would write a separate opinion; the separate opinions are then sent after the expiry of the time limits referred to in the preceding article. (2) If a decision or an order is published in the Collected Decisions and Orders of the Constitutional Court, on the website of the Constitutional Court, or in other computer databases, separate opinions thereto are published with the decision or order.

After 1991, separate opinion in the proceedings before the Slovenian Constitutional Court has been widely practised in different forms – as dissenting, as dissenting in part, as concurring, or as concurring in part, created by one judge or created by a group of judges. Although separate opinions have no legal force or legal effect, they represent a valuable complement to the decision. Through separate opinions, the public is informed of the argumentation or comments made by “the other side”, minority arguments are articulated that may eventually become the majority opinion, and all of the arguments competing in the process of constitutional review are weighed.
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Tudorel Toader

THE IMPORTANCE OF DISSenting AND CONCURRING OPINIONS FOR THE ROMANIAN CONSTITUTIONAL JUSTICE

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PREAMBLE

Constitutional justice is administered based on the provisions of Articles 142 to 147 of the Romanian Constitution, revised in 2003, as well as of Law No. 47/1992 on the organisation and functioning of the Constitutional Court. According to Article 145 of the Constitution, Constitutional Court judges are independent in exercising their office and irremovable throughout its duration. According to the provisions of Article 1, Paragraph 3 of Law No. 47/1992, the Constitutional Court is independent of any other public authority and subject only to the Constitution and to this law, and according to Article 61, Paragraph 2 of the same law, Constitutional Court judges cannot be held liable for any personal opinions and votes cast in rendering the decisions. Constitutional Court judges are bound to keep the secret of the deliberations and of the votes [Article 64, Paragraph 1, Subparagraph B of

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2 This paper was prepared for the Black Sea Regional Conference on the Importance of Dissenting and Concurring Opinions in the Development of Judicial Review, organised by the Constitutional Court of Georgia in cooperation with the Venice Commission of the Council of Europe and the German Society for Technical Cooperation (GTZ), September 17-18, 2010, in Batumi, Georgia.
3 The Constitution of Romania, in its initial form, was adopted at the sitting of the Constituent Assembly of November 21, 1991, it was published in the Official Gazette, Part I, no. 233 of November 21, 1991 and entered into force after its approval by national referendum of December 8, 1991.
4 Law no. 429/2003 for the revision of the Constitution of Romania was approved by the national referendum of October 18-19, 2003 and entered into force on October 29, 2003, day of publication in the Official Gazette of Romania, Part I, no. 758 of October 29, 2003 of the Constitutional Court Ruling no. 3 dated October 22, 2003 confirming the results of the national referendum of October 8-19, 2003 concerning the Law for the revision of the Constitution of Romania.
Law No. 47/1992], and judges who have given a negative vote may formulate a separate opinion. With regard to the reasoning of the decision, it is also possible to write a concurring opinion. The separate (dissenting) and, as the case may be, concurring opinion shall be published in the Official Gazette of Romania, Part I, together with the decision (Article 59, Paragraph 3) of Law No. 47/1992].

We should note that the legal requirement concerning the secrecy of the vote is excepted in the case of dissenting opinions, which are published in the Official Gazette together with the decision.

*The importance of dissenting and concurring opinions.* The Constitutional Court’s decisions have the same legal effect, whether rendered unanimously or by majority vote. Although they do not have legal effects, once made public, the reasons held by judges – the authors of dissenting or concurring opinions – are examined by academic circles and often discussed by civil society. They may be taken into account within the work of regulation, and they may constitute the premises for reconsidering constitutional jurisprudence.

Depending on the number of judges who sign the dissenting opinions, these can also have different meanings. We consider the fact that the dissenting opinion of a single judge represents his/her position as to the issue subject to settlement, while the dissenting opinions expressed by several judges may highlight even the identity of the other judges who have taken the decision, or may be serious premises for reconsidering the jurisprudence. By way of example, we refer to Decision No. 1351⁶, dated December 10, 2008, regarding the constitutionality of the law amending and supplementing Law No. 10/2001 on the legal status of property unlawfully seized from March 6, 1945 to December 22, 1989 – the decision according to which, by majority vote, the Constitutional Court found that the law is constitutional. The debates were attended by all nine judges who form the Plenary of the Constitutional Court, of whom four⁷ judges formulated a dissenting opinion, asserting that the statutory provisions are unconstitutional because the legislator’s interference in the course of the administrative or judicial procedures, by measures that would favour one of the parties, is likely to create a general climate of uncertainty and legal insecurity. Knowing the identity of the authors of the dissenting opinion reveals the identity of the judges who formed the majority opinion by default, and thus who adopted the decision.

The existence of dissenting or concurring opinions does not mean the division of the court, and thus does not affect its unity. Proof is that, later, another majority may have a different composition. The dissenting opinions may be an expression of different legal views, or the result of the different specialisations of the constitutional judges. In the Ro-

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⁶ Published in the Official Gazette of Romania, Part I, no. 881 of December 24, 2008.

⁷ This dissenting opinion, published together with the decision, was formulated by Judges Augustin Zegrean, Puskas Valentin Zoltan, Petre Lăzăroiu and Tudorel Toader.
manian constitutional contentions, there are relatively numerous dissenting or concurring opinions.

The academic circles formulate the most demanding and exegetic analysis and even criticism of the Constitutional Court decisions. Lately, with the significant increase in the number of cases settled by means of constitutional contentions (i.e. 8889 cases were registered on the Constitutional Court’s docket in 2009), we can note reviews and criticisms expressed even when their authors do not understand the contents of the ruling or of the decision. On the other hand, the Constitutional Court’s decisions are the ones giving consistency to studies and specialised works. In this context, the arguments given in dissenting or concurring opinions are cited by the critics of the decision, or rather rejected by those who agree with the contentious constitutional court’s solution. From the academic point of view, by their arguments, the dissenting or concurring opinions stimulate scientific research, doctrine, and sometimes are cited at the formulation of proposals for a better law (de lege ferenda).

