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ABUSIVE JUDICIAL REVIEW:
COURTS AGAINST DEMOCRACY

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ABUSIVE JUDICIAL REVIEW: COURTS AGAINST DEMOCRACY***

Both in the United States and around the world, courts are generally conceptualized as the last line of defense for the liberal democratic constitutional order. But this Article shows that it is not uncommon for judges to issue decisions that intentionally attack the core of electoral democracy. Courts around the world, for example, have legitimated antidemocratic laws and practices, banned opposition parties to constrict the electoral sphere, eliminated presidential term limits, and repressed opposition-held legislatures. We call this practice abusive judicial review. Would-be authoritarians at times seek to capture courts and deploy them in abusive ways as part of a broader project of democratic erosion, because courts often enjoy legitimacy advantages that make their antidemocratic moves harder to detect and respond to both domestically and internationally. This paper gives examples of abusive judicial review from around the world, explores potential responses both in domestic constitutional design and international law, and asks whether abusive judicial review is a potential threat in the United States.

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INTRODUCTION

Many in the United States fear that the country is living a precarious moment, and is potentially in danger of democratic breakdown.[1] Constitutional democracy is in fact under threat worldwide, with leaders across a range of countries leading efforts to erode their liberal democratic orders.[2] As many have noted, a major hallmark of recent attacks on democracy is its legalist tinge: Rather than using extra-legal mechanisms such as military coups, the new authoritarians rely heavily on formal and informal constitutional change, as well as ordinary legal mechanisms, to remake the constitutional order in ways that rig the electoral game in their favor.[3] Several prominent recent books have argued that the United States is in many ways as vulnerable as many other countries to this wave of democratic erosion, and in fact that warning signs seen abroad are also present here.[4]

Both inside and outside of the United States, courts are often seen as one of the main defenses against the threat posed by the new authoritarians. Judges are increasingly being called upon to intervene to protect democracy or to engage in a form of democratic hedging.[5] Not every effort at democratic hedging by courts will succeed. But constitutional courts can, and do, play an important role in protecting democracy from the threat of democratic backsliding.[6]

In the United States, initial optimism that the Supreme Court, and federal courts more broadly, would play such a role has faded with time. In issuing decisions such as *Trump v. Hawaii*,[7] where the

1 *See* CASS R. SUNSTEIN, CAN IT HAPPEN HERE? AUTHORITARIANISM IN AMERICA (Cass R. Sunstein ed., 2018) (containing a number of essays on whether authoritarianism is a realistic threat in the United States); TOM GINSBURG & AZIZ Z. HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY 1-5 (2018); STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE 1 (2018); Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78, 80 (2018).

2 *See, e.g.*, Annabelle Chapman, *Pluralism Under Attack: The Assault on Press Freedom in Poland*, FREEDOM HOUSE, June 2017, at 2; Andrew Byrne, *Hungarian PM's Media Clampdown Points to the Future for Poland*, FIN. TIMES (Jan. 19, 2016), https://www.ft.com/content/15899580-b9eb-11e5-bf7e-8a339b6f2164 [https://perma. cc/C7M3-36C7]; Editorial, *The Guardian View on Poland and Hungary: Heading the Wrong Way*, GUARDIAN (July 18, 2017, 3:15 PM), https://www.theguardian.com/ commentisfree/2017/jul/18/the-guardian-view-on-poland-and-hungary-heading-the- wrong-way [https://perma.cc/97TU-9C26] [hereinafter *Heading the Wrong Way*]; Stefani Weiss, *Rule of Law in Poland and Hundary: "Our Fundamental Values are Under Attack,"* BERTELSMANN-STIFTUNG (Sept. 20, 2017), https://www.bertelsmann- stiftung.de/en/topics/aktuelle-meldungen/2017/september/poland-and-hungary-our- fundamental-values-are-under-attack/ [https://perma.cc/83Y5-8FZY] (discussing how the European Union should respond to Poland and Hungary's violations of core principles of EU law).

3 *See* David Landau, *Abusive Constitutionalism*, 47 UC DAVIS L. REV. 189, 191 (2013) [hereinafter *Abusive Constitutionalism*]; Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545, 560-62 (2018); Ozan O. Varol, *Stealth Authoritarianism*, 100 IOWA L. REV. 1673, 1676-77 (2015).

4 *See* GINSBURG & HUQ, *supra* note 1, at 1-5; LEVITSKY & ZIBLATT, *supra* note 1, at 1-10.

5 "Democratic hedging" refers to the use of courts "as a hedge against excessive concentration of power." Samuel Issacharoff, *Constitutional Courts and Democratic Hedging*, 99 GEO. L.J. 961, 1002 (2011); *see also* Sujit Choudhry, "*He Had a Mandate": The South African Constitutional Court and the African National Congress in a Dominant Party Democracy*, 2 CONST. CT. REV. 1, 2-3 (2009). *See generally* SAMUEL ISSACHAROFF, FRAGILE DEMOCRACIES: CONTESTED POWER IN THE ERA OF CONSTITUTIONAL COURTS (2015) (discussing the role of legal institutions in constitutional democracy).

6 *See* ISSACHAROFF, *supra* note 5, at 9-11; Rosalind Dixon & David Landau, *Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment*, 13 INT'L J. CONST. L. 606, 612-13 (2015) [hereinafter *Transnational Constitutionalism*]; David Landau & Rosalind Dixon, *Constraining Constitutional Change*, 50 WAKE FOREST L. REV. 859, 860-62 (2015) [hereinafter *Constraining Constitutional Change*].

7 138 S. Ct. 2392 (2018).

Supreme Court upheld President Trump's travel ban, critics argue that the Court abdicated its responsibility to check a dangerously overreaching president and affirm constitutional values.[8] There is increasing concern among similar critics that the Court will not step in to prevent other acts of potential executive aggrandizement, such as Trump's recent emergency declaration to build a wall on the Mexican border.[9]

Based on comparative evidence, this Article shows that the fear espoused by critics of the Supreme Court — that it might stand by passively as democracy is dismantled — is a reasonable one. But the prospect of courts standing idly by in the face of an antidemocratic threat is not actually the worst-case scenario.

In fact, across a range of countries, would-be authoritarians have fashioned courts into weapons for, rather than against, abusive constitutional change. In some cases, courts have upheld and thus legitimated regime actions that helped actors consolidate power, undermine the opposition, and tilt the electoral playing field heavily in their favor.[10] In other cases, they have gone further and actively attacked democracy by, for example, banning opposition parties, eliminating presidential term limits, and repressing opposition-held institutions.[11] We label courts' intentional attacks on the core of electoral democracy "abusive judicial review," and we argue that it is an important but undertheorized aspect of projects of democratic erosion.

Regimes turn to courts to carry out their dirty work because, in doing so, they benefit from the associations that judicial review has with democratic constitutional traditions and the rule of law.[12] Having a court, rather than a political actor, undertake an antidemocratic measure may sometimes make the true purpose of the measure harder to detect, and at any rate it may dampen both domestic and international opposition. The nature of the practice of abusive judicial review, which masquerades as a legitimate exercise of an institution that is now almost-universally promoted, makes the practice challenging to prevent and respond to. Not all instances of abusive review will succeed, and not all courts will (willingly) engage in the practice. But, we suggest, the practice is likely to be a significant part of the authoritarian toolkit going forward.

The remainder of the Article is divided into seven parts, following this introduction. Part I draws out our definition of abusive judicial review — constitutional interpretation by judges that intentionally attacks the minimum core of electoral democracy — and situates it in the broader literature on democratic erosion and antidemocratic change. Part II explains the logic of abusive judicial review as a regime strategy; it emphasizes why and how regimes sometimes rely on courts to carry

8 *See, e.g.*, Adam Edelman, *Democrats, Civil Rights Groups Slam Supreme Court Ruling on Travel Ban*, NBC NEWS (June 26, 2018, 9:12 AM), https://www. nbcnews.com/politics/supreme-court/democrats-civil-rights-groups-slam-supreme- court-ruling-travel-ban-n886626 [https://perma.cc/J8XQ-UH57] (collecting criticism of the decisions from various political and social groups).

9 *See, e.g.*, Emily Stewart, *Why Trump Thinks a National Emergency Will Get Him His Border Wall*, VOX (Feb. 15, 2019, 11:31 AM), https://www.vox.com/policy-and- politics/2019/1/8/18172749/trump-national-emergency-government-shutdown-wall [https://perma.cc/X98R-4YAB] (quoting various scholars who think the declaration would likely be upheld by the Supreme Court).

10 *See infra* Part III.A (defining and giving examples of "weak" abusive judicial review).

11 *See infra* Part III.B (defining and giving examples of "strong" abusive judicial review).

12 *See infra* Part II.

out antidemocratic forms of constitutional change. Part III develops a basic typology of abusive judicial review, distinguishing two key forms of the phenomenon: a "weak" form where courts simply uphold and legitimate authoritarian moves, and a "strong" form where they actively work to dismantle democracy. Part IV gives two detailed examples of abusive judicial review in action: one a cross-national study of recent judicial efforts to loosen or eliminate presidential term limits in Latin America and Africa, and the other a study of Venezuela, where the Venezuelan Supreme Court in a series of decisions nullified the power of the national legislature after the opposition won overwhelming control of it in 2015.

Part V draws on these examples to explore the limits of the strategy of abusive judicial review, and the contexts in which it is likely to be successful or unsuccessful, while Part VI explores potential responses in both domestic constitutional design and transnational or international practice. On the first point, we argue that courts should be better designed to prevent regime capture in contexts where abusive judicial review is a significant threat. On the second, we consider ways for the international community to take a more skeptical, legal realist perspective on some high court decisions.

Finally, the Conclusion asks whether abusive judicial review is a realistic threat in the United States. We argue that there are at least hints of the weak form in the Court's consistent refusal to hear partisan gerrymandering claims and related issues,[13] and routes through which the strong form could at some point emerge, for instance centered around the "weaponization" of the First Amendment.[14] The United States in some ways would be a fertile ground for abusive judicial review: There is a history of judicial legitimacy on which authoritarians could draw, and the formal rules do not make the judiciary especially difficult to capture in comparative terms. At this point, the major impediment to review of this kind in the United States would seem to lie in informal norms, including norms of legal professionalism on the part of federal judges, and political norms of respect for the independence of the federal judiciary. But there are also signs that informal norms of this kind may be eroding.

I. DEFINING AND SITUATING ABUSIVE JUDICIAL REVIEW

It is by now well known that many countries around the world have experienced an erosion in their liberal democratic constitutional order.[15] Indeed, the topic has become a central preoccupa-

13 *See, e.g.*, Gill v. Whitford, 138 S. Ct. 1916, 1922-23 (2018) (dismissing a partisan gerrymandering claim on the grounds of lack of standing).

14 *See, e.g.*, Janus v. Am. Fed'n of State, City, & Mun. Emp., 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting) (accusing the majority of "weaponizing" the First Amendment).

15 *See, e.g.*, Daniele Albertazzi & Sean Mueller, *Populism and Liberal Democracy: Populists in Government in Austria, Italy, Poland and*

tion of current comparative constitutional law scholarship. Would-be autocrats have a number of tools to carry out projects of democratic erosion. The tools of formal constitutional change, both amendment and replacement, have been important across many countries both to consolidate political power and to weaken checks on it.[16] For example, in a number of Latin American countries, would-be authoritarian leaders have carried out constitutional amendments to loosen or abolish presidential term limits, allowing them to remain in power indefinitely.[17] In Turkey, the increasingly authoritarian Erdogan regime used a series of constitutional amendments both to strengthen presidential power and to allow the regime to pack the Constitutional Court of Turkey.[18] In countries including Venezuela, Ecuador, and Hungary, new leaders replaced existing constitutions entirely, in processes through which they had near total control, as a way to perpetuate the power of the regime and to marginalize the opposition.[19] In prior work, one of us has labelled this phenomenon "abusive constitutionalism," and jointly we have sought solutions to the problem.[20]

Formal constitutional change is also only one tool in a much broader authoritarian toolkit. Would-be authoritarian leaders can also carry out changes via informal mechanisms, or at the sub-constitutional level. They can pass new "cardinal" or "organic" laws that reorganize major institutions such as courts and ombudspersons in a notably less democratic or independent way,[21] or they can put pressure on courts to engage in forms of 'common law' interpretation that reduces the force of existing democratic constitutional constraints.[22] Or they may seek to achieve change via sub-constitutional means, for example by changing statutes governing the regulation and oversight of

Switzerland, 48 GOV'T & OPPOSITION 343, 345 (2013); David Landau, *Populist Constitutions*, 85 U. CHI. L. REV. 521, 521 (2018) [hereinafter *Populist Constitutions*]; Weiss, *supra* note 2; Nilüfer Göle, *Turkey is Undergoing a Radical Shift, from Pluralism to Islamic Populism*, HUFFINGTON POST (July 21, 2017, 1:13 PM), https://www.huffingtonpost.com/entry/turkey-coup-erdogan_us_ 596fcfcfe4b062ea5f8efa0f [https://perma.cc/F9V2-4PL5]; *Heading the Wrong Way*, *supra* note 2; Michaela Kollin, *The Rise of Stealth Authoritarianism in Cambodia*, DEMOCRATIC EROSION (Oct. 8, 2017), http://democratic-erosion.com/2017/10/08/the-rise-of-stealth-authoritarianism-in-cambodia/ [https://perma.cc/VH8A-NR5P]; Jan Surotchak & Daniel Twining, *The Fight Against European Populism Is Far from Over*, FOREIGN POL'Y (Feb. 1, 2018, 11:19 AM), http://foreignpolicy.com/2018/02/01/the-fight-against- european-populism-is-far-from-over/ [https://perma.cc/235A-JALA].

16 *See* Landau, *Abusive Constitutionalism*, *supra* note 3, at 191-92.

17 *See* David Landau, *Presidential Term Limits in Latin America: A Critical Analysis of the Migration of the Unconstitutional Constitutional Amendment Doctrine*, 12 LAW & ETHICS HUM. RTS. 225, 226 (2018) [hereinafter *Presidential Term Limits*].

18 *See* Hakki Tas, *Turkey — From Tutelary to Delegative Democracy*, 36 THIRD WORLD Q. 776, 788 (2015); Ozan O. Varol, Lucia Dalla Pellegrina & Nuno Garoupa, *An Empirical Analysis of Judicial Transformation in Turkey*, 65 AM. J. COMP. L. 187, 187 (2017); Steven A. Cook, *How Erdogan Made Turkey Authoritarian Again*, ATLANTIC (July 21, 2016), https://www.theatlantic.com/international/archive/2016/07/how-erdogan-made-turkey- authoritarian-again/492374/ [https://perma.cc/6YZK-DDSN]; Maria Haimeri, *The Turkish Constitutional Court Under the Amended Turkish Constitution*, VERFASSUNGSBLOG (Jan. 27, 2017), https://verfassungsblog.de/the-turkish-constitutional-court-under-the-amended- turkish-constitution/ [https://perma.cc/3MS7-HA33].

19 *See, e.g.*, Gabriel L. Negretto, *Authoritarian Constitution Making: The Role of the Military in Latin America*, *in* CONSTITUTIONS IN AUTHORITARIAN REGIMES 83 (Tom Ginsburg & Alberto Simpser eds., 2014); William Partlett, Opinion, *Hugo Chavez's Constitutional Legacy*, BROOKINGS (Mar. 14, 2013), https://www.brookings.edu/ opinions/hugo-chavezs-constitutional-legacy/ [https://perma.cc/B4QA-JQ5S]; NORWEGIAN HELSINKI COMM., DEMOCRACY AT STAKE IN HUNGARY: THE ORBÁN GOVERNMENT'S CONSTITUTIONAL REVOLUTION 5-9 (2012), https://www.nhc.no/content/uploads/2018/ 09/Rapport_1_12_web.pdf [https://perma.cc/SMA9-9ATQ].