Sometimes dissenting opinions can maintain the state of legal uncertainty settled by the Constitutional Court’s decision. For example, we refer to Decision\(^8\) No. 62, dated January 18, 2007, on the plea of unconstitutionality of the provisions of Article I, Section 56, of Law No. 278/2006, amending and supplementing the Criminal Code and also amending and supplementing other laws. By majority vote, a dissenting opinion and a concurring opinion, the Constitutional Court upheld the objection of unconstitutionality, noting that criticised legal provisions, by repealing the provisions of Article 205 of the Criminal Code relating to insult, Article 206 of the Criminal Code relating to defamation, and Article 207 of the Criminal Code relating to proof of truthfulness are unconstitutional. The court held that the actions representing the content of these crimes seriously violate the human personality, dignity, honour and reputation of those aggressed as such. On the other hand, those values protected by the Criminal Code have constitutional status. Human dignity is enshrined by Article 1 of the Constitution, which states that Romania is a democratic and social state governed by the rule of law, where human dignity, civil rights and freedoms, the free development of human personality, and justice and political pluralism represent supreme values in the spirit of the people’s democratic traditions and the ideals embodied by the December 1989 Revolution, shall be guaranteed. Likewise, the court held that the repeal of those legal provisions created an unacceptable regulatory lacuna, contrary to the constitutional provisions guaranteeing human dignity as a supreme value. On the other hand, the observance of the Constitution is mandatory, hence parliament can exercise its power of indictment and decriminalisation of antisocial acts only in compliance with the rules and principles enshrined in the Constitution.

Since the decriminalisation of insult and defamation was supported by a majority of the public opinion and regarded as a component of legislative reform to ensure the Europe-

\(^8\) Published in the Official Gazette of Romania, Part I, no. 104 of February 12, 2007.
anization of national law, the decision establishing the unconstitutionality of the repealing text led to many controversies. The controversies existing today concern two aspects – the Constitutional Court’s competence to examine the constitutionality of the repealing texts, respectively, and the legal consequences produced by declaring the unconstitutionality of the repealing text. The Constitutional Court held that the provisions of Article 146, Sub-paragraph A of the Constitution do not exempt the repealing provisions from constitutional review and that, in the event that they are declared unconstitutional, their legal effects cease as provided by Article 147, Paragraph 1 of the Constitution. Moreover, in such a case, the legal provisions forming the subject of repeal remain in effect in the same sense being delivered also other decisions.

The concurring opinion expressed on that occasion says that the unconstitutionality of the repealing text stems from the fact that by incorrectly interpreting the constituent legislator’s silence on how legal liability may arise in such a case, and considering that it could restrict the means of protection available to the injured in his personal attributes, by the abusive exercise of the freedom of expression, the legislator decided to decriminalize the offences of insult and defamation, removing thus criminal liability from the forms of legal liability that may result from the arbitrary use, with harmful consequences, of the freedom of expression. Moreover, given that, by declaring the unconstitutionality of the repealing provision, the same provisions that were repealed and not the new ones revert to force, it is difficult to claim that the court assumes the status of a positive legislator in this fashion.

The dissenting opinion expressed on that occasion argues that the Basic Law sets no legal means by which the protection of different social values should be carried out. It is left to the legislature’s discretion. The state’s policy in criminal matters may have different imperatives and priorities at different periods of time determined by the frequency, severity and consequences of certain antisocial acts. In relation to this, the legislator establishes the legal means to achieve the protection of various social relations, including the assessment of the degree of social danger of certain acts, which must be indicted and combated by setting criminal penalties. As these powers belong exclusively to the legislator, the conclusion is that currently the protection, by means of criminal law, of dignity, reputation and of the right of a person to his own image, is not necessary, and, therefore, the decriminalization of the offence of insult and defamation does not contravene any constitutional rule, being only a matter of expediency and practical justification. Through its effects, the Constitutional Court’s decision suspends the effects of the legal rule declared unconstitutional, and as from its publication in the Official Gazette, Part I, it reinstates the provisions of Articles

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9 i.e., Constitutional Court Decision no. 20 of February 2, 2000, published in the Official Gazette of Romania, Part I, no. 72 of February 18, 2000.
10 Formulated by Judge Şerban Viorel, published in the Official Gazette of Romania, Part I, together with the Constitutional Court Decision no. 62/2007
11 Formulated by Professor Ioan Vida, PhD, President of the Constitutional Court at the time of adoption of the decision, and Judge Kozsokar Gabor, published in the same Official Gazette.
205 and 206 of the Criminal Code, which once again are equal to incriminating acts of insult and defamation, as incrimination falling within the legislator’s exclusive competence. In these circumstances, the Constitutional Court becomes the positive legislator – a right that it was not conferred by the Constitution or by its own organic law.

Also today, in practice, different solutions are pronounced. Some courts consider that after the publication in the Official Gazette of the Constitutional Court’s decision, the acts of insult and defamation must once again be considered crimes. Other courts, on the contrary, consider that the provisions of Articles 205, 206 and 207 of the Criminal Code were and remain abrogated. For the unitary interpretation and application of the law by courts, and considering that the acts of insult and defamation do not constitute crimes any longer, the prosecutor general of the Prosecutor’s Office attached to the High Court of Cassation and Justice asked the supreme court to rule by means of an appeal in the interest of the law a decision with binding character. In light of the abovementioned issues, we can also mention that in a relevant decision, with respect to the grounds of appeal, the supreme court ruled that the result of declaring unconstitutional the legal provision repealing the legal text is that the repealed legal text reverts to force, a solution that has applicability in judicial practice.

The arguments expressed in dissenting opinions can be taken into account in formulating and supporting other challenges of unconstitutionality, or by the president of Romania who, before the promulgation of a law, can refer it back to parliament for review. In this respect, we mention the dissenting opinion formulated with respect to Decision No. 59, dated January 17, 2007, by which, in the a priori review, by majority vote, the Constitutional Court ruled that the provisions of Article 1 and Article 3 of the law approving certain financial measures for small- and medium-sized brewing companies are constitutional. The criticised legal provisions set out financial incentives granted to these brewing companies, including exemption from paying outstanding tax duties on December 31, 2003, and unpaid until the date of the law’s entry into force, representing excise tax and VAT, under the terms of the law, being exempted from withholding tax and VAT. Likewise, on the grounds of Paragraph 2 thereof, the exemption from additional tax duties also comprises interests, penalties, delay increases related to tax duties exempted according to Paragraph 1, calculated until this law’s entry into force.

The decision called into question has the particular feature that the law was adopted in December 2006, entering into force in 2007 after Romania’s EU accession. The court found that the criticised law was passed in the legislative context, in which the matter of state aid was regulated by Law No. 143/1999, republished in the Official Gazette, Part I, No. 744, dated August 16, 2005, as well as the law repealed by State Emergency Ordinance No. 117.

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12 Formulated by Professor Ioan Vida, PhD, and Judge Nicolae Cochinescu, published together with the decision.
13 Published in the Official Gazette of Romania, Part I, no. 98 of February 8, 2007.
dated December 21, 2006, on national procedures in matters of state aid published in the Official Gazette, Part I, No. 1042, dated December 28, 2006. Article 1, Paragraph 1 of the ordinance states that it “is intended to cover national procedures in matters of state aid, in view of the application of Articles 87-89 of the European Community Treaty, and of secondary legislation adopted on the basis thereof. The Constitutional Court held that state aid provided by the criticised law may be compatible with free competition on the grounds of Article 87, Paragraph 3 of the European Community Treaty, since such aid is intended to keep the traditional beer production business alive among small- and medium-sized companies, which face economic difficulties and are subject to restructuring processes.

The authors of the dissenting opinion state that, as the content of legal rules are subject to constitutional review, the financial incentives of small businesses in the brewing industry shall be no more and no less than the aid granted by the state to these companies. In this regard, the first complaint regarding the unconstitutionality of the law envisaged that the notification to the European Commission on Aids granted by states provided by Article 88, Paragraph 3 of the treaty (consolidated version) establishing the European Community, and imposed by this law, was not made, whereas the provisions of this treaty have become mandatory for Romania since January 1, 2007. This duty is incumbent also on the Constitutional Court, whereas the contentious constitutional authority ruled on the reference of unconstitutionality on January 17, 2007, after Romania’s EU accession. The issue called into question by the authors of the dissenting opinions is whether the provisions of this law subject to constitutional review may be compatible with the provisions of Articles 87-88 of a European treaty that Romania has to observe on the grounds of Article 148 of the Constitution of Romania. The second complaint regarding this law’s unconstitutionality concerned the same relation between a domestic law and a provision of the community law. Thus, on the grounds of Regulation (EC) No. 70/2001, dated January 12, 2001, on the application of Articles 87-88 of the EC Treaty, in the case of aid granted by the state to small- and medium-sized companies (which is part of the domestic law), the aid contingent upon the use of domestic over imported products is prohibited or, more precisely, the provisions of the regulation do not apply in this matter [Article 1, Paragraph 2, Subparagraph C]. Based on these arguments, the authors of the dissenting opinion conclude that the legal provisions subject to review deviate from the community law’s provisions and are, in this way, contrary to the provisions of Article 148 of the Constitution of Romania.

Citing the reasons of unconstitutionality expressed in the dissenting opinion and exercising his constitutional powers, the president of Romania did not promulgate the law, which would have resulted in its publication in the Official Gazette and its entry into force, but returned it to parliament for review. The legislative proceedings are being carried out in consideration of those criticisms.

The divergent opinions expressed in the debate and reflected in the adoption of decisions by a majority vote of the judges does not always become a dissenting or concurring opinion substantiated in writing and published together with the decision. In this respect,
the choice belongs to the judges who disagree with the majority opinion. Given the vote’s secrecy, in such situations, the public opinion should not know the identity of the judges ruling in favour of that decision. Neither the court nor the judges are protected from criticism in such situations, especially since the decision has strong and immediate social consequences. Civil society, as much as it can be objective, gives various variants of voting, especially taking into account the fact that some judges were appointed by the current government majority or by the parliamentary opposition.

We have yet to assess to what extent the dissenting or concurring opinions are beneficial, highlighting the dynamic of debates, the consistence of arguments in favour and against a solution, or whether they are likely to affect the unity of the court and the authority of the decisions rendered by it. Most likely a single answer does not exist. The premises for such an answer are found in the type and level of structuring of the rule of law.
According to the basic law of the Republic of Bulgaria and the Constitutional Court Act (hereinafter – CCA), Constitutional Court ensures supremacy of the Constitution. Besides these two normative documents, organization and legal proceedings of the Court are also regulated by the Rules of Organization and Activities of the Constitutional Court (hereinafter – ROACC).

Constitutional Court of the Republic of Bulgaria is composed of 12 judges. Four judges are appointed by the President of the Republic; four are elected by the National Assembly, and the remaining four – by judicial authorities for nine-year terms. The Constitutional Court acts on an initiative from not less than 1/5 of the entire composition of the National Assembly, the President, and the Council of Ministers, the Supreme Court of Cassation, the Supreme Administrative Court and the Chief Prosecutor (Constitution, Article 150).

The Constitutional Court may hold its sittings when 2/3 of its members or eight judges are present (CCA, Article 15,). In cases when the charge is brought against the president or vice-president, quorum of the Constitutional Court shall make up ¾ of the total number of its composition or nine judges (CCA, Article 24, par.1).

In accordance with the Article 151, par.1 of the Constitution, decisions and rulings (resolutions) require the consent of majority of the judges, i.e., not less than seven judges. Majority votes of 2/3 of the judges, i.e., eight judges, is needed only in cases when revoking

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1 This paper was prepared for the Black Sea Regional Conference on the Importance of Dissenting and Concurring Opinions in the Development of Judicial Review, organised by the Constitutional Court of Georgia in cooperation with the Venice Commission of the Council of Europe and the German Society for Technical Cooperation (GTZ), September 17-18, 2010, in Batumi, Georgia.
judicial immunity or deciding on the inability of discharging the duties of the member of the Constitutional Court.

When the texts of the Constitution, Constitutional Court Act and Rules of Organization and Activities of the Constitutional Court mention a majority, it means a unanimous opinion of at least seven or eight judges taking part in making a decision or ruling on the admissibility of a specific case.

In some cases, it is impossible to make up such a majority. For instance, when eleven members of the Constitutional Court take part in hearing and only five or six of them vote for a specific opinion and the rest of them vote against it (the Bulgarian Constitutional Court has experienced similar occasions) an application submitted to the Court cannot be regarded either satisfied or refused since there is no majority of judges required by the legislation which would have satisfied or refused a complaint.