20 *See* Dixon & Landau, *Transnational Constitutionalism*, *supra* note 6, at 606; Landau, *Abusive Constitutionalism*, *supra* note 3, at 189; Landau & Dixon, *Constraining Constitutional Change*, *supra* note 6, at 859.

21 *See, e.g.*, MIKLÓS BÁNKUTI ET AL., OPINION ON HUNGARY'S NEW CONSTITUTIONAL ORDER: AMICUS BRIEF FOR THE VENICE COMMISSION ON THE TRANSITIONAL PROVISIONS OF THE FUNDAMENTAL LAW AND THE KEY CARDINAL LAWS 4-7 (Gábor Halmai & Kim Lane Scheppele eds., 2012); *see also* William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1215-17 (2001).

22 See GINSBURG & HUQ, *supra* note 1, at 126-27 for a discussion on packing institutions.

the media, or by using existing legal tools, such as defamation laws and electoral registration rules, in selective ways to punish opposition to the regime and undermine independent elements of civil society.[23]

These tools often operate in an interdependent manner — efforts to undermine democracy in countries like Venezuela, Hungary, and Turkey seem to rely on a broad mix of them. Elsewhere, as in Poland, the route of formal constitutional change is closed off (because the ruling party lacks the votes to carry it out), but the regime is able to achieve similar ends by using other tools such as gaining control of the judiciary and passing new sub-constitutional legislation.[24]

What we emphasize here is the key role that courts sometimes play in advancing these anti-democratic projects. Our perspective is very different from the prevailing view, where domestic high courts are commonly conceptualized as one of the main defenses against abusive maneuvers, and for good reason. Constitutional courts can potentially conduct exercises of judicial review that will defend the constitutional rights of minority groups and ensure that political institutions do not overstep the boundaries of their power. And as we have argued in past work, courts can also exercise control over attempts to change or even replace the existing constitution, using tools such as the unconstitutional constitutional amendment doctrine.[25] In at least some cases, these tools can help act as a speed bump that will slow or otherwise hinder efforts at democratic erosion.

Existing scholarship takes quite different positions as to how readily courts can protect the liberal democratic order. Issacharoff, for example, while acknowledging the difficult political and legal tasks faced by courts in seeking to protect democracy, argues that they can nonetheless succeed in checking the monopolization of political power, and gives examples of successful tactics.[26] Choudhry also argues that courts can use various techniques to help prevent the consolidation of dominant party rule.[27]

Daly, in contrast, expresses more skepticism about whether courts can defend liberal democracy in these ways.[28] In past work, we have emphasized that the answers to these questions are likely contextual.[29] Courts are most likely to be successful when they are relatively strong and independent, and when political parties or civil society are sufficiently strong to support implementation of

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23 *See* Varol, *supra* note 3, at 1693-1707.

24 *See generally* Wojciech Sadurski, *How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding* (Sydney Law School Research Paper No. 18/01, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3103491 [hereinafter *How Democracy Dies (in Poland)*] (discussing political and legal changes in Polish constitutional politics after the victory of the populist Law and Justice party).

25 The unconstitutional constitutional amendment doctrine "holds that a constitutional amendment can itself be substantively unconstitutional under certain conditions." Landau, *Abusive Constitutionalism*, *supra* note 3, at 231.

26 *See* ISSACHAROFF, *supra* note 5.

27 *See* Choudhry, *supra* note 5, at 5-6.

28 *See* TOM GERALD DALY, THE ALCHEMISTS: QUESTIONING OUR FAITH IN COURTS AS DEMOCRACY-BUILDERS 1-2 (2017); Tom Gerald Daly, *The Alchemists*: *Courts as Democracy-Builders in Contemporary Thought*, 6 GLOBAL CONSTITUTIONALISM 101, 101 (2017); *see also* RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2004) (critiquing the view of courts as protectors of rights).

29 *See* Landau & Dixon, *Constraining Constitutional Change*, *supra* note 6, at 870.

court decisions. At any rate, the scholarly conversation to date has focused mainly on the ways in which courts might or might not be able to *protect* liberal democratic constitutionalism.

However, with a few notable exceptions, the existing literature has given less consideration to what we see as the also-common phenomenon of courts actively working to *undermine* the liberal democratic order. Some important work, most notably by Moustafa and Ginsburg, looks at the functions played by courts in fully authoritarian regimes, and shows they can play a central role in advancing various goals of authoritarian leaders.[30] But this question of maintaining an already authoritarian regime is distinct from the process of creating one.

Varol has noted ways in which courts can use existing legal tools (like defamation and money laundering laws) to carry out the agendas of would-be authoritarian actors trying to consolidate power and repress the opposition.[31] And some authors have carried out invaluable case studies of individual countries. For example, Sadurski has highlighted the role of the Constitutional Court in Poland both as an initial site of resistance to the abusive small "c" constitutional changes introduced by the Law and Justice party ("PiS"), and later, as a tool used by PiS to promote such change;[32] likewise, Sanchez Urribarri has conducted a detailed look at the utility of the Venezuelan Supreme Court to the regime there.[33]

What we supply here is a more general, systematic treatment of the phenomenon of courts as agents, rather than opponents, of antidemocratic constitutional change. As noted above, our definition of abusive judicial review is judicial review that intentionally undermines the minimum core of electoral democracy. We first define the two key elements of our definition — effect and intent. Then we explore the logic of abusive judicial review as a regime strategy.

A. Abusive Change and Effect on the Democratic Minimum Core

Labelling some subset of constitutional amendments and replacements "abusive" begs the obvious question of how to distinguish "abusive" forms of constitutional change from other forms. We have elsewhere defined "abusive" constitutional change as change that makes the constitutional order meaningfully less democratic than it was initially.[34] In other words, it moves on a spectrum towards authoritarianism, even if the resulting regime will often be "hybrid" or "competitive au-

30 *See* Tamir Moustafa & Tom Ginsburg, *Introduction: The Functions of Courts in Authoritarian Politics*, *in* RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES 1-2 (Tom Ginsburg & Tamir Moustafa eds., 2008).

31 *See* Varol, *supra* note 3, at 1687-1700, 1707-10.

32 *See* Sadurski, *How Democracy Dies (in Poland)*, *supra* note 24, at 18.

33 *See* Raul A. Sanchez Urribarri, *Courts Between Democracy and Hybrid Authoritarianism: Evidence from the Venezuelan Supreme Court*, 36 LAW & SOC. INQUIRY 854 (2011). With Yaniv Roznai, we recently explored similar dynamics in Honduras. *See* David Landau, Rosalind Dixon & Yaniv Roznai, *From an Unconstitutional Constitutional Amendment to an Unconstitutional Constitution? Lessons from Honduras*, 9 GLOBAL CONST. (forthcoming 2019) [hereinafter *Lessons from Honduras*].

34 *See* Landau & Dixon, *Constraining Constitutional Change*, *supra* note 6, at 859.

thoritarian" rather than completely authoritarian.[35] In these kinds of regimes, elections continue to be held, but they are unfair and the rights of the opposition are not respected. Sometimes, elections may be manipulated through outright fraud, such as ballot stuffing or computer manipulation, but clever authoritarians often do their manipulation well before elections have actually been held, by consolidating power, stacking key institutions such as courts and electoral commissions, and harassing opposition parties and leaders.[36]

We have also argued that these shifts between democracy and authoritarianism must be measured by using a relatively minimalist definition of constitutional democracy that consists of free and fair elections, with a minimum set of independent checks and balances on the elected government, rather than more maximal definitions that might contain a range of richer but far more contestable commitments such as deliberation or substantive equality.[37] We have called this conception the "democratic minimum core."[38]

Our minimal definition of democracy is not as narrow as purely procedural or competitive accounts of democracy, such as those developed by Joseph Schumpeter.[39] It builds in additional commitments to constitutionalism and the rule of law, including commitments to a degree of protection for certain individual rights, such as freedom of expression, association and assembly, equality or universal access to the franchise, because these rights are closely bound up with electoral fairness, independent institutions capable of supervising the electoral process, and checking the arbitrary use of executive power.[40]

In this sense, it draws on broadly shared understandings of constitutional democracy at the transnational level, such as those embodied in the Copenhagen criteria for admission of the European Union — including a commitment to democracy, the rule of law, human rights, and respect for and protection of minorities.[41] The European Union has also noted that, at minimum, electoral democracy requires: free elections with a secret ballot, the right to establish political parties without any hindrance from the state, fair and equal access to a free press, free trade union organisations, freedom of personal opinion, and executive powers restricted by laws and allowing free access to judges independent of the executive.[42] The concept of the democratic minimum core also draws on

35 *See* Steven Levitsky & Lucan A. Way, *The Rise of Competitive Authoritarianism*, 13 J. DEMOCRACY 51, 52-53 (2002). *See generally* STEVEN LEVITSKY & LUCAN A. WAY, COMPETITIVE AUTHORITARIANISM: HYBRID REGIMES AFTER THE COLD WAR (2010).

36 *See* LEVITSKY & WAY, *supra* note 35, at 3 (noting that the use of such mechanisms "skewed the playing field in favor of incumbents," and that electoral competition was "real but unfair").

37 *See* Rosalind Dixon & David Landau, *Tiered Constitutional Design*, 86 GEO. WASH. L. REV. 438, 469-70 (2018) [hereinafter *Tiered Constitutional Design*].

38 *See* Rosalind Dixon & David Landau, *Competitive Democracy and the Constitutional Minimum Core*, *in* ASSESSING CONSTITUTIONAL PERFORMANCE 268 (Tom Ginsburg & Aziz Huq eds., 2016) [hereinafter *Constitutional Minimum Core*].

39 *See* JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 241-69 (2010); *see also* RICHARD A. POSNER, LAW, PRAGMATISM AND DEMOCRACY 14-15 (2003).

40 *See* Dixon & Landau, *Constitutional Minimum Core*, *supra* note 38, at 277.

41 *See Presidency Conclusions*, COPENHAGEN EUR. COUNCIL (June 21-22, 1993), http://www.europarl.europa.eu/enlargement/ec/pdf/cop_en.pdf [https://perma.cc/38AU- NZDP].

42 *See generally* Geoffrey Pridham, *The European Union's Democratic Conditionality and Domestic Politics in Slovakia: The Mečiar and*

an overlapping consensus in the actual practice of the majority of (true) constitutional democracies worldwide.[43] And it is generally consistent with recent legal and social scientific work on democratic erosion of backsliding, where analysts have adopted similar criteria that focus on elections.[44]

But the minimum core definition is narrower than many broader definitions of democracy, which emphasize other commitments such as deliberation or substantive equality.[45] It thus has the advantage of avoiding contentious debates in political theory about what additional commitments democracy might require. The phenomenon we seek to highlight involves the erosion of democracy on almost *any definition* or measure, and thus is one which any democracy ought to agree is normatively problematic.[46]

We recognize, however, that even a minimal definition will be difficult to apply in some circumstances. One reason is because the effect of a given change will inevitably depend on how it interacts with other changes, political institutions, and the broader political and social contexts. That is, one cannot simply make a list of "abusive" changes in the abstract.[47] Changes to appointment procedures for courts or other independent bodies such as election commissions, changes to electoral rules, and extensions of presidential term limits are all the kinds of changes that *could* have a significant negative impact on the democratic minimum core, but that does not mean they will do so in every context. Such a judgment can only be made through close consideration of context, and perhaps sometimes only with the benefit of hindsight.[48]

Applying our definition of abusiveness, a judicial decision is an act of abusive judicial review if it has a significant negative impact on the minimum core of electoral democracy. This is a narrower question than whether a decision is partisan in the sense that it favors one party over another or even that it reflects partisan judicial motives. Partisan patterns of decision-making may reduce the legitimacy of the judiciary over time or reflect other problems, but they are abusive only if they make elections systematically unfair. Moreover, decisions that impact more maximalist democratic

Dzurinda Governments Compared, 54 EUR.-ASIA STUD. 203 (2002) (explaining the EU's democratic conditionality depends on candidate countries); Kristi Raik, *EU Accession of Central and Eastern European Countries: Democracy and Integration as Conflicting Logics*, 18 EAST EUR. POL. & SOCIETIES 567 (2004); Michael Emerson et al., *The Reluctant Debutante: The European Union as Promoter of Democracy in its Neighbourhood* (Ctr. for European Policy Studies, Working Document No. 223, 2005) (discussing whether the European Union is a coherent actor in pursuing its goal of democracy).

43 *See* Dixon & Landau, *Transnational Constitutionalism*, *supra* note 6, at 629-30 (arguing that transnational constitutional practice is a useful check for courts deploying the doctrine of unconstitutional constitutional amendment).

44 *See, e.g.*, GINSBURG & HUQ, *supra* note 1, at 14 (developing a definition of liberal democracy that includes "free elections, rights to speech and association, and a bureaucratic rule of law," and grounding the latter two elements largely in their importance for electoral democracy).

45 *See* POSNER, *supra* note 39, at 130 (noting that broader theories of democracies, which build in concepts like deliberation, are more contestable).

46 *See* Cass R. Sunstein, *Problems with Minimalism*, 58 STAN. L. REV. 1899, 1899 (2006).

47 *See* Kim Lane Scheppele, *The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work*, 26 GOVERNANCE 559, 559-60 (2013) (arguing that checklist approaches to rule of law norms can be evaded through manipulating the interaction effect between different norms or by transplanting norms into different contexts).

48 *See id.* at 562; Martin Krygier, *The Rule of Law: Pasts, Presents, and Two Possible Futures*, 12 ANN. REV. L. & SOC. SCI. 199, 212-13 (2016) (calling for an approach to the rule of law that is more sensitive to context).

commitments, such as principles of deliberation and ideas of substantive equality, will not automatically be abusive in the sense we are using here. Such decisions must have a significant negative impact on electoral democracy in order to constitute abusive judicial review.

Of course, figuring out whether a given decision or line of decisions has a significant adverse effect on the democratic minimum core can be a difficult question. The problem is that the democratic effect of a decision will often depend on its interaction with political and social context, and with other constitutional and legal changes. Take, for example, a judicial interpretation that loosens or eliminates presidential term limits. This is clearly the sort of change that has the *potential* to undermine the democratic minimum core, and therefore might be viewed with suspicion.[49] But not all rulings of this sort actually *will* have a significant negative effect on electoral democracy. In some contexts, the increase in presidential power might be an isolated change that is checked by other institutional dynamics or features of the political party system.[50] In other cases, the change may greatly augment a president's ability to dominate the electoral system and may be accompanied by a series of other formal and informal constitutional changes that further centralize power.

Thus, in some cases, it will only be possible to verify the impact on the minimum core after the fact. But as with other variants of abusive constitutional change, one can think about whether such change is underway by focusing on key component elements — whether, for example, the changes a leader or movement are seeking to make through the courts are likely to undermine core aspects of liberal democracy such as judicial independence and fairness in the electoral playing field. Understanding the likely effect of a given change will often require careful attention to context and to other formal and informal changes occurring in a given country.

B. Intent and Abusive Judicial Review

Our definition of abusive judicial review requires that judges *intentionally* take aim at the democratic minimum core. As we explain below in Part II, judges usually do this after being either coerced or captured by antidemocratic actors, and thus become part of a regime strategy to undermine liberal democracy. Implicit in this concept of intent is some notion of bad faith, at least when abusive judicial review operates within constitutional orders with a liberal democratic starting point.[51] In issuing decisions with a heavily antidemocratic valence, judges distort constitutional meaning and often draw on concepts and doctrines designed to protect liberal democracy in an abusive way that subverts their underlying meaning and turns them into tools to attack liberal democracy.