According to the Constitution of Bulgaria, the Constitutional Court exercises its authorities and functions only when the majority of its composition has been secured when considering the issues admissible under the paragraphs 1-8 of the Article 149, after submission of complaints from the agencies envisaged in the paragraph 1 of the Article 150.

As the Article 149 of the basic law stipulates, the Constitutional Court delivers binding interpretations of the Constitution, makes decisions on either constitutionality or unconstitutionality of laws and other legal acts adopted by the National Assembly as well as those issued by the President; decides on compatibility of the international agreements with the Constitution before they are ratified by the National Assembly and it also determines whether domestic legislation is consistent with universally recognized norms of international law and international instruments to which Bulgaria is a party. The Constitutional Court also considers disputes on the constitutionality of political parties and associations, legality of the elections of the president, vice-president and a member of the National Assembly and resolves the disputes among the National Assembly, president and the Council of Ministers regarding their competences as well as disputes between local self-governance and the central executive bodies. Decisions on these issues are made by open ballot.

In cases when the Constitutional Court rules on charges brought by the National Assembly against the President or Vice-President or makes decision on revoking immunity of the Constitutional judge the decisions are made by secret ballot (Constitutional Court Act, Article 24 (pa 3) and Article 25 (pa 2). In these cases filing or signing a dissenting opinion is inadmissible (ROACC, Article 32 (par.4)).

Dissenting and concurring opinions become challenging when the Constitutional Court makes its decisions and rulings (resolutions) in an open ballot regime.

Brief analysis points out that the Constitutional Court is capable of exercising its authorities in accordance with the Constitution only when the Court achieves a majority opinion over the issue to be decided. This is equally relevant when it comes to the ruling on ad-
missibility of the case brought before the Court by the agencies listed in the Article 150 (par.1) of the Constitution. The practice of the Constitutional Court of Bulgaria shows that a great number of special opinions seriously impede gaining a convincing majority needed for adoption of decisions in the Constitutional Court.

Bulgarian Constitution and Constitutional Court Act do not set out any standards or norms concerning special and concurring opinions, consequently they do not stipulate any possibility for a constitutional judge to stick to his own opinion. The issue of special opinion and concurring opinions are regulated in a few words and somewhat vaguely only by the ROACC. The Article 32 (par.3) stipulates, “the judges who disagree with either the decision or ruling (resolution) on inadmissibility of a compliant shall have a right to file a dissenting opinion and they must state their own individual opinions in written form”. At the same time, the 5th paragraph of the same article states that “each judge shall be empowered to state an individual opinion/viewpoint on the act adopted by the Constitutional Court in written form”. In addition, the 1st paragraph of the Article 33 prescribes that “a decision made by the Constitutional Court together with motivations, dissenting and concurring (personal viewpoints) shall be published in an official gazette (Държавен вестник) within 5 days after their adoption”. Consequently, they are made public.

However, the Court’s Rules do not specify what is the difference between “dissenting opinion” and “written individual opinion/viewpoint”, but, in any way, it is possible to define these two notions. Dissenting opinions of the Constitutional judges are of the individual or collective nature, which can be attached to a specific decision. Each judge is free to vote at his/her own discretion and with inner conviction either “for” or “against” the decision or ruling (resolution). For the Bulgarian Constitutional Court a special opinion expresses an opinion counter to the opinion of majority. The judge who opposed a decision or ruling (resolution) must deliver written reasoning for his rejection of the Court’s given act only in cases when voting on a decision or ruling (resolution) is open. Opinions delivered by the constitutional judges are individual and possible acts which are attached to the decisions in cases when a judge supports the majority’s opinion, but believes that additional considerations different from those reasons which were accepted by the majority could be put forward for further substantiating the dispositive.

Drawing up special/dissenting opinions in written form is mandatory and according to the Bulgarian legislation, it should be published with the Court’s decision. Initially, in the first years after the Constitutional court has been established many of the judges filed dissenting opinions on almost every decision of the Court thinking it was natural. From theoretical point of view, it can be justified since conflicting opinions provide fertile soil for theoretical discussions and to some extent they enrich constitutional studies. Unfortunately, the current developments in Bulgaria are not favorable for development of the right of a constitutional judge to express his special opinion. Hence, regrettably dissenting opinions are unable to achieve their practical objectives for the benefit of public.
Not infrequently, the special opinions are being expressed inaccurately and as professor Zhivko Stalev (former chair of the Constitutional Court of Bulgaria) pointed out “in an unacceptable manner”. As firmly established Bulgarian practice shows, the special opinion is actually a discussion on the majority opinion delivered. Dissenting opinions do not provide arguments for development a reasonable answer to the complaint submitted to the Court. A special opinion should be worded in a manner as if it were a decision on a case of its author if he were to be the only adjudicator of the case. Polemics with the majority opinion undermines reputation and authority of the Constitutional Court. Therefore, it should be avoided. Sometimes public opinion through mass media gets largely oriented to the interest towards special opinions rather than decisions themselves adopted by the court majority which are binding for the state agencies, legal entities and citizens alike.

Perhaps it is high time we learnt and accepted the practice established in the French and Italian Constitutional Courts, where constitutional judges do not have right to express publicly their dissenting opinions. However, current political situation in Bulgaria and legal circumstances are not suitable for solution of the problem through adopting a new law.

The Constitutional Court should speak with one harmonized voice. When decision is made by the narrow majority, i.e. seven votes against the rest of five, it is clear that in this and similar cases the prestige of a judge faces threat and weight of the decisions may be lost that is utterly undesirable for the court as it diminishes the importance and the role of the constitutional justice.

**LITERATURE:**

B. Balamezov, Конституционен Съдб СОФИ-Р, София, 1999; pp.81-81
Dz. Stalev, N. Nenovsکy, Конституционният съд и правното действие на неговите решения, Сibi, 1996; pp.117-118
Dz. Stalev, Същност на Конституционния съд, Юридически свят, №1, 2001; pp. 11-27.
The suggested topic for discussion is in my view an actual, disputed and very interesting one.

Taking into consideration the fact that the Constitutional Court of the Republic of Moldova is not part of the system of common courts of the country and in accordance with the Constitution (Article 134) it is the single organ of constitutional jurisdiction, in my presentation I will focus basically on the role and place of dissenting opinions of Constitutional Courts' judges.

The institute of dissenting opinion is a peculiar institute of law. Special opinion is a vivid confirmation that there are diverse opinions among judges while interpreting the law. It is without question a guarantor of the independence, responsibility and independence of Constitutional Court judges.

The institution of dissenting opinion of judges is established by law or recognised in practice in many, if not in the majority of countries having constitutional justice. A given prescription is also enshrined in the second part of Article 45 of the Convention on Human Rights and Fundamental Freedoms, which stipulates that any judge should have the right to present a separate opinion, if a decision does not express wholly or partly, the unanimous opinion of judges.

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In some places, dissenting opinion is published together with the constitutional court decision, while in others it is presented as a personal summary in the text of the decision’s motivational segment. Yet, in some quite civilized countries this public institution does not exist at all.

This fact can be explained partially by the fear that a judge’s special opinion expressed publicly could disrupt the authority of the instance’s decision, and disclose the secrets of the deliberations room as well as the voting results. Emphasis should also be placed on maintaining a cautious approach to dissenting opinion as such. As some critics say, inasmuch as dissenting opinion undermines the impression of a judicial body’s solidarity, its number should be reduced. However, if it is still filed, then it should always be presented as a judge’s personal view and not as a consolidated position of a minority of judges. Hence, there is the rejection of joint opinions. When a dissenting opinion filed by one judge is attached to the Constitutional Court’s decision, we have to speculate whether he had been alone or was supported by some of his colleagues when deciding on a case. Obviously, a special opinion is considered a private matter for a judge. It is not viewed as an authoritative source for a doctrine which will be able to have some impact on the court’s practice in the future.

The authority of a constitutional court’s decision, as we view it, is not based on the number of judges voting in favour or against it. It is assessed on entirely different grounds, including the quality of a decision itself, its validity, persuasiveness and fairness, as well as its acceptability for popular and legal minds and so on. Clearly, the arguments in favour of any decision have different significance and weight.

The existence or non-existence of the institution of special opinion results largely from the country’s legal tradition, and in our opinion its efforts to strengthen the right to express a dissenting opinion.

A constitutional judge’s special opinion is a personal opinion (legal position) of a judge participating in court proceedings, which is expressed publicly and differs from the court’s final decision made on the plenary session. It is the right of the minority to express a different point of view and to propose another decision. The fact that constitutional court judges argue and have a dissenting view about a case’s resolution is normal and reflects the nature of constitutional justice. Constitutional judges deal exclusively with issues of law. Unlike other judges who must apply the norms of a law produced by legislators in standard situations, constitutional courts evaluate disputable provisions using higher criteria, that is, from the perspective of their compliance with constitutional provisions, applying principal considerations. The court acts in the sphere of subjective assessment, so-called “prescriptive thoughts” about legal rights founded on certain principles, norms and values. This complicates and limits the search and motivation of arguments which would justify the court’s decision and make it more convincing and authoritative.
The right to a dissenting opinion protects the reputation of a judge. It is also a strong professional incentive and psychological guarantee that allows a judge to enjoy personal freedom and independence, and to be aware of his decision’s significance and his responsibility for his choice.

Clearly, expressing and defending one’s personal opinion is an emotional and psychologically tough mission – always a serious inner conflict. Defeating one’s doubts is hard when left alone in the minority among exceptionally high-qualified colleagues.

Of course, special opinion is the last option for a judge when the price of a solution is high, when internal compromise is impossible, and while conviction in a judicial mistake is at its maximum. After all, the principles and values in need of vigorous verbal protection are at stake and, moreover, there is simply no other way left. However, if a court’s position has strong reasoning, a judge’s dissenting opinion may reinforce it by demonstrating that a court has taken into account and assessed the entire spectrum of controversial questions and doubts.

However, an alternative yet correct and acceptable version of the solution can be substantiated in special opinion. Judges also appeal by special opinions to their colleagues. Despite the court’s final decision, the possibility of its revision by a judge may not be ruled out if there are new conditions and circumstances available or if a judge’s position has been taken into account in new cases. Such examples have been observed in constitutional court practice in cases when the legislator’s position coincided with the special opinion, resulting in an amendment to the disputed norm recognised as constitutional by the judge.

As mentioned above, the right to special opinion is a highly controversial issue. The key issue is to determine the level of accessibility of dissenting opinions.

Some authors of scientific research on this institution state that there are four options (models), namely – complete closure (secrecy), the uncertainty model, the partial accessibility model and the complete openness model (publicity).

The most liberal option is the complete (universal) openness model which has been implemented merely in the practice of constitutional proceedings.

Undoubtedly, the judge’s right to publicity expresses his special opinion is directly linked to the basic freedoms of expression and speech, and the inadmissibility of one’s coercion to waive his right to express his personal opinions and beliefs. These freedoms acquire great values in court practice, as justice is based on consciousness and reasonableness, a judge’s personal and independent evaluation, his inner convictions and on a judge’s strictly determined intransigent sense. Any external influence, any blind compliance with an authority and majority opinion, as well as conformism, may lead to the absence of freedom and the loss of independence as often happens in everyday life.
Considering the Convention on Human Rights and Fundamental Freedoms’ Article 10 (Part 2) and similar norms enshrined in the constitutions of various countries, it is necessary to determine the scope or limits of a judge’s right to publish and disseminate his dissenting opinion. In our view, it is necessary to seek these limits, as in the course of exercising the right to disseminate a dissenting opinion it is important to take into account such a public interest as “securing judge’s authority and impartiality”.

Considering the “restrictions ... needed in a democratic society” it is inadmissible to use special opinions for political announcements, as by virtue of the imperative requirements of law, judges of the Constitutional Court should remain apolitical.

It is also important to remember that limits to the right to express and disseminate dissenting opinions are also linked to and result from the need to “prevent the spread of information obtained confidentially.”

It is inadmissible to reveal what was going on in the deliberations room via special opinion, how judges reasoned or what positions they took. This information is confidential and is covered by a legal regime for official discretion.