49 *See* Tom Ginsburg, James Melton & Zachary Elkins, *On the Evasion of Executive Term Limits*, 52 WM. & MARY L. REV. 1807, 1816-17 (2011) (describing the benefits of presidential term limits in a democratic system).

50 *See id.* at 1832.

51 For an exploration of the use of bad faith in constitutional law and theory, see generally David E. Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 885 (2016).

An intent requirement is helpful in distinguishing abusive judicial review from several other related but distinct phenomena. Courts may at times render decisions that have antidemocratic effects without having an antidemocratic motive. For some purposes, such as empirical analysis of the damage done to democracy, motive may make little difference and the variants laid out below should be seen as close relatives to abusive judicial review. But the presence or absence of antidemocratic motive will at times be very relevant in determining the appropriate response by international actors and others. Harsh sanctions against judges or other measures may be in order when judges intentionally destroy their own democratic order; softer measures may make more sense when judges make antidemocratic decisions in error or for other reasons. Moreover, abusive judicial review is much more likely to form a coherent, long-term program to undermine democracy — and thus a problem for those interested in preserving liberal democracy — when it is intentional.

First, judges may render antidemocratic decisions because they genuinely believe that existing interpretive materials — such as constitutional text or precedent — require them to reach an antidemocratic result. Cases of this kind should be relatively rare in a constitutional democracy, since commitments to democracy will generally be reflected in both the text and structure of a written constitution. In particular, it should be unusual for a liberal democratic constitution to *compel* an antidemocratic outcome. But major constitutional questions allow for a range of possible interpretive choices, and at least some of those choices may impact the democratic minimum core.[52] In some cases, as Pozen has pointed out, genuinely- held beliefs may shade into a kind of bad faith, where actors engage in motivated reasoning and block out all competing evidence.[53] In those cases, the line between intentional attacks on democracy and genuine belief in constitutional meaning might become hard to discern.

Second, sometimes judges might choose to uphold antidemocratic action for prudential reasons. Courts may believe, for example, that in the long run, issuing such decisions will leave more space for the court to counter more serious threats to democracy. In the United States, there is a vast literature on the "prudential" virtues to judicial restraint by judges. From Bickel onwards, scholars have argued that judges should engage in restrained or weak forms of judicial review — or various forms of constitutional "avoidance" — wherever stronger forms of review are likely to provoke a direct confrontation with the political branches of government.[54] Gardbaum has recently extended

52 Take, for example, the United States Supreme Court case *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983), which struck down the line-item veto used by Congress to control executive action. Some commentators have argued that the decision had antidemocratic effect because it weakened congressional control over the president and further centralized power in the hands of an already-powerful presidency. The decision is best seen as a choice made by the Court from a number of constitutional possibilities, not as a decision compelled by the constitutional text. *See* E. Donald Elliott, INS v. Chadha*: The Administrative Constitution, the Constitution, and the Legislative Veto*, 1983 SUP. CT. REV. 125 (1983).

53 *See* Pozen, *supra* note 51, at 934-36 (referring to this phenomenon as "Sartrean bad faith," because of its emphasis on self-deception). Engagement with comparative materials may be useful as a check against behavioral biases towards motivated reasoning of this kind. *See, e.g.*, Dixon & Landau, *Transnational Constitutionalism*, *supra* note 6, at 629.

54 *See, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 111-12 (2d ed. 1986) (referring to the "passive virtues"); *cf.* Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 257-59 (2005) (discussing the need for constitutional law theorists to embrace politics in theories of judicial review). In a comparative context, see Erin F. Delaney, *Analyzing Avoidance: Judicial Strategy in Comparative Perspective*, 66 DUKE L.J. 1, 1-12 (2016).

this argument to a comparative context.[55] At times, he argues, strong forms of judicial review may simply provoke a confrontation between courts and the political branches, which leads to the political branches openly disobeying courts (i.e., undermining the rule of law) or attacking their independence and jurisdiction (thereby undermining judicial independence).[56] In certain contexts, such as dominant party rule, Gardbaum thus suggests that courts should exercise a form of prudential restraint that is designed to protect the rule of law in ordinary cases, or long-term judicial independence.[57] Similarly, one of us has argued (with Issacharoff) that courts should "defer" certain highly charged constitutional decisions, with a view to building the necessary legal *and* political authority to engage in effective forms of democratic hedging.[58] One can rightly ask, of course, about the extent to which strategic deference for institutional reasons is appropriate in the face of a significant threat to the minimum core of the democratic order. But it is clearly possible for judges to make a good faith judicial calculation that issuing an antidemocratic decision may at times be a lesser evil.

Third, in some cases judges may make errors about the likely effects of a given decision on the democratic order. For example, courts sometimes engage in forms of review that impose limits on constitutional amendment, or ordinary legislation, which unreasonably limit the scope for majorities to pursue their legitimate objectives. But judges may do so in good faith, out of a genuine (if mistaken) belief that the relevant arrangements threaten commitments to democracy. For example, judges in many systems possess power to ban "antidemocratic" political parties.[59] Many scholars now advocate that some parties in "fragile" democratic orders should be banned to protect the constitutional democracy itself,[60] but the exercise of this power is fraught with potential peril. Courts might ban political parties that they deem a threat to the democratic order because of their leadership, organization, or platform, but in so doing they might also constrict the democratic order, perhaps allowing other movements to monopolize power.[61] A court might make an incorrect calculation about the size of the threat posed by a given party, thus banning it even though the ban may pose a greater threat to electoral democracy than the allegedly antidemocratic party itself.

As an example of the complexities that sometimes attend efforts to discern judicial intent in this area, consider a line of cases by the Constitutional Court of Thailand that took aim at the populist leader Thaksin Shinawatra and his allies. The Constitutional Court and Constitutional Tribunal

55 *See* Stephen Gardbaum, *Are Strong Constitutional Courts Always a Good Thing for New Democracies?*, 53 COLUM. J. TRANSNAT'L L. 285 (2015).

56 *See id.* at 294-97.

57 *See id.* at 303. In the absence of self-restraint, Gardbaum calls for institutional design that creates weaker forms of judicial review less likely to spark backlash. *See id.* at 311.

58 *See* Rosalind Dixon & Samuel Issacharoff, *Living to Fight Another Day: Judicial Deferral in Defense of Democracy*, 2016 WIS. L. REV. 683, 699 (2016); *see also* Delaney, supra note 54, at 41-42.

59 *See* Tom Ginsburg & Zachary Elkins, *Ancillary Powers of Constitutional Courts*, 87 TEX. L. REV. 1431, 1447 (2009) (finding that twenty-eight percent of modern constitutions have party proscriptive provisions); Samuel Issacharoff, *Fragile Democracies*, 120 HARV. L. REV. 1405, 1430 (2007) [hereinafter *Fragile Democracies*].

60 *See, e.g.*, Issacharoff, *Fragile Democracies*, *supra* note 59, at 1406.

61 *See id.* at 1411 (noting that "limiting the scope of democratic deliberation necessarily calls into question the legitimacy of the political process").

between 2005 and 2015 handed down decisions invalidating the 2006 parliamentary elections, removing three prime ministers, and disqualifying the largest political party in Thailand.[62] These events prevented most of its leadership from seeking political office and from enacting a range of key policies, including a series of constitutional amendments.[63] These decisions were interspersed with military coups in 2006 and 2014 against the elected democratic order, with the most recent coup resulting in a durable military regime.[64] Without much question, then, the long-term effect of this line of jurisprudence has been antidemocratic in nature: The court's decisions helped to create the climate that justified military rule.

Determining antidemocratic intent is trickier. Thaksin's populism posed its own kind of threat to the democratic order, as many comparative episodes have shown — populist leaders often gain power through free and fair elections, but then use it to craft new rules that may result in significant democratic erosion.[65] While those bringing cases against Thaksin may have had abusive motives from the start,[66] some have suggested that the decisions banning Thaksin's supporters may have been based on a good-faith (although ultimately erroneous) idea about which side posed the bigger threat to democratic constitutionalism.[67] The court, on this account, may have contributed to the suspension of the Thai Constitution and military rule, but this was an unintended consequence of a good-faith but clumsy effort to check Thaksin and the threat that his brand of electoral populism posed to constitutionalism and the rule of law.[68] Others have labelled the court's decisions a form of antidemocratic "judicial coup."[69] It is of course also possible that the nature of judicial intent

62 *See generally* Khemthong Tonsakulrungruang, *Thailand: An Abuse of Judicial Review*, *in* JUDICIAL REVIEW OF ELECTIONS IN ASIA (Po Jen Yap ed., 2016).

63 *See id.* at 1; Björn Dressel, *Judicialization of Politics or Politicization of the Judiciary? Considerations from Recent Events in Thailand*, 23 PAC. REV. 671, 671 (2010); Sarah Bishop, Balancing the Judicial Coup Myth: The Constitutional Court and the 2014 Coup (2017) (unpublished manuscript) (on file with author) [hereinafter Balancing the Judicial Coup]; Sarah Bishop, The Thai Administrative Courts and Environmental Conflicts: A Case Study of Map Ta Phut, Rayong (Oct. 28, 2011) (unpublished Honours Thesis, College of Asia and the Pacific, Australian National University) [hereinafter The Thai Administrative Courts]; *see also* ANDREW HARDING & PETER LEYLAND, THE CONSTITUTIONAL SYSTEM OF THAILAND: A CONTEXTUAL ANALYSIS 185-86 (2011).

64 *See* Jonathan Liljeblad, *The Efficacy of National Human Rights Institutions Seen in Context: Lessons from the Myanmar National Human Rights Commission*, 19 YALE HUM. RTS. & DEV. L.J. 95, 130 (2017).

65 *See* JAN-WERNER MÜLLER, WHAT IS POPULISM? 102 (2016) (stating that populists tend to write "partisan" or "exclusive" constitutions); Landau, *Populist Constitutions*, *supra* note 15, at 532.

66 Those bringing cases to the court were generally part of what Duncan McCargo labels the Thai "network monarchy" — the mix of military, political/bureaucratic, and business elites loyal to the King. *See* Duncan McCargo, *Thailand: State of Anxiety*, SE. ASIAN AFF. 333, 334 (2008) [hereinafter *Thailand: State of Anxiety*]. Some commentators argue that after 2006, these actors generally saw judicialization as a way to compensate for their electoral weaknesses relative to Thaksin's coalition. *See* Duncan McCargo, *Competing Notions of Judicialization in Thailand*, 36 CONTEMP. SE. ASIA 417, 419-22 (2014).

67 *See* Bishop, Balancing the Judicial Coup, *supra* note 63, at 4-6; Bishop, The Thai Administrative Courts, *supra* note 63, at 1-2.

68 On the threats posed by Thaksin in this context, see Michael K. Connors, *Article of Faith: The Failure of Royal Liberalism in Thailand*, 38 J. CONTEMP. ASIA 143, 143-44 (2008); Michael K. Connors, *Liberalism, Authoritarianism and the Politics of Decisionism in Thailand*, 22 PAC. REV. 355, 365-66 (2009); Thitinan Pongsudhirak, *Thailand Since the Coup*, 19 J. DEMOCRACY 140, 141-42 (2008).

69 *See* Eugénie Mérieau, *Thailand's Deep State, Royal Power and the Constitutional Court (1997-2015)*, 46 J. CONTEMP. ASIA 445, 449 (2016); Bishop, Balancing the Judicial Coup, *supra* note 63, at 1; Editorial, *A Coup By Another Name in Thailand*, N.Y. TIMES (May 8, 2014), https://www.nytimes.com/2014/05/09/opinion/a-coup-by-another- name-in-thailand.html [https://perma.cc/RGW5-QTJK]; *Thailand's Aristocratic Dead- Enders*, WALL ST. J. (May 7, 2014, 12:52 PM), https://www.wsj.com/articles/thailands- aristocratic-dead-enders-1399481518 [https://perma.cc/ADA9-GUEG]; *cf.* Dressel, *supra* note 63, at 687 (making a more tentative suggestion along the same lines).

changed over time and became closer to abusive judicial review as the military's end goals became clearer.[70]

Regardless of such complexities, analysts have a range of tools for determining when courts are likely intentionally subverting the democratic order. One kind of evidence focuses on significant intrusions on the independence of courts as institutions.[71] Since abusive judicial review is usually associated with captured (or at least cowed) judiciaries, one should look for evidence that the independence of courts and judges have been undermined. We examine these points in greater detail in Part II below, but evidence of both formal and informal moves to take over courts is often available: flimsy impeachment attempts or other irregular removals, changes to the rules for selecting and regulating judges, and similar measures.[72] Of course, not all forms of constitutional capture or coercion will be readily visible to outside observers. In some cases, would-be authoritarians may simply threaten to use these tools as a means of capturing or controlling a court — and do so behind closed doors.[73]

Other important indicators are significant procedural irregularities in the way an individual case is handled. In the United States, for instance, federal courts generally decline to hear petitions for review under federal law if there are "adequate and independent" state grounds for a decision.[74] The United States Supreme Court, however, has held that state grounds will not be "adequate" to prevent federal review in certain circumstances — including where there is evidence of bad faith, procedural irregularity, or a novel or bizarre approach to state law on the part of a state court.[75] A similar point applies comparatively. While procedural irregularity may not be the same as bad faith, it may be an important indicator of it. Thus, judges being mysteriously replaced, normal procedures deviated from, or decisions made under odd circumstances may all be potential red flags.

Take the 2009 Nicaraguan case, examined in more detail in Part IV.A below, where the Supreme Court of Justice of Nicaragua excised presidential term limits from the Nicaraguan Constitution. The decision was issued under extraordinary procedural conditions. The president of the court formally notified the other judges of the vote on the case only after normal business hours had ended, and thus judges and court personnel had gone home for the day.[76] Informally, only those judges affili-

70 *See generally* Tonsakulrungruang, *supra* note 62 (describing the expansion of judicial review in Thailand and its contribution to the constitutional crisis).

71 *See infra* Part II.B.

72 *See infra* Part II.B.

73 In Burundi, for example, allegations of coercion emerged only after the decision of the Constitutional Court in 2015 to allow the president to run for another term had already been handed down. *See Senior Burundi Judge Flees Rather Than Approve President's Candidacy*, GUARDIAN (May 4, 2015, 10:48 PM), https://www.theguardian. com/world/2015/may/05/senior-burundi-judge-flees-rather-than-approve-presidents- candidacy [https://perma.cc/6RL2-PGY2] (stating that judges had faced "enormous pressure and even death threats" after initially concluding that presidential re-election would be unconstitutional).

74 Stewart G. Pollock, *Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts*, 63 TEX. L. REV. 977, 977 (1985).

75 *See* Kermit Roosevelt III, *Light from Dead Stars: The Procedural Adequate and Independent State Ground Reconsidered*, 103 COLUM. L. REV. 1888, 1890 (2003) (noting that procedural review under the doctrine is "far more searching" than review of substantive grounds).

76 *See Nicaragua's Chief Justice Denounces Pro-Ortega Ruling*, LATIN AM. HERALD TRIB., http://www.laht.com/article.asp?CategoryId=23558&ArticleId=345896 (last visited Nov. 4, 2019) [https://perma.cc/9CAM-JKNH]; *see also* Rosalind Dixon & Vicki C. Jackson, *Consti-*

ated with the president's party were notified; naturally, the opposition judges on the court did not show up and were replaced by pro-regime substitutes.[77] Such extraordinary procedural irregularities are useful evidence of bad faith.[78]

In the same vein, the nature of legal reasoning may at times be helpful in discerning whether abusive judicial review is taking place. Courts in different constitutional systems have differing norms surrounding the degree to which they give reasons for their decisions or seek unanimity or joint judgments.[79] Given this variety in approaches, it will often be difficult to determine the abusive nature of judicial review based simply on the scope and nature of a court's reasoning. One needs to look at the context and effects of a judicial decision. But departure by a court from its *own* established practices and precedents may be one important sign that a court is in fact engaging in knowing forms of abusive judicial review: If a court fails to live up to its own ordinary standards of legal reasoning, this may be one relatively clear sign that it is engaged in abusive forms of review.

Where courts knowingly engage in antidemocratic forms of review, there may likewise be evidence of abusive forms of reasoning or "borrowing" by judges in the application of existing precedents. Elsewhere, we define abusive borrowing as the borrowing of liberal democratic ideas in one of the following ways: (i) highly superficial, or involves the form but not substance of constitutional democratic norms; (ii) highly selective, and picks and chooses certain elements of liberal democratic constitutionalism; (iii) highly acontextual, and ignores differences in political or social context; or (iv) that inverts the purpose of democratic norms and ideas so that they have the opposite effect to previously.[80] Courts engaged in knowing forms of abusive review may employ all of these techniques as a means of reconciling the demands of respect for precedent, and orthodox legal reasoning, with antidemocratic effects. Instead of simply ignoring existing doctrines, they will tend to cite them in an acontextual way — thus reusing doctrines found elsewhere in contexts where the absence of certain supporting legal, social, or political conditions would make that use problematic. Or they may make use of doctrine in a way that is patently selective, for example by wielding doctrines against political opponents but trying to protect allies. As Pozen emphasizes, highly inconsistent use of methodologies or extremely unreasonable interpretations of law are often taken as evidence of bad faith.[81]

tutions Inside Out: Outsider Interventions in Domestic Constitutional Contests, 48 WAKE FOREST L. REV. 149, 164 (2013) (noting that the panel that heard the case was composed only of pro-Ortega judges).

77 *See Nicaragua's Chief Justice Denounces Pro-Ortega Ruling*, *supra* note 76.

78 *See* Dixon & Jackson, *supra* note 76, at 203 (grounding the legitimacy of outsider interventions in domestic constitutional controversies in concerns about bad faith).

79 *See generally* MITCHEL DE S. -O. -L'E. LASSER, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY (2004) (comparing decision styles across countries).

80 *See* Rosalind Dixon & David Landau, *1989-2019: From Democratic to Abusive Constitutional Borrowing*, 17 INT'L J. CONST. L. 489, 489 (2019).

81 *See* Pozen, *supra* note 51, at 925, 933 (referencing "interpretive arguments that are so unreasonable as to betray a furtive design or malicious state of mind" as evidence of bad faith, although noting "the difficulties of determining what is objectively unreasonable in constitutional law") (emphasis omitted).

We expect these signs will usually be subtle. Courts engaged in intentionally antidemocratic forms of review have powerful incentives to obscure their motives. This is because, to succeed, antidemocratic forms of judicial review must ultimately be seen by the broader public as at least somewhat independent of the political branches. Courts themselves must therefore reason in a way that respects relatively orthodox processes of legal reasoning: The most transparent forms of abusive judicial review will be those that involve little or no attempt by judges to justify their conclusions by reference to orthodox legal processes of reasoning, or little or no citation of established or recognized constitutional modalities. But judicial review of this kind will also have limited value to would-be authoritarians — it may be so transparently abusive that it may do less to increase the perceived legitimacy of underlying attempts at abusive constitutional change. More effective forms of abusive judicial review, therefore, will tend to be better reasoned, and more orthodox in their approach to the legal reasoning process, in ways that make them harder to identify as having abusive motives. This mirrors broader findings by political scientists that courts tend to *increase* efforts at legal justification where they anticipate political opposition.[82]

II. ABUSIVE JUDICIAL REVIEW AS A REGIME STRATEGY

Most cases of abusive judicial review involve courts working as part of a broader regime strategy, led by would-be authoritarians, to undermine a country's liberal democratic order. In this sense, abusive judicial review can be conceptualized as one tool in the hands of antidemocratic political actors, alongside others such as formal amendment, sub-constitutional legal changes, and shifts in informal norms.

The idea of courts as agents of a regime is not, of course, an insight that is unique to contexts of democratic erosion. Indeed, a sizable literature views courts as part of their underlying political regime and looks at the functions that they can play for that regime.[83] What is distinctive about abusive judicial review is twofold. First, the particular functions played by courts in this context undermine the liberal democratic order, rather than simply redistributing power within it (for example, between subnational and the national government).[84] Second, judges carrying out abusive judicial

82 *See* Olof Larsson et al., *Speaking Law to Power: The Strategic Use of Precedent of the Court of Justice of the European Union*, 50 COMP. POL. STUD. 879, 896 (2017).

83 *See, e.g.*, Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35, 44 (1993) (arguing that U.S. politicians turn to courts when intra-party splits make the system unable to cope with an issue); Ran Hirschl, *The Judicialization of Mega-Politics and the Rise of Political Courts*, 11 ANN. REV. POL. SCI. 93, 107 (2008) (considering the incentives for political actors to empower judges to decide core political issues); Keith E. Whittington, *"Interpose Your Friendly Hand": Political Supports for the Exercise of Judicial Review by the United States Supreme Court*, 99 AM. POL. SCI. REV. 583, 584-85 (2005) (considering the political functions that judicial review in the United States has played over time).

84 *See* Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875-*

review are often not merely ideologically aligned with the political regime; they have been captured or cowed by it, as we explain below. The steps which would-be authoritarians use to take control over courts in this context may be especially aggressive because the rewards of that control are also potentially high.[85] This Part tackles two key questions regarding a regime strategy of abusive judicial review: why might regimes rely on courts to carry out antidemocratic constitutional changes, and how do they do so?

A. Why Would-Be Authoritarians Turn to Courts

Statistical studies have shown a sharp increasing trend in the percentage of constitutions providing for judicial review — the vast majority of texts around the world now do so.[86] The trend has exceptions, of course,[87] but it runs across all regions. Beyond this, inclusion of a court possessing powers of judicial review is now often seen as one of the canonical features of liberal democratic constitutionalism, and often included in recipes for new democracies.[88] When exercising powers of judicial review, most courts are also afforded a degree of presumptive legitimacy, as institutions acting "legally" rather than politically. Most constitutional scholars agree that there is some degree of choice, and thus political judgment, inherent in the process of constitutional construction.[89] But most also maintain there is still something distinctively legal to the process of constitutional construction, or that it involves a mix of legal and political judgment.[90] This understanding of the relative autonomy of law from politics means that judicial decisions enjoy a presumptive form of respect in most constitutional systems. Opposition legislators and civil society actors often agree to respect the decisions of courts, even when they strongly oppose the result reached by a court, or the effect of its decisions. And international actors often agree to respect the outcome of a constitutional decision, even where they disagree with the outcome, and might be inclined to criticize the government for engaging in equivalent forms of legislative or constitutional change.

1891, 96 AM. POL. SCI. REV. 511, 516 (2002) (arguing that the Republican party used the federal judiciary to pursue a policy of economic nationalism); Whittington, *supra* note 83, at 584.

85 *See* Maria Popova, *Political Competition as an Obstacle to Judicial Independence: Evidence from Russia and Ukraine*, 43 COMP. POL. STUD. 1202, 1205 (2010).

86 *See* Tom Ginsburg & Mila Versteeg, *Why Do Countries Adopt Constitutional Review?*, 30 J.L. ECON. & ORG. 587, 587 (2014) (finding that only thirty-eight percent of constitutions had constitutional review in 1951, but eighty-three percent by 2011).

87 *See, e.g.*, Jens Elo Rytter & Marlene Wind, *In Need of Juristocracy? The Silence of Denmark in the Development of European Legal Norms*, 9 INT'L J. CONST. L. 470, 470 (2011) (stating that Nordic countries have no such tradition of judicial review).

88 *See* Alec Stone Sweet, *Constitutional Courts*, *in* THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 816, 816 (Michel Rosenfeld & András Sajó eds., 2012) (noting that by the 1990s, a "basic formula" including judicial review "had diffused globally").

89 *See, e.g.*, Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 527-28 (2013) (conceding the impossibility of restraining modern judicial review to the understandings of those alive at the time of the framing and ratification of the relevant constitutional provision); Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 104 (2010) (stating that construction cannot be "value neutral").

90 *Compare* THEUNIS ROUX, THE POLITICO-LEGAL DYNAMICS OF JUDICIAL REVIEW: A COMPARATIVE ANALYSIS 6 (2018) (stating this conventional wisdom that constitutional decisions have a political dimension but are still distinctly legal), *with* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1731-32 (1976) (challenging this view).

When regimes pursue a strategy of abusive judicial review, they are also attempting to play off the presumptive legitimacy accorded to judicial review in liberal democratic constitutionalism in order to blunt both domestic and internal opposition to authoritarian actions. Domestic constitutional cultures, as well as international norms, may make it difficult for executive or legislative officials to flagrantly disregard or violate constitutional norms. For example, and to take several examples drawn from recent comparative experience, political officials who disregard clear textual term limits on their mandates, who ban opposition parties, and who shut down or limit opposition- controlled institutions such as legislatures, may face a hostile domestic reception and swift sanctions from international or regional institutions.[91] Courts can cut through some of the constraints apparently posed by constitutional texts, in a way that may cause less of an outcry from international institutions, if they are the ones who carry out these actions.

At the very least, they can provide dominant elites with a means of achieving ends that would be far costlier if they were done through political routes. In the U.S. context, this is one of the key insights of "regime"-based theories of judicial review. Scholars such as Whittington and Gillman suggest that federal courts in the United States have at times performed critical functions, from "assist[ing] powerful officials within the current government in overcoming various structural barriers to realizing their ideological objectives through direct political action," in ways that explain why political leaders are often willing to support, or at least tolerate, strong forms of judicial review.[92] The main difference is that in the contexts being studied here, the functions played by courts involve attacks on the basic values of the democratic order.

There are also increasing costs from the international realm to pursuing openly authoritarian forms of change. In some regional contexts, regimes now face a set of potential sanctions for acting in a flagrantly unconstitutional or antidemocratic way. This is most obvious in Europe, where both the European Union and Council of Europe contain monitoring mechanisms and potential sanctions for antidemocratic moves.[93] Other regions of the world, including Latin America and Africa, have human rights courts with at least some interest in hearing cases touching on democratization issues and "democracy clauses" that contemplate sanctions for "unconstitutional" ruptures in the democratic order.[94] These clauses have mainly been deployed against coups, but a burgeoning literature and conversation also contemplates them as responses to subtler forms of democratic undermining.[95] By ensuring that relevant changes are carried out in part or whole through the acts

91 The potential international sanctions on flagrantly unconstitutional action have been strengthened in recent years in many regions of the world, including Latin America, Europe, and Africa, through "democracy" clauses that threaten consequences for regimes that carry out unconstitutional interruptions of the democratic order or other threats to the rule of law. *See* David Landau, *Democratic Erosion and Constitution- Making Moments: The Role of International Law*, 2 UC IRVINE J. INT'L TRANSNAT'L & COMP. L. 87, 100 (2017) [hereinafter *Democratic Erosion and Constitution-Making Moments*].

92 *See* Gillman, *supra* note 84, at 515; Whittington, *supra* note 83, at 584.

93 *See* Jan-Werner Müller, *Should the EU Protect Democracy and the Rule of Law Inside Member States?*, 21 EUR. L.J. 141, 144 (2015) (discussing a range of mechanisms under EU law).

94 *See* Landau, *Democratic Erosion and Constitution-Making Moments*, *supra* note 91, at 100; Jacob Wobig, *Defending Democracy with International Law: Preventing Coup Attempts with Democracy Clauses*, 22 DEMOCRATIZATION 631, 633-34 (2015).

95 *See* Theodore J. Piccone, *International Mechanisms for Protecting Democracy, in* PROTECTING DEMOCRACY: INTERNATIONAL RESPONSES 101, 102 (Morton H. Halperin & Mirna Galic eds., 2005).

of "independent" courts, however, would-be authoritarian actors may be able to blunt the force of both domestic and international criticism of their actions. Thus, international actors may sometimes be less willing to attack judicial decisions, or quick to perceive that a regime actually is exceeding its constitutional bounds. This may help to stave off sanctions or other consequences that would otherwise ensue from antidemocratic action. In short, judicial review may be a way to make democratic erosion both less visible and more legitimate, with potential benefits to the regime.

Abusive judicial review is usually part of a broader regime strategy of antidemocratic constitutional change, which includes a range of formal and informal tools.[96] In this sense, it may be both a substitute and complement for other forms of change. In some situations, actors may turn to courts precisely because other avenues of change, especially the tools of formal constitutional change, are blocked or would impose higher costs on the regime. For example, in Poland, analysts have noted that the ruling party has relied very heavily on capturing the Constitutional Tribunal, the nation's constitutional court, which has subsequently issued a number of favorable rulings allowing the regime to consolidate power, in part because it has lacked the votes needed for formal constitutional amendment.[97] Similarly, across several countries in Latin America, including Nicaragua, Bolivia, and Honduras, courts have utilized the unconstitutional constitutional amendment doctrine to abolish presidential term limits, precisely because presidents either lacked the means to carry out formal constitutional changes or feared the consequences of going that route.[98]

In other respects, abusive judicial review may be complementary to other tools. In Poland, the ruling party has also carried out a series of sub-constitutional changes. It passed a series of important laws, for example to change the organization of the judiciary and limit opposition speech.[99] These laws, however, are of dubious constitutionality, and thus government control over the Polish constitutional court has proven critical for allowing the regime to enact these laws. For related reasons, we would expect abusive judicial review to play an important role even in many contexts where other tools *are* available. Many of the examples of abusive constitutional change that have been most studied, such as Hungary, Venezuela, and Turkey, rely on a mix of tools, including formal constitutional change, statutory change, informal constitutional changes, and judicial review.[100] Each of these appears to play an important (and still not fully understood) role in eroding democracy across national contexts.

96 *See supra* Part I (describing other constitutional and sub-constitutional tools of change).

97 *See* Sadurski, *How Democracy Dies (in Poland)*, *supra* note 24, at 31.

98 *See infra* Part IV.A.

99 *See* Sadurski, *How Democracy Dies (in Poland)*, *supra* note 24, at 51-52.

100 *See* Landau, *Populist Constitutions*, *supra* note 15, at 532-33.

B. How Regimes Capture Courts

How can would-be authoritarians increase the chances of constitutional courts engaging in abusive forms of judicial review? They have many tools available to them. Some of these are informal, while others are formal. Also, some are obvious, while others are subtler forms of pressure that rely on the willingness of courts to "play along."

Informally, regimes sometimes rely on bribes and other inducements in order to garner favorable decisions or well-timed retirements from the bench.[101] Regimes can threaten the prestige or reputation of a court or its judges through public campaigns. Perhaps the most obvious informal tool is the threat of coercion, which is still clearly a tactic used by some nondemocratic governments today.

In Burundi, for example, there were several reports of direct interference by the president, and his supporters, with the independence of the Constitutional Court in 2015 in the context of its deliberations over the application of presidential term limits.[102] Likewise in Ecuador, Craig M. Kauffman and Pamela M. Martin have discovered evidence of threats by President Rafael Correa against various judges. They cite, for example, a 2010 memo that was supposedly sent to all judges by the National Judicial Secretary, where Correa stated that any judge who found a public works projects unconstitutional would be *personally* liable to the state for "damage and harm" caused by the lost opportunity to pursue the project.[103] Similar tactics were also reported in Fiji following a military coup by now-Prime Minister Josaia Voreqe Bainimarama in 2006 — judges reported their houses being burned, and property vandalised.[104]

Beyond coercion, regimes have a range of formal *legal* tools to influence the composition and powers of the judiciary. Most of these changes fall into one of two buckets: attempts to "pack" a court by influencing its composition and attempts to "curb" a court by threatening its institutional powers or resources.