The legislations of most countries on organising and operating constitutional courts regulate the issue of a constitutional judge’s right to file a dissenting opinion.

Moldovan Constitutional Court judges have their right to a dissenting opinion, as well.

Hence, according to Article 67 of the Law on Constitutional Jurisdiction, a Constitutional Court judge disagreeing with the adopted regulation or resolution has the right to express his /her dissenting opinion in written form. The judge’s special opinion, upon his /her request, is attached to the adopted act (regulation or resolution).

Considering the essence of the given norm, the court is not bound to present a dissenting opinion upon rendering its final decision since the Law on the Constitutional Court (articles 26 and 27) requires it to publish decisions in the Official Monitor (Gazette) within 10 days from their adoption. A judge’s dissenting opinion is attached to the decision upon his /her request.

However, considering the Moldovan Constitutional Court’s practice, dissenting opinions of judges are simultaneously published together with the Constitutional Court’s decisions (regulations or resolutions).

It is not a judge’s obligation to make his opinion public – it is rather his right. However, Moldovan constitutional judges do not often exercise this right. As figures show, there were filed 68 dissenting opinions from 1995-2010, out of which 46 refer to regulations, 10 to opinions and the remaining 12 to decisions.

These figures reveal that Constitutional Court judges file special opinions even when they disagree with the court’s rulings although the Law of the Constitutional Jurisdiction
of the Republic of Moldova (Article 67) stipulates that a judge is empowered to express his special opinion only in case of disagreement with the court’s findings and decisions.

This issue triggers disputes. From our point of view, this is a gap in legislation. In our court’s practice, when the court refuses to hear an appeal on the substance of a decision, it is issuing a reasoned ruling on inadmissibility which is also a court’s act and has no less potential for discords.

In conclusion, I would like to note that, in our view, the right to special opinion individualizes the position of a judge. It also recognizes him as an autonomous and responsible person in the body of constitutional jurisdiction, gives meaningful sense to his personal decision and provides him with the rights equal to those of the majority of judges. Dissenting opinions should not be underestimated.
It is not always possible to achieve consensus and unanimity while deciding on any matter in a committee or a group. To take different points of view into consideration is one of the most important practices in the process of decision making and it is very helpful in the development of the democratic reconciliation.

When this issue is considered in terms of law, we encounter with the concepts of dissenting and concurring opinions. The concept of dissenting opinion and concurring opinion may be briefly defined as a democratic mechanism reflecting the thoughts of the ones who fall outside the majority vote on any subject.

Some argue that decisions should not contain dissenting or minority votes. In this regard, it has been put forward that minority views should not be included in judgments, should not published and should not be declared on the grounds that their publication and declaration affect trust to the judiciary and have influence on its decisions in a negative way and that they do not conform to the supremacy of the judiciary. According to this view, on a similar case, a dissenting vote can turn into a majority vote with when the composition of any chamber or bench change. If that happens in a very short time, there is a possibility that the discussions on critical decisions of the Constitutional Court will decrease its reliability.

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1 The presentation was delivered at the Black Sea Regional Conference on the Importance of Dissenting and Concurring Opinions in the Development of Judicial Review, organised by the Constitutional Court of Georgia in cooperation with the Venice Commission of the Council of Europe and the German Society for Technical Cooperation (GTZ), September 17-18, 2010, in Batumi, Georgia.

In spite of these negative approaches there is another approach to dissenting opinions. According to this approach, if all members of any chamber or bench do not share the same opinion, different opinions should be put forth in their decisions\(^3\). The second approach is generally accepted as a common practice in judicial decisions.

It may be seen that certain decisions of committees or groups on the same matter change in the course of time. Consequently, the minority opinions may become majority opinion. Even though this situation can be evaluated as if it is an institutional inconsistency or contradiction at the first sight, in fact it is an indication of its contribution to the institutional transformation and development of the dissenting or decomposed views\(^4\).

As it is known, it is not compatible with the human nature that expression of opinions is confined into certain patterns in a democratic society. Dissenting votes, as a procedural matter and as a democratic concept which reflects the value judgments of the ones falling outside the majority on a subject, are not only a form of the freedom of expression but also they contribute a good functioning of an court. From that point of view, they have a very important function in the formation of judgments of any court. Courts generally take their decisions with a majority vote. When the dissenting opinions and their reasoning are included in the decisions, the subject shall be discussed deeply from the point of dissenting opinions and possibly they will have impact on the discussions and evaluation of court decisions in the future.

The concepts of dissenting votes and concurring opinions, which are of high importance legally and politically, only have a meaning with the majority votes and reasoning of the judgment. Contrary to the decisions of the Constitutional Court taken unanimously, the impacts of the result in the judgments based on the majority votes, can encounter different interpretations mostly, in respect of the number of the dissenting votes taken and the reasons they are based on. Dissenting votes can put forth different points of view, regarding to cases on which no reconciliation is achieved and which need to be discussed in the future as well.

Dissenting votes may contribute to the concrete scientific discussions in the future. It is also possible that a different resolution can be adopted after the discussion of the question, which is put forth in a dissenting vote and in a judgment. Such a result has certainly a great importance in terms of the dynamism and development of law.

Since in bench courts, each member has to have a full evaluation of the case, the judgments of the Constitutional Court contain evaluation of all of its members\(^5\). Evaluation of

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\(^3\) Mustafa GÖNÜL, Dissenting Opinion on Turkish Constitutional Justice, Public Administration Digest, Volume 28, June 1995, No.2, p.11.

\(^4\) Mustafa GÖNÜL, mentioned article, p.11.

The Role of Dissenting and Concurring Opinions in the Turkish Practice

the members having different opinions is reflected in the dissenting opinions⁶. For this reason, we can conclude that the judgments should contain dissenting opinions.

I would like to mention the legal bases of the dissenting votes in the Turkish Constitutional Court judgments:

First of all, it should be pointed that the institution of dissenting votes is a procedural matter. It obtains its basis from provisions of laws⁷. Positive legal basis of the dissenting votes exercised in the Turkish Constitutional Justice is the 53rd Article of the Act on the Foundation and Proceedings of the Constitutional Court, numbered 2949. According to this rule, “The judgments of the Constitutional Court are written with their reasoning. The judgments are signed by the President and the Members who take part in the jurisdiction and examination. The ones who oppose the judgment shall explain their reasoning in the judgment. The judgments are notified to the ones concerned as such.”