The most orthodox way to influence the composition of a court, or to "pack" it, is to appoint a new set of judges to one or more vacant seats. But where this is not possible, would-be authoritarians may attempt to alter the size of a court, or the number of judges sitting on a court of specific judicial panel. For example, they might choose not to appoint a full quorum of judges to a court, or conversely, to increase the size of a court, with a view to appointing a new set of ideologically sympathetic judges.

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101 *See* GRETCHEN HELMKE, INSTITUTIONS ON THE EDGE: THE ORIGINS AND CONSEQUENCES OF INTER-BRANCH CRISES IN LATIN AMERICA 126-50 (2017) (discussing "judicial manipulation" in Latin America).

102 *See* Stef Vandeginste, *Legal Loopholes and the Politics of Executive Term Limits: Insights from Burundi*, 51 AFR. SPECTRUM 39, 56 (2016); Busingye Kabumba, *A Legal Expert's view on Burundi Term Limits Saga*, OBSERVER (May 13, 2015), http://observer.ug/viewpoint/37809-a-legal-expert-s-view-on-burundi-term-limits-saga [https://perma.cc/VW98-DE5Z].

103 Rosalind Dixon, *Constitutional Rights as Bribes*, 50 CONN. L. REV. 767, 800 (2018).

104 *See* INTERNATIONAL BAR ASSOCIATION, DIRE STRAITS: A REPORT ON THE RULE OF LAW IN FIJI 44 (2009).

Thus, in Venezuela, for example, the National Assembly of Venezuela, the nation's congress, passed the new Organic Law of the Supreme Court in 2004, expanding the size of the Venezuelan Supreme Court from twenty to thirty-two justices, and making it much easier for the congress to dismiss justices either through annulling their appointments or impeaching them.[105] These new dismissal powers were used to force several key changes, including the removal of the court's vice-president, so that after 2004, the regime effectively has exercised complete control over the court.[106] Similarly, in Hungary, the Fidesz- controlled parliament increased the size of the Constitutional Court of Hungary from eleven to fifteen justices as part of a broader effort to capture the court.[107]

Another mechanism for influencing the composition of a court involves attempts to remove existing allegations of misconduct against certain judges, including allegations of corruption, and following established procedures for removal, such as impeachment based on misconduct or corruption. Where regimes have sufficient support in the legislature, such removals may be fairly easy. In Bolivia, for example, the regime of Evo Morales has been aggressive in seeking to impeach hostile judges on flimsy grounds. In 2014, for example, impeachment proceedings were initiated against three justices of the Plurinational Constitutional Tribunal, the nation's constitutional court, after they ruled against the government, and all three were eventually removed from the court.[108]

A related way to remove hostile judges is to change the retirement age, effectively forcing older judges to leave the court and thus creating new vacancies that can be packed by regime loyalists. This tactic was used in both Poland and Hungary, although the European Court of Justice ("ECJ") in both cases struck down the lowered retirement age as a violation of EU law.[109]

A "softer" version of a similar technique is to manipulate the process of judicial promotion, either to higher courts or to the chief justiceship of a court. In India, for example, after the Indian Supreme Court issued its famous *Kesavananda* decision holding that a constitutional amendment of Indira Gandhi purporting to insulate certain issues from judicial review was an unconstitutional constitutional amendment,[110] Gandhi responded the very next day by flouting a long-accepted norm that promotion to the chief justiceship of the Court would be based solely on seniority. She passed

105 *See* Sanchez Urribarri, *supra* note 33, at 871-72.

106 *See id.* at 872-73.

107 *See* Zoltán Szente, *The Political Orientation of the Members of the Hungarian Constitutional Court Between 2010 and 2014*, 1 CONST. STUD. 123, 131 (2016).

108 *See El Senado Reactiva Juicio en Contra del Magistrado Gualberto Cusi*, LA RAZON (Nov. 24, 2016, 8:47 AM), http://www.la-razon.com/nacional/Senado-reactiva- magistrado-Gualberto-Cusi_0_2606739313.html [https://perma.cc/9T3J-3P56].

109 *See* Case C-286/12, Commission v Hungary, 1 C.M.L.R. 1243 (2012); Tamás Gyulavári & Nikolett H□s, *Retirement of Hungarian Judges, Age Discrimination and Judicial Independence: A Tale of Two Courts*, 42 INDUS. L.J. 289, 291-92 (2013) (noting that the attempt to lower the Hungarian retirement age from seventy to sixty-two was struck down both by both the Constitutional Court and ECJ); *EU Court Orders Poland to Halt Court Retirements Law*, BBC NEWS (Oct. 19, 2018); https://www.bbc. com/news/world-europe-45917830 [https://perma.cc/DLU6-6WET]; Jennifer Rankin, *EU Court Rules Poland's Lowering of Judges' Retirement Age is Unlawful*, GUARDIAN (June 24, 2019, 10:45 AM), https://www.theguardian.com/world/2019/jun/24/eu-court-rules- polands-lowering-of-judges-retirement-age-unlawful [https://perma.cc/7NCS-K3CN].

110 *See* Kesavananda v. State of Kerala, (1973) SCR (Supp) 1 (India).

over three senior justices in the *Kesavananda* majority and promoted a more junior justice who had dissented from the *Kesavananda* decision.[111]

In Poland in 2015, the PiS also began its efforts to undermine judicial independence by refusing to seat judges appointed by the outgoing Sejm, the lower house of the Polish parliament, and electing five new judges.[112] When the Constitutional Tribunal ordered the government to seat three of the original judges (whom it held were properly appointed), the government brought the matter back before the court, now comprised of two irregularly appointed PiS judges, and the court "reinterpreted" its prior ruling to recognize all judges appointed by the old and new Sejm.[113] The government also then effectively sidelined non-PiS judges by challenging their ability to sit and requiring them to take forced annual leave.[114]

Attempts to alter the composition of a court may also focus more narrowly on a specific case. Would-be authoritarians may manipulate the composition of the panel allocated to hear a particularly important case. We already referred to the example of Nicaragua above — in the 2009 reelection case, regime allies used trickery to avoid notifying opposition judges on the Supreme Court of Justice, and then replaced those judges with pro-regime substitutes, resulting in a unanimous decision in favor of the incumbent president, Daniel Ortega.[115]

Instead of, or in addition to, seeking to pack a court, regimes may also target the court as an institution. For example, they may cut a court's budget or remove its access to necessary resources, strip a court's jurisdiction to hear some or all cases involving core constitutional disputes, decline to publish its judgments, or refuse to follow its judgments where the executive government is a party to the case.[116] By cutting a court's budget, or access to basic resources, would-be authoritarians can undermine courts in several ways. They can make it more difficult for judges to produce judgments in a timely way. They can also reduce the perceived power and prestige of the court in ways that affect the support for the court in the broader constitutional culture. And they can reduce the attractiveness of judicial office, or the caliber of judge, likely to take office in the future.

Likewise, refusing to publish a court decision or give it any authoritative effect reduces the practical effect of court decisions as a potential check on abusive constitutional change, and diminishes the perceived power and prestige of courts as important social actors in ways that undermine their effectiveness as institutions.

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111 *See* Burt Neuborne, *The Supreme Court of India*, 1 INT'L J. CONST. L. 476, 481-82 (2003).

112 *See* Sadurski, *How Democracy Dies (in Poland)*, *supra* note 24, at 19; Hubert Tworzecki & Radoslaw Markowski*, Why Is Poland's Law and Justice Party Trying to Rein in the Judiciary?*, WASH. POST (July 26, 2017), https://www.washingtonpost.com/ news/monkey-cage/wp/2017/07/26/why-is-polands-law-and-justice-party-trying-to- rein-in-the-judiciary/?utm_term=.bc645112bcfa [https://perma.cc/LGB3-U3KR].

113 *See* Sadurski, *How Democracy Dies (in Poland)*, *supra* note 24, at 19-20.

114 *See id.* at 22.

115 *See supra* text accompanying notes 76–77.

116 For use of this tactic as a response to international courts, see, e.g., Karen J. Alter, James T. Gathii & Laurence R. Helfer, *Backlash Against International Courts in West, East and Southern Africa: Causes and Consequences*, 27 EUR. J. INT'L L. 293, 293-94 (2016).

Attacking the jurisdiction of a court may have similar effects: It may reduce the standing and prestige of the court, and the effectiveness of judicial office. At a practical level it can also deprive courts of the capacity to invalidate some illiberal constitutional changes that effectively erode constitutional democracy.[117] Courts, of course, can find, and in some cases have found, ways to invalidate or evade these restraints on their jurisdiction.[118] But this move itself puts courts in a potentially difficult bind, requiring a choice between being respectful to formal legal constraints and their broader role as guardians of the political process. By forcing courts to sacrifice their commitment to legal form in order to preserve this broader role, would-be authoritarians may discredit courts in the eyes of key constituents.

In some cases, would-be authoritarians may also be able to secure a compliant or cowed judiciary simply by *threatening* to use both informal and formal tools of this kind. Judges may attempt to preempt threats to their individual safety or reputation, or the court's constitutional role, by "willingly" reaching decisions that advance the regimes' objectives. Threats of this kind may be especially powerful if they are directed toward the use of legal tools against individual judges as opposed to a court itself — for example, the use of anti-corruption laws or other criminal laws to threaten non-compliant judges with politically- motivated prosecutions. Yet the effect of such threats will often be hard to show in practice: Often there is little public evidence of when and how they are made, and if they are made public, on the thinking and responses of individual judges.

Table 1. Techniques for Controlling a Court

Composition of Court: Court-Packing	Court as an Institution: Court-Curbing
Altering court size (through non-staffing, or court-packing) Removing judges (via misconduct allegations, or new retirement norms)	Budget cuts Non-publication of decisions Non-compliance with decisions Jurisdiction stripping Altering the majority rule for invalidation of legislation Changing the order of court rulings

117 For example, after the Constitutional Court of Hungary struck down a law imposing a retroactive ninety-eight percent tax on severance payments, the Fidesz regime responded by stripping the court of the ability to review fiscal legislation. *See* Szente, *supra* note 107, at 132.

118 The *Kesavananda* case in India, for example, involved the court deploying the unconstitutional constitutional amendment doctrine to strike down purported restrictions on its jurisdiction. *See* Kesavananda v. State of Kerala, (1973) SCR (Supp) 1 (India). In Hungary, the Court declined to hold the amendment unconstitutional but held that it could still review fiscal or budgetary legislation on other grounds. *See* Gábor Halmai, *Unconstitutional Constitutional Amendments: Constitutional Courts as Guardians of the Constitution?*, 19 CONSTELLATIONS 182, 192 (2012); Szente, *supra* note 107, at 133.

Table 1 gives a summary of some major court-packing and court- curbing techniques. The various techniques to attack courts are not necessarily equivalent in purpose or effect, and some are more closely tied to a regime strategy of abusive judicial review than others. Of the two sets of techniques, court-packing may be more likely to produce a judiciary that is useful for carrying out regime tasks, since it leaves the powers of a court intact and tries to stack the court with regime loyalists. Court-curbing in contrast may be more effective for nullifying judicial power entirely, for cabining the court's jurisdiction over certain sensitive matters, or perhaps for producing a form of abusive judicial review that is weaker and merely about upholding (and thus legitimating) regime actions, rather than about actively aiding the regime. Ironically, a curbed court may actually be less valuable to a regime in carrying out abusive judicial review, since the court will have less power and prestige.

There is some evidence that regimes sometimes deploy these two techniques in sequence, as a kind of one-two punch. The first move is to disable or paralyze a hostile court by curbing it, while the second is to make the court a regime ally by packing it. In Hungary, after the Fidesz party took power in 2009, it began by attacking the jurisdiction of the country's previously independent and celebrated Constitutional Court.[119] An early move was to pass a constitutional amendment limiting the jurisdiction of the court, by preventing it from hearing classes of cases dealing with fiscal issues.[120] The regime also launched a harsh rhetorical attack against the court and, after it promulgated a new constitution, stripped the court's old jurisprudence of any force and effect[121] and restricted access to the court by getting rid of the old *actio popularis* mechanism that allowed any citizen to challenge laws.[122] Initially, while the judiciary was still in opposition hands, these court- curbing moves reduced its ability to check Fidesz.

At the same time, the regime was taking steps to pack the judiciary. It changed, for example, the method for appointment to the constitutional court, increased the size of the Court, altered the qualifications needed to be a justice, reorganized the judiciary to allow more political input into appointments and promotions, and lowered the retirement age for the ordinary judiciary.[123] By about 2013, the regime thus had a firm grip on the court.

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119 On the historical power and prestige of the court, see THEUNIS ROUX, THE POLITICS OF PRINCIPLE: THE FIRST SOUTH AFRICAN CONSTITUTIONAL COURT, 1995-2005, at 68 (David Dyzenhaus & Adam Tomkins eds., 2013); Jonathan Bond, *Concerning Constitutional Courts in Central and Eastern Europe*, 2 INT'L PUB. POL'Y REV. 5, 8-9 (2006); Rosalind Dixon, *Constitutional Design Two Ways: Constitutional Drafters as Judges*, 57 VA. J. INT'L L. 1, 27-28 (2017); Kim Lane Scheppele, *Guardians of the Constitution: Constitutional Court Presidents and the Struggle for the Rule of Law in Post-Soviet Europe*, 154 U. PA. L. REV. 1757, 1775-86 (2006); John W. Schiemann, *Explaining Hungary's Powerful Constitutional Court: A Bargaining Approach*, 42 EUR. J. SOC. 357, 357-58 (2001); Herman Schwartz, *Eastern Europe's Constitutional Courts*, 9 J. DEMOCRACY 100, 106 (1998).

120 *See* László Sólyom, *The Rise and Decline of Constitutional Culture in Hungary*, *in* CONSTITUTIONAL CRISIS IN THE EUROPEAN CONSTITUTIONAL AREA 5, 21 (Armin von Bogdandy & Pál Sonnevend eds., 2015) (discussing Law CXIX of 2010 on the amendment to Law XX of 1949 on the Constitution of the Republic of Hungary, *Magyar Kozlony*, Issue 177 (2010)); Miklós Bánkuti, Gábor Halmai & Kim Lane Scheppele, *Hungary's Illiberal Turn: Disabling the Constitution*, *in* THE HUNGARIAN PATIENT: SOCIAL OPPOSITION TO AN ILLIBERAL DEMOCRACY 37, 38 (Péter Krasztev & Jon Van Til eds., 2015).

121 This amendment was struck down by the Constitutional Court of Hungary in 2016, but the Fidesz government refused to publish the decision.

122 *See* Bánkuti, Halmai & Scheppele, *supra* note 120, at 42.

123 *See id.* at 42-43.

In Poland, the PiS followed a similar strategy after coming to power in 2015.[124] The PiS engaged in a series of court-curbing measures that aimed to paralyze the Polish constitutional court before the party was able to take control of it. It introduced dozens of new laws limiting the jurisdiction of the court, raising the supermajority required to invalidate a law, limiting the scope for judicial dissent, making it easier to remove sitting judges, and giving the prime minister apparent discretion whether or not to publish decisions of the court. When the constitutional court itself struck down some of these laws as unconstitutional, the prime minister responded by declining to publish those decisions.[125] Over time, however, as Sadurski has pointed out, the regime used irregularities in the appointment process and the passage of time to gain a solid pro-regime majority of judges.[126] Since that has happened, the court has become a partner of the regime in helping to consolidate power.

III. A TYPOLOGY OF ABUSIVE JUDICIAL REVIEW: WEAK AND STRONG FORMS

The prior part demonstrated that antidemocratic actors have a number of tools available to co-opt courts, and once captured, judges may be turned into extremely valuable allies in undermining democracy. The tasks that judges perform for regimes take two major forms. "Weak" abusive judicial review occurs when courts uphold legislation or executive action that significantly undermines the democratic minimum core, thus legitimating damaging moves undertaken by political actors. "Strong" abusive judicial review occurs when courts themselves act to remove or undermine democratic protections.[127] The weaker or "rubber stamp" version of abusive judicial review is much more widely conceptualized than the strong, obstacle- clearing form, but both appear to be reasonably

124 *See* Bojan Bugari□ & Tom Ginsburg, *The Assault on Postcommunist Courts*, 27 J. DEMOCRACY 69, 73 (2016); Pablo Castillo-Ortiz, *The Illiberal Abuse of Constitutional Courts in Europe*, 15 EUR. CONST. L. REV. 48, 57 (2019); Sadurski, *How Democracy Dies (in Poland)*, *supra* note 24, at 2; Wojciech Sadurski, *Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Government Enabler*, 11 HAGUE J. RULE L. 63, 82 (2018).

125 *See* CHRISTIAN DAVIES, FREEDOM HOUSE, HOSTILE TAKEOVER: HOW LAW AND JUSTICE CAPTURED POLAND'S COURTS (2019); MARCIN MATCZAK, POLAND'S CONSTITUTIONAL CRISIS: FACTS AND INTERPRETATIONS, FOUND. FOR L., JUST. & SOC'Y 2, 3 (2018); Tomasz Tadeusz Koncewicz, Marek Zubik, Magdalena Konopacka & Karol Sta□kiewicz, *Developments in Polish Constitutional Law: The Year 2016 in Review*, BLOG INT'L J. CONST. L. (Nov. 12, 2017), http://www.iconnectblog.com/2017/11/developments-in-polish-constitutional-law-the- year-2016-in-review/ [https://perma.cc/D5TM-25K8]; Christian Davies, *Poland Is 'On Road to Autocracy', Says Constitutional Court President*, GUARDIAN (Dec. 18, 2016, 2:24 PM), https://www.theguardian.com/world/2016/dec/18/poland-is-on-road-to-autocracy-says- high-court-president [https://perma.cc/C5A3-SK2Y].

126 *See* Sadurski, *How Democracy Dies (in Poland)*, *supra* note 24, at 31.

127 The distinction between weak and strong judicial review is now familiar in comparative constitutional law. *See, e.g.*, MARK TUSHNET, WEAK COURTS, STRONG RIGHTS 33-36 (2008) (contrasting weak-form and strong-form judicial review). Weak judicial interpretations or remedies are deferential and leave room for a range of political responses. Strong interpretations or remedies impose judicial decision-making more strongly on the political process. *See* Rosalind Dixon, *Creating Dialogue About Socioeconomic Rights: Strong-Form v. Weak-Form Judicial Review Revisited*, 5 INT'L J. CONST. L. 391, 402 (2007); Rosalind Dixon, *The Forms, Functions, and Varieties of Weak(ened) Judicial Review*, 17 INT'L J. CONST. L. 904, 904 (2019) [hereinafter *Forms, Functions, and Varieties*]; *cf.* Aileen Kavanagh, *What's So Weak About "Weak-Form Review"? The Case of the UK Human Rights Act 1998*, 13 INT'L J. CONST. L. 1008, 1034 (2015) (noting complexity but in a more critical vein).

common in projects of democratic erosion. In the remainder of this Part, we outline the distinction and give examples of both forms.

A. Weak Abusive Judicial Review

The weak form of abusive judicial review occurs paradigmatically when courts are asked to review new legislation or executive action that plausibly clashes with the constitutional text and undermines the democratic minimum core. By dismissing a constitutional challenge to this legislation or executive action, courts are often interpreted by the broader public to be affirming the legitimacy of those laws.[128] This is in large part the by-product of the respect which courts are given in many constitutional democracies. This kind of "legitimation effect"[129] may be especially valuable to would-be authoritarian actors seeking to engage in "stealth" forms of authoritarianism, or to achieve antidemocratic change while retaining the appearance of a commitment to constitutional democracy. If a would-be authoritarian actor can point to a court decision upholding those actions as plausibly constitutional, this can add an argument that the actions conform to generalized norms of democratic constitutionalism.

This weak variant of abusive judicial review has been a prominent feature of many of the well-studied cases of democratic erosion in recent years. In Venezuela, for example, the Supreme Court initially maintained some independence from the regime of Hugo Chavez, but was completely packed following the passage of new legislation in 2004, after a failed coup attempt against Chavez.[130] The court ruled in favor of the government in essentially all significant cases from that point forward.[131] In the process, it upheld a number of laws and actions that were both constitutionally problematic and which helped Chavez consolidate power. For example, it upheld electoral changes that greatly favored the incumbent regime, and it also legitimated the government's decision to strip an opposition-held TV station of its license.[132] It also further cleared the way for successive attempts at constitutional reforms that increased Chavez's power by, among other things, removing presidential term limits, as we explain in more detail below.[133]

One observes similar dynamics in Ecuador during the administration of Rafael Correa, which was also viewed by many observers as embarking on a project of democratic erosion. After winning office in 2006, Correa quickly replaced the constitution[134] Even though the new constitutional

128 *See, e.g.*, Moustafa & Ginsburg, *supra* note 30, at 6 (referring to the "veneer of legal legitimation" that courts can provide authoritarians).

129 *See id.*; Ronen Shamir, *"Landmark Cases" and the Reproduction of Legitimacy: The Case of Israel's High Court of Justice*, 24 L. & SOC'Y REV. 781, 783 (1990).

130 *See* Sanchez Urribarri, *supra* note 33, at 871-72.

131 *See id.* at 878.

132 *See id.* at 876.

133 *See infra* Part IV.A.

134 *See* Catherine M. Conaghan, *Ecuador: Correa's Plebiscitary Presidency*, 19 J. DEMOCRACY 46, 46 (2008).

order contained a series of formal protections for judicial independence, Correa used his control of political institutions and supposedly independent bodies to gain a firm grip over the Constitutional Tribunal of Ecuador.[135] The institution in turn helped to legitimate consequential acts of the administration that helped push it in authoritarian directions. The most important cases involved proposed constitutional amendments that arguably clashed with a tiered amendment rule found in Ecuador's new constitution. Under this rule, sensitive amendments such as those affecting the "fundamental structure" or reducing "fundamental rights and guarantees" require more demanding procedures of change.[136] In one key case, the court allowed Correa to call a 2011 referendum on proposed changes that, *inter alia*, substantially weakened judicial independence by giving the regime far more power over the appointment of judges.[137] The consultation provided for a new Judicial Council, controlled by the Correa regime, which then appointed and removed hundreds of new judges, including the entire Constitutional Tribunal.[138] In a second case from 2015, analyzed in more detail below, the court permitted Correa to use the least demanding procedure for constitutional change (requiring only congressional approval) to undertake changes that completely eliminated presidential term limits.[139] Congress subsequently passed the changes and excised presidential term limits from the Ecuadorian constitution.[140]

Poland also offers an example of the weak form of abusive judicial review playing a meaningful role in democratic erosion. Shortly after the Law and Justice party won a majority of seats in the Parliament with a minority of votes, it began a project to take over the Constitutional Tribunal, which had previously been seen as a strong protector for the democratic order.[141] The new "captured" court has now become an important partner in the regime's overall project to consolidate power and weaken the opposition. For example, it issued a decision that upheld a law effectively prioritizing pro-government rallies over other assemblies, despite an obvious clash with freedoms of expression and association.[142] The Polish Constitutional Tribunal has been called upon to play this role particularly aggressively precisely because the Law and Justice Party lacks the parliamentary supermajority necessary to enact formal amendments to the constitution.[143] Thus, it has passed a number of laws — of dubious constitutionality — to effectively amend the Polish Constitution anyway, for example by reorganizing the constitutional court, the ordinary judiciary, and other sensitive

135 *See* José Luis Castro-Montero & Gijs van Dijck, *Judicial Politics in Unconsolidated Democracies: An Empirical Analysis of the Ecuadorian Constitutional Court (2008–2016)*, 38 JUST. SYS. J. 380, 383-85 (2017).

136 *See* CONST. OF THE REPUBLIC OF ECUADOR [CRE] arts. 441-44.

137 *See* Decision No. 008-11-DEE-CC, Sept. 29, 2011 (Ecuador).

138 *See* Castro-Montero & van Dijck, *supra* note 135, at 384.

139 *See infra* Part IV.A.

140 *See infra* Part IV.A.

141 *See* Sadurski, *How Democracy Dies (in Poland)*, *supra* note 24, at 17-18.

142 *See* Ref. No. Kp 1/17, Mar. 16, 2017 (Pol.).

143 *See* Sadurski, *How Democracy Dies (in Poland)*, *supra* note 24, at 11.

"control" institutions such as media regulators.[144] The court has played a role in legitimating these changes by generally upholding them.[145]

The "weak" variant of abusive judicial review is, at first glance, a simple phenomenon, seemingly captured with the metaphor of the court as rubber stamp, or as the proverbial "yes-man" or "yes-woman." But beneath the surface, there is more variation behind why regimes engage in this strategy and what they seek to attain. At a most basic level, judicial review of major changes might be an automatic requirement or at least an expected consequence of opposition lawsuits. When these inevitable challenges occur, of course, a yes vote will generally allow the change to proceed, while a no vote will stop or at least alter or slow it, unless the regime wants to be in the position of openly disregarding its own judiciary. Having a Court engage in weak abusive judicial review thus lowers the costs and risks of embarking on projects of constitutional change that take aim at the democratic minimum core.

But regimes may also seek the broader legitimacy benefits of a favorable decision. That is, in the face of an ambiguous or dubious legal situation, a favorable judicial decision may increase domestic and international acceptance that a given change is consistent with the existing constitutional order rather than a breach of it. This function, though, is more contextual than the one above: Not every favorable judicial decision is likely to provide substantial legitimacy benefits for a regime. Rather, the extent of those benefits potentially depends on the extent to which the court can plausibly be presented as something other than a mere rubber stamp or automatic regime vote. This may depend on the prior history of judicial independence in the country: Poland and (to a much lesser extent) Venezuela had such a history, while Ecuador did not.[146] It may also depend on the extent to which the regime continues to lose meaningful cases, at least sometimes. An interesting example is Hungary, where the Court has also been a fairly loyal partner of the Fidesz regime but has also issued several decisions that broke with the party in some major cases.[147] We return to these problems, which we think mark an important limit to abusive judicial review as a regime strategy, in Part V.

B. Strong Abusive Judicial Review

More interesting than mere legitimation of antidemocratic political decisions are cases where courts themselves are the ones actively undertaking antidemocratic changes. Courts in some cases may choose to engage in robust forms of review, which involve little or no deference to the constitutional judgments of legislators or executive actors. Judicial review of this kind is also often under-

144 *See generally id.* (discussing these transformations in detail).

145 *See, e.g.*, Emily Tamkin, *Polish Ruling Party Passed Unconstitutional Laws, Now Controls Constitutional Tribunal*, FOREIGN POL'Y (Dec. 19, 2016, 3:17 PM), https://foreignpolicy.com/2016/12/19/polish-ruling-party-passed-unconstitutional-laws- now-controls-constitutional-tribunal-trump-law-justice/ [https://perma.cc/RP5K-A9YX].

146 For further discussion on this point, see *infra* Part V.

147 *See, e.g.*, Szente, *supra* note 107, at 138 tbl.3 (finding that political ideology is a strong determinant of vote, but that even some justices affiliated with Fidesz and its allies sometimes vote against the government).

stood as a form of "strong" or "active" judicial review.[148] Courts may likewise rely on certain remedies, such as the immediate invalidation of an existing statute or executive decision, or a mandatory order directed at a specific government official requiring specific and immediate action, which tend to give judicial review a strong character.[149]

The co-optation of stronger or more active forms of judicial review may be especially valuable for would-be authoritarian actors. Democratic constitutions often limit the scope for would-be authoritarian actors to pursue their objectives in a range of ways: Federal structures may mean that the national legislature lacks power to enact desired legislation,[150] limits on executive power may constrain the power of the president to enact various policies, and entrenched term limits may prevent an elected president from remaining in office.[151] Finding ways either to change, or circumvent, these restrictions is a key part of any would-be authoritarian's agenda.

Furthermore, would-be authoritarians are increasingly faced with amendment rules that make formal change to such provisions quite difficult. Increasingly, provisions of this kind enjoy heightened protection via "tiered" approaches to constitutional design, which impose heightened requirements for amendment of these provisions.[152] In some cases, constitutional limits are even made formally unamendable by virtue of an "eternity clause."[153] The advantage of judicial review in this context is that it has the potential to circumvent these limitations. Strong forms of judicial review can provide would-be authoritarians with the means of achieving their objectives without being bound by the constraints of a federal division of power, the separation of legislative and executive powers, or even formal limits on constitutional amendment.[154]

Below, we discuss in detail several examples of strong abusive judicial review in which judges have removed presidential term limits and nullified the power of opposition-controlled legislatures.[155] Here, we also briefly give a couple of other examples of this kind of "active" or strong abusive judicial review.

A first involves the abuse of doctrines of militant democracy. Post- War Germany pioneered the concept that liberal democratic orders may be able to ban antidemocratic parties, movements, and politicians that would seek to undo that order if they succeeded in winning power.[156] As we have

148 *See* sources cited *supra* note 127. Other definitions, which are useful in other contexts, but less so in this one, focus on the finality of court decisions. *See* TUSHNET, *supra* note 127.

149 *See* Landau, *Forms, Functions, and Varieties*, *supra* note 127; Kent Roach, *Polycentricity and Queue Jumping in Public Law Remedies: A Two-Track Response*, 66 U. TORONTO L.J. 3 (2016).

150 *See* Whittington, *supra* note 83, at 585 ("[T]he Court is able to do what national political leaders are either constitutionally incapable of doing or politically unwilling to do themselves.").

151 *See* Ginsburg et al., *supra* note 49, at 1816-18.

152 *See* Dixon & Landau, *Tiered Constitutional Design*, *supra* note 37, at 444 (giving numerous examples).

153 *See* YANIV ROZNAI, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: THE LIMITS OF AMENDMENT POWERS 5-6 (2017); Richard Albert, *Constitutional Handcuffs*, 42 ARIZ. ST. L.J. 663, 665 n.6 (2010).

154 *See infra* Part IV.A.

155 *See infra* Part IV.

156 *See* Patrick Macklem, *Militant Democracy, Legal Pluralism, and the Paradox of Self- Determination*, 4 INT'L J. CONST. L. 488, 491

noted above, the constitutions of many countries around the world now give their high courts the power to ban parties, often on similar grounds that they are "antidemocratic" or otherwise anti-constitutional.[157]

Consider a 2017 decision by the Supreme Court of Cambodia, which banned the opposition National Rescue Party.[158] The decision was issued by a Court that is universally regarded as being controlled by the incumbent Cambodian People's Party ("CPP"),[159] and reasoned on extremely flimsy grounds that the party was allied with foreign interests (including the United States) and posed a threat of national breakup.[160] The relevant standards applied by the Court, which were found in the Law of Political Parties rather than the constitution itself, were themselves highly ambiguous and open to abuse.[161] And the case was brought by the government itself (i.e., the Ministry of the Interior), and decided by the Court after only five hours of hearing, and two hours of deliberation.[162]

The effect of the decision was dramatic: It decimated the major opposition party in the country, which had made extraordinary gains in the previous elections of 2013, almost winning control of the national parliament.[163] The Rescue Party was dissolved, lost all 55 of its seats (out of 125 total seats) in the parliament, and more than 100 of its leaders were banned from politics for 5 years.[164] In a subsequent election in July 2018 with no effective opposition, the CPP won all 125 seats in the parliament; the incumbent prime minister Hun Sen has now controlled the country since 1985.[165] The Supreme Court's decision banning the Rescue Party thus played a pivotal role in protecting a long-term authoritarian regime in Cambodia and in cutting off a likely process of re-democratization.