On the other hand, in the first paragraph of the 12th Article of the Rules of the Constitutional Court, it is provided that “The ones who take part in the judgment, the ones who remain in the minority and the summary of the judgment are specified with minutes.” As for the fifth paragraph, in parallel with the 53rd Article of the Act numbered 2949, it is stated that “The ones who remain in the minority indicate the bases of their opinions in their dissenting opinions which they may draw up together or separately within one month as from the date on which the draft decision is put on the agenda to be read.” In order to draw up the decision with its reasoning, a period of one month has been fixed since there were some delays in the past in drafting judgments with their dissenting opinions.

It is observed that some opinions in the dissenting votes of the judgments of the Turkish Constitutional Court on various cases have been adopted later by the majority of the members and they turned into majority vote. When generally considered, it can be stated that this change and diversity arising in judgments incline towards the fundamental rights and universal standards in terms of the Turkish Constitutional Court. At that point, I would like mention some examples of dissenting opinions of the Turkish Constitutional Court judgments. Later on, they have been shared with other members of the Court and become majority opinions.

DECISIONS ON WARNING TO THE POLITICAL PARTIES: At the beginning of 2000, there was difference of thoughts among the members of the court. This difference was reflected in the dissenting opinions of the judgments on dissolution of political parties.

Articles 68 and 69 of the Constitution have been amended in 2001 and some provisions have been brought on establishment, activities and dissolution of political parties. Those

⁶ Mustafa ALP, So-called (Observable) Reasoning in Court Decisions from Point of Constitutional Court, Prof Dr. Tevfik Birsel'e Armağan, İzmir 2001, sh.241.
⁷ Mustafa GÖNÜL, Dissenting Opinion on Turkish Constitutional Justice, Public Administration Digest, Volume 28, June 1995, No.2, p.11.
provisions may be regarded as the rules applied in a democratic social state. According to those provisions, any political party shall be dissolved if its internal regulation and program are contrary to Article 68/4 of the Constitution, if it has become a centre for the execution of activities violating the provisions of the same Article, if it accepts financial assistance from foreign states, international institutions and persons and corporate bodies.

In Article 104 of the Act on Political Parties, it was stated that if political parties are in conflict with the provisions of that law, they will be given warning by the Constitutional Court. If the conflict is not removed within 6 month, an action against that political party shall be brought to the Constitutional Court in order to be dissolved.

At that time, the members who used dissenting votes on warning decisions against political parties put forward following thoughts regarding the subject: There is no provision on dissolution of political parties in the Constitution if they are in conflict with Article 104 of the Law on Political Parties. Since there is no clear provision in the Constitution on dissolution of political parties, they may not be dissolved due to reasons counted in the Law. It is doubtless that the legislator can introduce another sanction other than dissolution so that the political parties will act in accordance with the statutory provisions provided for in Article 104.

The thoughts expressed in dissenting opinions have been discussed intensely in the doctrine. With the effect of those discussions, lawmaker has amended the provisions of Article 104 in 2003. Under the new provisions, the political party that does not observe warning of the Constitutional Court shall not be dissolved, but they will be deprived of state aid.

Therefore, it can be clearly observed that the thoughts expressed in the dissenting opinions pushed the legislator to amend provisions on dissolution of political parties. That is one of the important effects of dissenting opinions on the Turkish Political Parties Law.

THE ANNUAL INCREASE ON THE RENT TO BE APPLIED TO IMMOVABLES: In 2000, a provisional Article was added to the Act on Real Estate Rents. Under that Article, the rents that are applied to immovable shall not be increased more than %25 in the year 2000 and not more than % 10 in the year 2001.

A local court applied to the Constitutional Court in order the phrase “%25 in the year 2000” of the provisional Article to be annulled. It alleged that determination of a maximum increase in immovable rents by a provision of Law is not compatible with the principle of a social state governed by the rule of law. The local court also considered that it has got negative results towards owners of immovable. I would like to mention that during those years, in Turkey the inflation rate was quite high.

The Constitutional Court did not find the mentioned provision unconstitutional. According to the Court, amount of immovable rents is continuously increasing and it affected economic and social life in a negative way. That is why limitation of immovable rents has been introduced in order to ensure the economic balance between owner and renter. The
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rents of immovable are not only related to obligational law but also it is related to public law. If any measure is taken by the State, because of the scarcity of immovable, their rent shall increase continuously and tremendously. Since immovable rents are a social issue, the State may determine a maximum rate for the immovable rent. Therefore, the Constitutional Court rejected the application and did not find any unconstitutionality in the provision.

In the dissenting opinions, it is stated that the freedom of contract is formulated in Article 48 of the Constitution and it is among the fundamental rights and liberties. The freedom of private enterprise is accorded both to the real people individually and collectively and to the legal people. In Article 35 of the Constitution, it has been accepted that everybody has property and inheritance rights. In spite of those provisions, it can not be acceptable that the limitation at the rate of % 25 introduced by the provisional Article. That is not aimed to public interest since it had disadvantages for the owners of immovable and advantages for the renters. So that provision includes a regulation contrary to the freedom of contract.

After one year, the Court reviewed a request on limitation at the rate of %10 annually in the same regulation. In the new judgment it has almost based its reasoning on dissenting opinions of the mentioned judgment: Modern democracies are the regimes in which fundamental rights and liberties are ensured to a largest extent. It cannot be acceptable that provisions which limit the fundamental rights and liberties in a broad sense or make them unavailable. Since it has touched the essence of fundamental rights, it is not compatible with the requirements of a democratic social order. Therefore, the limitation introduced for the immovable rent has gone beyond its purpose and brought forth the conclusion that a just balance which should exist between the landlord and the tenant has been violated to the disadvantage of the tenant to the extent that it cannot be described as acceptable, reasonable in a democratic society. In this case, it is not compatible with the requirements of a democratic social order.

Therefore, it can easily be observed that the thoughts expressed in the dissenting opinion in the previous judgment have turned into a court decision on a later date.