A second example of strong-form abusive judicial review stems, once again, from the Polish case. The Court there has not only legitimated key regime actions, but has also actively worked to destabilize the democratic order. One of its key decisions, for example, struck down the law regulating the country's Judicial Council, on the dubious ground that it discriminated against different

(2006).

157 Ginsburg & Elkins, *supra* note 59, at 1447.

158 *See* Ministry of Interior v. Nat'l Rescue Party, Verdict No. 340, Nov. 16, 2017, at 50 (S. Ct. Cambodia, Plenary of Trial Chamber) (translation on file with authors).

159 *See* Lucy West, *The Limits to Judicial Independence: Cambodia's Political Culture and the Civil Law*, 26 DEMOCRATIZATION 537, 537-38 (2019) (noting the "lack of judicial independence" in the country, and arguing it is a result of both the political context and design of the judiciary).

160 *See Nat'l Rescue Party*, Verdict No. 340, at 41-47.

161 *See id.* Indeed, the law had been amended earlier in 2017 to add broader grounds for party dissolution, and in an act of weak abusive judicial review, the Constitutional Council upheld the amendments. *See* Wendy Zeldin, *Cambodia: Supreme Court Dissolves Main Opposition Party*, GLOBAL LEGAL MONITOR (Dec. 6, 2017), http://www.loc.gov/ law/foreign-news/article/cambodia-supreme-court-dissolves-main-opposition-party/ [https://perma.cc/M6A8-ZCHT].

162 Kosal Path, *A Cambodian Fusion of Personality, Party, and the State*, 117 CURRENT HIST. 215, 215 (2018).

163 *See Cambodia Top Court Dissolves Main Opposition CNRP Party*, BBC NEWS (Nov. 16, 2017), https://www.bbc.com/news/world-asia-42006828 [https://perma.cc/P6Z8- CC93].

164 *Id.*

165 *See* Hannah Beech, *Cambodia Re-elects its Leader, a Result Predetermined by One*, N.Y. TIMES (July 29, 2018), https://www.nytimes.com/2018/07/29/world/asia/cambodia- election-hun-sen.html [https://perma.cc/H55R-HXLX]; Julia Wallace, *'Fireflies' and 'Ghosts' in Cambodia Prop up Facade of Real Election*, N.Y. TIMES (July 11, 2018), https://www.nytimes.com/2018/07/11/world/asia/cambodia-election-hun-sen.html [https://perma.cc/N9BM-76VX].

levels of the judiciary by prescribing different methods for their appointment to the Council, and also had improper terms for their mandates.[166] As Sadurski recounts, the decision was essentially "pretextual," but it served an important political function by creating a vacuum in which the Peace and Justice party could now introduce and pass a new law governing this matter.[167] The new law changed the appointment process from a judicial one to a political one, thus giving the ruling party an effective monopoly on appointments. It also dumped existing members of the Council out midway through their existing terms, which the party justified by pointing to the "defect" in appointments found by the Court in the existing law.[168] Effectively, the Court gave the party the tools it needed to capture the institution regulating the ordinary judiciary.

The concept of strong abusive judicial review dovetails nicely with other work that points out various ways in which courts carry out functions for authoritarian regimes or regimes whose leaders are seeking to become authoritarian. Much of this work identifies the ways in which leaders use a range of ordinary legal techniques such as libel lawsuits and anti-corruption investigations to harass, divide, and weaken opposition political movements.[169] The difference is that the functions carried out in those cases, which one might call the abuse of the rule of law, occur at the routine legal level rather than the extraordinary level of constitutional change. Regimes engaged in such strategies seek to lower the visibility of their actions and to present them as neutral rather than selective or distorted applications of rule of law principles. In contrast, the strong form of abusive judicial review involves cases that are generally far more salient to domestic and international observers. In using courts to carry out visible, sweeping, and problematic constitutional changes, regimes may help to blunt hostile responses or measures that might otherwise follow on steps to erode or limit liberal democracy.

IV. ABUSIVE JUDICIAL REVIEW IN ACTION: TWO EXAMPLES

In this Part, we seek to gain additional insight into the phenomenon of abusive judicial by exploring two important recent examples. The first is cross-national and looks at judicial decisions either legitimating the removal of presidential term limits, or actively removing them, across various countries in Latin America and Africa. The second is a single-country case study: We look at a series

166 *See* Decision K 5/17, Jun. 20, 2017 (C.C. Poland).

167 Sadurski, *How Democracy Dies (in Poland)*, *supra* note 24, at 31-32.

168 *See* Wojciech Sadurski, *Bad Response to a Tragic Choice: The Case of Polish Council of the Judiciary*, VERFASSUNGSBLOG (Apr. 16, 2018), https://verfassungsblog.de/bad- response-to-a-tragic-choice-the-case-of-polish-council-of-the-judiciary/ [https://perma.cc/8HRF-SQJR].

169 *See* Varol, *supra* note 3, at 1679; Alvin Y.H. Cheung, An Introduction to Abusive Legalism 1-2 (Feb. 22, 2018) (unpublished manuscript), *available at* https://osf.io/preprints/lawarxiv/w9a6r/.

of high court decisions in Venezuela to nullify the power of the elected National Assembly after the opposition won control of it in 2015.

A. Presidential Term Limits in Latin America and Africa

A number of recent judicial decisions on presidential term limits in both Latin America and Africa offer important examples of both the weak and strong forms of abusive judicial review. There are a few prominent and well-studied examples of courts defending the constitutional order against attempts by would-be authoritarians to eliminate or ease presidential term limits. Perhaps the most famous is a 2010 Colombian decision that used the unconstitutional constitutional amendment doctrine to stop President Alvaro Uribe from amending the Colombian Constitution to seek a third consecutive term in office.[170] The Court in that case held that allowing three presidential terms (consecutive or otherwise) would effectively transform the system of separation of powers by allowing an incumbent president to amass too much power.[171] But there are many more examples of courts wielding similar doctrines as a way to enable, or directly carry out, the elimination of presidential term limits.

We of course do not argue that all decisions allowing an easing of presidential term limits are abusive in character; some are pretty clearly democratically legitimate. First, there is a fairly broad, reasonable range of disagreement as to the scope of term limits in a presidential system.[172] For example, there are good arguments that some limits, such as those prohibiting any consecutive or non-consecutive re-election, are too strict, and movements certainly ought to be able to ease them.[173] Second, and relatedly, much depends on the political context in which changes are made, and the impact of changing term limits in light of other formal and informal changes.

Take as an example Costa Rica, where the Supreme Court in 2003 issued a decision excising an earlier term limit in the constitution, which prohibited any consecutive or non-consecutive re-election.[174] The Court's decision relied on problematic reasoning similar to that of many of the cases reviewed below. But the effect of the decision was quite different. The decision removed the amendment, but left a still- meaningful term limit found in the original constitution in place, which continued to prohibit *consecutive* reelection.[175] In addition, the context in which the decision was

170 *See* MANUEL JOSÉ CEPEDA-ESPINOSA & DAVID LANDAU, COLOMBIAN CONSTITUTIONAL LAW 351-59 (2017) (discussing Decision C-141 of 2010 and providing a translation of the case).

171 *See id.*

172 *See* David Landau, Yaniv Roznai & Rosalind Dixon, *Term Limits and the Unconstitutional Constitutional Amendment Doctrine: Lessons from Latin America*, *in* POLITICS OF PRESIDENTIAL TERM LIMITS 1 (Alexander Baturo & Robert Elgie eds., 2019).

173 *See id.* at 11; Jack M. Beermann, *A Skeptical View of a Skeptical View of Presidential Term Limits*, 43 CONN. L. REV. 1105, 1107 (2011); John M. Carey, *The Reelection Debate in Latin America*, 45 LATIN AM. POL. & SOC'Y 119, 130-31 (2003); Ginsburg et al., *supra* note 49, at 1813.

174 *See* Decision No. 02771, Apr. 4, 2003 (Const. Chamber, S. Ct.).

175 *See* COSTA RICA CONST. [CRC] art. 132.

made clearly served the political interests of one political party and ex-president seeking a return to office, but it did not pose a serious threat to liberal democratic constitutionalism because it was not coupled with other formal and informal changes to erode democracy.[176]

Our argument, therefore, is contextual — in the cases and contexts we review here, the decisions constituted abusive exercises of judicial review. All of these cases are ones where the changes did more than allow a single presidential re-election; they mostly eliminated presidential term limits entirely, or at least allowed three or more consecutive terms. Furthermore, the changes to term limits were coupled with other formal and informal measures, such as attacks on judicial independence and the media, or alterations to electoral rules, which also constituted attacks on the democratic minimum core. The different forms of change worked together, with the changes to term limits allowing presidents to increase their control over other institutions of the state, such as courts, that are supposedly in charge of checking them, and greater tenure in office allowing the president to tilt the electoral playing field ever more greatly against opposition figures. There is a cluster of "weak" abusive judicial review cases where courts held that political attempts to loosen or eliminate term limits were legitimate, even when they posed a risk of substantial democratic erosion.[177] Take a trio of cases from the Andes, in Venezuela (2009), Ecuador (2014), and Bolivia (2015).[178] In all three countries, presidents first replaced their constitutions, and then, as their final terms expired, sought to eliminate or extend presidential term limits in the constitutions they themselves had played a major role in drafting.[179] The three cases are especially interesting because all three contained a "tiered" constitutional design, where certain changes such as those to the "fundamental" or "basic" structure, or which infringed on basic rights and guarantees, would require a more demanding procedure for formal constitutional change.[180] There are compelling arguments that the elimination of presidential term limits is indeed the type of change that infringes on the basic structure, or infringes on the fundamental rights of the opposition.[181] Thus, a significant easing or elimination of term limits would appear to be the kind of change that would activate the defenses embedded in the constitutional text. Nonetheless, in all three cases, Presidents Chavez, Correa, and Morales, respectively, all sought to use the lowest level of constitutional change (the ordinary amendment

176 *See* Elena Martinez-Barahona, *Constitutional Courts and Constitutional Change: Analysing the Cases of Presidential Reelection in Latin America*, *in* NEW CONSTITUTIONALISM IN LATIN AMERICA: PROMISES AND PRACTICES 289, 297 (Detlef Nolte & Almut Schilling-Vacaflor eds., 2012).

177 On "weak" abusive judicial review, see *supra* Part III.A.

178 *See* Decision 1974/07 (S. Ct. Ven.); Decision 1610/08 (S. Ct. Ven.); Decision 0001–14-RC (C.C. Ecuador 2014); Decision 0194/2015 (C.C. Bolivia); Decision R.A. L.P. 017/2015–2016 (S. Elect. Trib. Bolivia).

179 For an overview of the three decisions and their contexts, see Landau, *Presidential Term Limits*, *supra* note 17, at 234-38. For a focus on Ecuador, see Carolina Silva-Portero, *Chronicle of an Amendment Foretold: Eliminating Presidential Term Limits in Ecuador*, CONSTITUTIONNET (Jan. 20, 2016), http://www.constitutionnet.org/news/chronicle- amendment-foretold-eliminating-presidential-term-limits-ecuador [https://perma.cc/ W3BX-5EE4].

180 *See* VENEZ. CONST. [VC] arts. 340-49; ECUADOR CONST. [EC] arts. 441-44; BOL. CONST. [BC] art. 411; *see also* Dixon & Landau, *Tiered Constitutional Design*, *supra* note 37, at 440-50.

181 *See* Carlos Bernal Pulido, *There are Still Judges in Berlin: On the Proposal to Amend the Ecuadorian Constitution to Allow Indefinite Presidential Reelection*, BLOG INT'L J. CONST. L. (Sept. 10, 2014), http://www.iconnectblog.com/2014/09/there-are-still-judges-in-berlin-on-the-proposal-to-amend-the-ecuadorian-constitution-to-allow-indefinite-presidential- reelection/ [https://perma.cc/BR4P-D6V6].

tier) to eradicate term limits completely (in Venezuela and Ecuador) or to extend them to effectively allow four consecutive terms (in Bolivia).[182]

Courts in all three countries ratified these maneuvers.[183] In each case, the change was one of many undertaken by incumbents seeking to consolidate power and to tilt the electoral playing field sharply in their favor, such that observers of all three countries were already worried that there was a significant risk of democratic erosion.[184] And each decision was taken by a court that was clearly controlled by the regime.[185] The reasoning in each decision held that the easing or elimination of term limits advanced, rather than clashed with, the fundamental structure or fundamental rights found in the existing constitution because this easing or elimination vindicated the fundamental rights of voters and elected officials.

By failing to activate defense mechanisms found in the existing constitutional text, and by framing change as concordant rather than clashing with basic constitutional values, these three courts legitimated political projects that allowed incumbents to remain in power through relatively undemanding routes of constitutional change. In Ecuador, for example, the opposition to President Correa demanded that he at least put the change to a referendum, which they felt he might lose.[186] A popular referendum was required for the higher tiers of constitutional change, but not for an ordinary amendment.[187] The Court made it easier for Correa to achieve his goals by allowing him to avoid the need for a referendum. Similarly, in Bolivia, the only alternative route of change would have required a costly (and potentially unpredictable) constituent assembly, which the ruling allowed Morales to avoid.[188] Finally, in Venezuela, the Court's ruling that the lowest tier of change was appropriate helped Chavez avoid the charge that his successful 2009 referendum to remove presidential term limits was an unlawful rerun of a narrowly failed 2007 referendum that would have removed term limits but also carried out many other changes, and which had used the middle ("reform") tier of change.[189]

Not all these changes ultimately led to a long-term erosion in the democratic minimum core of each country: In Ecuador in particular, *popular* resistance to Correa's efforts at antidemocratic change — and the Court's role in going along with it — created strong pressure on Correa to step

182 In Bolivia, the literal effect of the proposal was to allow three consecutive terms in office, but the court had already held that the term Morales served before the 2009 Bolivian Constitution came into effect did not count towards the limit. *See Bolivia: New Law Backs President Evo Morales Third Term*, BBC NEWS (May 21, 2013) [hereinafter *Bolivia: New Law*], https://www.bbc.com/news/world-latin-america-22605030 [https://perma.cc/7LFG-8WYH].

183 *See supra* note 178.

184 *See* Steven Levitsky & James Loxton, *Populism and Competitive Authoritarianism in the Andes*, 20 DEMOCRATIZATION 107, 108 (2013).

185 *See* Landau, *Presidential Term Limits*, *supra* note 17, at 245 (noting that the high courts in each country were all "widely seen as controlled by the ruling party at the time key decisions were made").

186 *See id.* at 236-37.

187 *See* EC, *supra* note 180, arts. 441-42.

188 The prior constituent assembly in Bolivia, between 2006 and 2009, was a chaotic power struggle between contending political forces. *See, e.g.*, Fabrice Lehoucq, *Bolivia's Constitutional Breakdown*, 19 J. DEMOCRACY 110 (2008).

189 *See* Decision 1610/08 (Venez.) (rejecting this challenge).

aside, and not contest the 2019 presidential election.[190] The new President Lenin Moreno has taken a number of steps to assert his independence, including the re-imposition of term limits after a successful referendum on that issue.[191] In Bolivia, however, there are continuing concerns about the erosion of democracy,[192] and Venezuela has slid further, towards full-scale authoritarianism.[193]

Other examples can be found in Africa, though many African constitutions give more limited textual recognition to the idea of judicially enforceable limits on the constitutional amendment process. In Rwanda, for instance, when the Rwanda Patriotic Front-controlled Parliament proposed changes to the Rwandan Constitution in 2015 that effectively allowed President Kagame to serve a further 17 years in office,[194] the Rwandan Supreme Court declined to uphold a challenge to this proposal.[195] The court rejected the suggestion, by the Green Party, that the amendment power in Article 193 of the constitution was subject to implied restrictions necessary to protect democracy.[196] Instead, it upheld the validity of the relevant amendment.