I would like to mention some numbers on dissenting opinions of the Turkish Constitutional Court judgments. When the numerical and proportional distribution of the dissenting votes in the judgments of Constitutional Court between 2008 and 2010 is examined, it is seen that 257 judgments out of the total 403 judgments have been rendered unanimously; in return, at least one dissenting vote is available in 146 judgments. And this shows that unanimity has not been reached in %65 of the judgments. In the years before 2008, the number of judgments rendered unanimously is less than the judgments rendered by a majority vote. Moreover, it is obviously seen that judgments by a unanimous vote are not related to the problematic issues in the practice and doctrine of the Turkish Constitutional Justice.

In my opinion, the high number of the judgments with dissenting opinions shows that the cases before the court have been broadly discussed.
More examples can be given on dissenting opinions of the Turkish Constitutional Court judgments. In spite of the negative thoughts on publication of dissenting opinions, their positive effects on constitutional justice cannot be denied. There is concrete data indicating the positive contributions of dissenting votes and different thoughts to the development of the Constitutional Justice in terms of the Turkish Constitutional Law. I am pleased that development is inclined towards the state governed by the rule of law, human rights and universal values.
The institute of special opinion in the constitutional control system is regarded in two contrasting ways. Supporters of the “positive approach” assert that special opinions maintain the independence of a Constitutional Court judge, as well as the versatile, comprehensive consideration of a particular case. The “negative approach” in regards to the issuance of special opinions is based on the notion that special opinions as a whole undermine the authority of constitutional court decisions and negatively affect the efficiency of constitutional control.

The role of special opinions in the legal system directly depends on the effect of constitutional court decisions on the legal system as a whole. The Constitutional Court’s decisions have a depersonalised, imperative character, and, to a certain degree, influence legal relationships. The Constitutional Court’s decisions do not reflect results of voting, since voting is made on behalf of all of the court’s members. Unlike a court decision, the special opinion of an individual judge has no legal power. However, special opinion allows a particular case to be approached from a different perspective. Although special opinion is not used in the decisions of general courts and in law enforcement practice, it indirectly influences the legal system as a whole.
In constitutional law, special opinion is classified taking into account its relationship with the common decision. There are two types of special opinions:

- a judge disagreeing with the decision expresses his special opinion with a relevant argumentation in the form of a special document;
- a judge agreeing with the position of the court majority on the decision’s substance expresses his own opinion about its argumentation.

Public expression of special opinions is not always allowed. For example, in the constitutional control systems of Austria, Belgium, Ireland and Italy, special opinions are not expressed publicly. However, European constitutional courts give preference to the institute of special opinion, and make it legally binding to publish them, such as in Germany, Spain, Portugal, Russia, Slovenia and Azerbaijan.

According to Article 77 of the Law of the Azerbaijan Republic “On the Constitutional Court”, dated October, 21, 1997, a Constitutional Court judge is granted the right to issue a special opinion and to attach it to the court’s main decision. The new Law “On the Constitutional Court”, dated December 23, 2003, specifically defined the obligation of promulgating a judge’s special opinion. Article 64 stipulates that in the case of a disagreement with the descriptive, motivational or resolution section of the Constitutional Court’s decision, a Constitutional Court judge may issue a written special opinion. Thus, the special opinion should be published alongside the Constitutional Court’s decision.

Therefore, it is possible to conclude that a Constitutional Court judge has the right to issue a special opinion concerning the decision’s descriptive and motivational sections. However, the law does not limit judges in terms of the purpose for issuing special opinions, i.e. special opinions can be issued in support of the Constitutional Court’s common decision, or express disagreement with the general opinion.

The issuance of special opinions is always conjugated with the divergence of the judges’ opinions. However, special opinions should not belittle or put to question the entire validity and justice of the Constitutional Court’s decisions. Special opinions basically express the position of an individual judge or a group of judges, but this opinion should not belittle the authority of the judges’ joint decision. Thus, the use of direct, unreasoned and open forms of criticism towards a court’s common decision is inexpedient in the judge’s special opinions.

A special opinion should be argumented. A judge, choosing an individual position on a particular case, should justify his reasoning and give an exhaustive explanation of his position. In the special opinion, the judge’s position should be presented taking into account the results of a legal investigation. In other words, the special opinion must be based on a legal investigation.

To a certain degree, special opinions are the result of special scientific research. Hence, if research is based on scientific methods, its results may advance jurisprudence. For ex-
ample, in his special opinion, a judge may explain certain terms, offer the most reasonable qualification to certain delicto relations, and express any typology or classification, etc.

An important question is the time when the special opinion is issued and publication. Azerbaijani legislation does not limit Constitutional Court judges by setting a time frame for issuing special opinions. However, as there is a requirement for the special opinion to be published together with the Constitutional Court’s decision, the special opinion should be issued before the promulgation of the court’s common decision. Taking into account the practice and requirements of the Internal Charter of the Azerbaijani Constitutional Court, the opportunity to issue a special opinion is announced when the court takes its common decision. According to Article 38, the special opinion should be given to the court within five days after the announcement of the Constitutional Court’s decision. This term is necessary to guarantee the special opinion’s timely promulgation.

A special opinion should not be confidential. Other judges and members of the court sanctioning the special opinion serve to increase the quality of the judicial deed. Openly discussing the special opinion, on one hand, will allow judges to familiarise themselves with an alternative opinion before taking a decision. On the other hand, it will allow the author of the special opinion to find supporters for his position and also substantially affect their position regarding the main decision.

We need to note here that the institute of special opinion has certainly received active dynamics in the Azerbaijani Constitutional Court’s practice in recent years. The court has been functioning since 1998, but the practice of applying special opinions is relatively new. Special opinions were issued individually, and also by groups of judges. However, there have been no cases of ties in constitutional jurisprudence when an equal number of judges expressed different opinions.

Such prospective procedural complexities in the issuance of special opinions highlight the importance of a remedially procedural regulation of the mechanism for issuing special opinions. There is no certain required order for issuing and publishing special opinions in European constitutional legislation. However, general practice underlines several basic requirements applicable to special opinions. These requirements include the individual right of each judge to issue a special opinion, the obligatory acknowledgement of the presence of a special opinion during the announcement of the court’s decision, and its public promulgation.