Beyond these examples of weak-form abusive judicial review, there are a series of cases where courts carried out more active forms of abusive judicial review in order to allow would-be authoritarian leaders to remain in power. In these cases, courts went beyond merely legitimating political projects to carry out antidemocratic constitutional change and have in fact directly carried out these changes in ways that benefitted incumbents.

One form of this occurs where courts reinterpret existing presidential term limits in ways that permit incumbents to remain in office for longer than the constitutional text would appear to allow.[197] Some courts have held, for example, that amendments to add term limits do not cover incumbents but only apply prospectively; others that constitutional term limits do not count terms

190 *See* Dan Collyns, *Protests in Ecuador as Lawmakers Approve Unlimited Presidential Terms*, GUARDIAN (Dec. 3, 2015, 10:05 PM), https://www. theguardian.com/world/2015/dec/04/protests-in-ecuador-as-lawmakers-approve- unlimited-presidential-terms [https://perma.cc/9TW8-QUTA].

191 *See* Maggy Ayala & Marcelo Rochabrún, *Ecuador Votes to Bring Back Presidential Term Limits*, N.Y. TIMES (Feb. 4, 2018), https://www.nytimes.com/2018/02/04/world/ americas/ecuador-presidential-term-limits.html [https://perma.cc/VK35-SP22].

192 Oliver Della Costa Stuenkel, *Bolivia's Democracy at Risk: What Role for External Actors?*, CARNEGIE ENDOWMENT FOR INT'L PEACE (June 20, 2017), https:// carnegieendowment.org/2017/06/20/bolivia-s-democracy-at-risk-what-role-for-external- actors-pub-71301 [https://perma.cc/5MZG-Z6WH].

193 *See* Max Fisher & Amanda Taub, *How Does Populism Turn Authoritarian? Venezuela Is a Case in Point*, N.Y. TIMES (Apr. 1, 2017), https://www.nytimes.com/ 2017/04/01/world/americas/venezuela-populism-authoritarianism.html [https://perma. cc/DB2X-KBFB].

194 *See Rwandans Vote on Allowing Third Kagame Presidential Term*, BBC NEWS (Dec. 18, 2015), http://www.bbc.com/news/world-africa-35125690 [https://perma.cc/NB5D- 3S23] [hereinafter *Rwandans Vote*].

195 Clement Uwiringiyimana, *Rwanda's Top Court Clears Way for Kagame Third Term*, REUTERS (Oct. 8, 2015, 4:12 AM), http://www.reuters.com/article/us-rwanda- president-idUSKCN0S21AI20151008 [https://perma.cc/BJV5-U5RT].

196 *See id.*

197 Sometimes, these kinds of exemptions for incumbents are done by formal amendment rather than judicial interpretation. In Rwanda in 2015, for example, amendments shortened presidential terms and created a two-term limit, but also created an explicit set of transitional arrangements whereby the winner of the 2017 presidential election would serve an initial transitional seven-year term, and then be eligible for two further five-year terms. In aggregate, these changes created the possibility for Kagame himself to stay in office until 2034, a total of thirty-one years. *See Rwandans Vote*, *supra* note 194. Likewise, in Namibia in 1999, parliament resolved not to apply term limits to President Sam Nujoma on the basis that he had not been directly elected in 1989. *See* Wachira Maina, *Drunk with Power: African Presidents Fight Term Limits*, DAILY MONITOR (Mar. 5, 2018), http://www.monitor.co.ug/SpecialReports/African-presidents-fight- term-limits/688342-4329366-11vd18j/index.html [https://perma.cc/WJ34-5Z7L].

begun before a new constitutional text was adopted.[198] Take Senegal: In 2012, in the face of attempts by President Abdoulaye Wade to run for a third term in office, the Supreme Court held that earlier changes to the Senegalese Constitution to introduce a seven-year (single) presidential term only applied to future presidents — and not to the then sitting president, even on a prospective basis. The Court was comprised of five judges, all of whom were appointed by Wade himself;[199] and reasoned in what one commentator called a "tortured" way.[200] The immediate effect of the decision was that Wade was empowered to stand for a third term, despite the apparent formal constitutional prohibition on him seeking re-election and his own public promises not to seek such a term- extension. Nonetheless, opposition to this move was sufficiently powerful that Wade was ultimately defeated in the relevant elections.[201] Leading opposition figures in fact publicly labelled the decision of the Court a "constitutional coup" and encouraged widespread public protest — first against the decision, and then later at the ballot box.[202]

Similarly, in 2015, the Burundi President's party asked the Constitutional Court to find that existing term limits did not prevent the President from seeking reelection because he was first elected under transitional provisions that provided for indirect, parliamentary election rather than direct elections. The Court accepted the argument, finding that the transitional provisions operated completely separately from the provisions imposing term limits.[203] This paved the way for President Pierre Nkurunziza to be reelected for a third term in office;[204] and subsequent changes have led to an even greater consolidation of presidential rule. In 2018, in the lead up to the 2020 presidential elections, President Nkurunziza successfully introduced changes to the Constitution of Burundi to allow himself to seek reelection for a fourth and fifth consecutive term.[205] The Burundi context has included extensive evidence of coercion against members of the Constitutional Court. The Vice-President of the Court refused to sign his name to the 2015 opinion of the Court, and immediately fled to Rwanda,[206] claiming that the Court had been subject to intense political pressure in the lead

198 Bolivia is an example of the latter dynamic. *See Bolivia: New Law*, *supra* note 182.

199 Catherine Lena Kelly, *Senegal: What Will Turnover Bring?*, 23 J. DEMOCRACY 121, 122 (2012); *Senegal's President Can Run for Third Term, Court Rules*, GUARDIAN (Jan. 30, 2012, 5:40 AM), https://www.theguardian.com/world/2012/jan/30/senegal-president-run- third-term [https://perma.cc/TP86-KXCD] [hereinafter *Senegal's President*]; *see* Lamin Jahateh, Opinion, *Controversy of Abdoulaye Wade's Presidential Bid*, AL JAZEERA (Jan. 28, 2012), https://www.aljazeera.com/indepth/opinion/2012/01/201212712295177724.html [https://perma.cc/P657-WR77].

200 Tom Ginsburg, *Senegal: Court Clears Wade for Third Term*, BLOG INT'L J. CONST. L. (Jan. 28, 2012), http://www.iconnectblog.com/2012/01/senegal-court-clears-wade- for-third-term/ [https://perma.cc/V4FB-CEFZ].

201 *See Senegal Court Confirms Third Term Bid for President Wade*, BBC NEWS (Jan. 30, 2012), http://www.bbc.com/news/world-africa-16784055 [https://perma.cc/9U26- FMY7]; Lansana Gberie, *Is Democracy Under Threat in West Africa?*, AFR. RENEWAL (Aug. 2012), https://www.un.org/africarenewal/magazine/august-2012/democracy-under-threat- west-africa [https://perma.cc/HXM9-S7YV].

202 *See Senegal's President*, *supra* note 199.

203 *See* Vandeginste, *supra* note 102, at 52.

204 *See id.*; Clement Manirabarusha, *Burundi President's Commission Says People Want Term Limits Removed*, REUTERS (Aug. 25, 2016, 1:26 AM), https://www.reuters.com/ article/us-burundi-politics/burundi-presidents-commission-says-people-want-term- limits-removed-idUSKCN1100O1 [https://perma.cc/4CHX-W7Q5].

205 *See* Jina Moore, *Burundi's Leader Can Extend his Term. His African Peers Take Notes.*, N.Y. TIMES (May 17, 2018), https://www.nytimes.com/2018/05/17/world/africa/ burundi-president-nkurunziza-referendum.html [https://perma.cc/6MSV-7HR2].

206 *See* Vandeginste, *supra* note 102, at 52; Kabumba, *supra* note 102.

up to its decision, and that several judges had received death threats, before changing their vote to uphold the constitutionality of the President's third term.[207]

An even stronger version of the same approach has taken hold recently in Latin America, where courts in several countries have used the unconstitutional constitutional amendment doctrine to uproot, rather than to protect, presidential term limits.[208] We focus on two countries here — Nicaragua and Bolivia. The two cases share some key similarities of context. In both, observers raised concerns about the erosion of the liberal democratic order led by the same incumbents who sought to change the term limits. Moreover, courts in both countries were under the control of the regime by the time these decisions were issued.

In Nicaragua, the incumbent president, Daniel Ortega, sought potential reelection in 2011 after winning the presidency in 2007. However, an article of the existing constitution prohibited consecutive reelection and limited presidents to serving only two terms in their lifetimes.[209] This provision had been added to the 1987 constitution as part of a major package of amendments in 1995 that helped to negotiate an end to domestic conflict.[210] Because Ortega had earlier served as president in the 1980s, he ran up against not only the consecutive limit, but also the lifetime limit for exercising the presidency. Ortega at the time lacked the necessary supermajority in Nicaraguan congress to pursue a constitutional amendment that would have eliminated the term limit, and his attempt to push a change through the congress failed.

In this context, Ortega's allies brought a case in the Constitutional Chamber of the Supreme Court, arguing that the term limit itself was an unconstitutional constitutional amendment.[211] The court agreed with the petitioners and voided the term limit, holding that the amendment adding the term limit violated fundamental rights and thus was an unconstitutional constitutional amendment. As noted above, the decision was issued under extraordinary procedural conditions that sidelined all of the opposition members of the court.[212] Through subterfuge, three opposition members of the six-member Constitutional Chamber were replaced by pro-government judges, leading to a unanimous decision in favor of the regime.[213] At any rate, the result of the case was that Ortega was thus able to run for (and win) a new term. After winning that term and the necessary supermajority

207 *See* Vandeginste, *supra* note 102, at 52; Kabumba, *supra* note 102.

208 We do not discuss a similar Honduran decision also abolishing term limits, which shares similarities of reasoning. The Honduran case is somewhat less clearly "abusive" in the sense of impacting the democratic minimum core. For a discussion of this decision, see Landau, Dixon & Roznai, *Lessons from Honduras*, *supra* note 33, at 67, 69.

209 CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE NICARAGUA [CN.] art. 147, LA GACETA, DIARIO OFICIAL [L.G.] 1995.

210 *See* Lee Demetrius Walker and Philip J. Williams, *The Nicaraguan Constitutional Experience: Process, Conflict, Contradictions, and Change*, *in* FRAMING THE STATE IN TIMES OF TRANSITION 483, 496 (Laurel E. Miller ed., 2010).

211 *See* Decision 504 of 2009, Oct. 19, 2009 (S. Ct. Nicaragua).

212 *See id.*

213 *See supra* text accompanying notes 76–77; *see also* Dixon & Jackson, *supra* note 76, at 203; *European Parliament resolution of 26 November 2009 on Nicaragua* (2009) P7_TA 0103 final (Nov. 26, 2009), *available at* http://www.europarl.europa.eu/ sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2009-0103+0+DOC+XML+V0//EN [https://perma.cc/S2XF-LDQP] ("[O]n 19 October 2009 the Nicaraguan . . . member judges, who were not invited and who were replaced by three pro-government judges . . .").

in the congress, he passed a formal amendment removing the term limit, ran again and won reelection, and remains in power today.[214]

In Bolivia, President Morales narrowly lost a 2016 constitutional referendum that would have allowed him to run for a fourth consecutive term in office,[215] and which had been legitimated by the 2015 decision of the Plurinational Constitutional Tribunal, Bolivia's constitutional court, noted above.[216] The result of the referendum suggested that while Morales himself was popular, his plans to extend term limits were not. Rather than risk another popular referendum that would motivate the opposition (and would have been of dubious legality), Morales's allies instead switched from a strategy of weak abusive judicial review to one of strong abusive judicial review. Thus, they approached the constitutional court with a new argument that the presidential term limits found in the original 2009 constitution, written and promulgated during Morales's own presidency, should be set aside because they clashed with international human rights law.

The constitutional court accepted the argument in late 2017, holding that the domestic constitution itself had to be compliant with international human rights law as found in the Inter-American System and elsewhere, and moreover that the term limits clashed with international law and thus must be disregarded.[217] While the justices of the court are elected in popular elections, the electoral lists are composed by the congress, which has been dominated by Morales's Movement Toward Socialism (Movimiento al Socialismo, or "MAS").[218] The opposition has also frequently called for boycotts of the judicial elections because they have considered them unfair, leaving only MAS supporters to participate.[219] Four of seven justices elected to the court in 2011, which was the one deciding the cases discussed here, previously held posts in the Morales administration.[220] The practical result of the decision is to eradicate all presidential term limits from Bolivia, allowing Morales to run for a fourth five-year term in 2019.

Aside from irregularities in process and signs of regime control over the judiciaries to achieve key political goals, these two decisions show signs of problematic reasoning, in particular the misuse of transnational constitutional principles and international human rights law. A running thread in the Latin American term limits cases is the argument that presidential term limits violate fundamental rights of both voters and elected officials, which is often based on jurisprudence and

214 *See* Nicolas Cherry, *The Abolition of Presidential Term Limits in Nicaragua: The Rise of Nicaragua's Next Dictator?*, CORNELL INT'L L.J. ONLINE (Mar. 13 2014), http://cornellilj.org/the-abolition-of-presidential-term-limits-in-nicaragua-the-rise-of- nicaraguas-next-dictator/ [https://perma.cc/VA8W-GCJZ].

215 Nicholas Casey, *Bolivian President Concedes Defeat in Term-Limit Referendum*, N.Y. TIMES (Feb. 24, 2016), https://www.nytimes.com/2016/02/25/world/americas/bolivian- president-evo-morales-concedes-defeat-in-term-limit-referendum.html [https://perma.cc/VS5J-LW6B].

216 *See supra* text accompanying notes 178–182.

217 *See* Decision N. 84 of 2017, Nov. 28, 2017 (C.C. Bolivia).

218 *See* Amanda Driscoll & Michael J. Nelson, *The 2011 Judicial Elections in Bolivia*, 30 ELECTORAL STUD. 1, 2 (2012).

219 *See id.*

220 *See id.* at 3-4. The administration has also relied heavily on impeachment, for example suspending and eventually impeaching three justices after they made a ruling against the administration in a case involving the Notary Law, on charges that were widely seen as trumped up. *See supra* text accompanying note 108.

principles supposedly found in international human rights law in the Inter- American System. But the argument that a constitutional term limit violates international or regional human rights law (or other fundamental rights principles) is strikingly ill-founded. The Organization of American States recently asked the Venice Commission (the "Commission") to issue a report on the issue, and the Commission concluded that there was no support for the position that presidential term limits violated international law.[221] The Commission noted wide variance surrounding state practice on presidential term limits, precluding any claim that there was a customary international law norm on this issue.[222] And it found that any restriction placed by presidential term limits on the rights of political participation of voters and elected officials was highly likely to be justified by the known risks posed by indefinite continuance in office.[223] The problematic reasoning of all of these courts suggests the immense political pressure that these courts were under to eradicate term limits, or to permit incumbents to do so.

B. Suppressing the Congress in Venezuela

The Venezuelan Supreme Court has long been interesting as an example of the role of the judiciary during an increasingly authoritarian regime. As Sanchez Urribarri has documented in detail, the court initially preserved a significant space of independence after Hugo Chavez came to power and replaced the Venezuelan constitution in 1999, especially as the original Chavista coalition fragmented.[224]

However, following a failed coup attempt against Chavez, the National Assembly of Venezuela passed a law allowing his regime to take full control of the court.[225] It broadly maintained the powers of the court over other institutions while allowing the regime to exert near-complete control over it. The new Organic Law of the Supreme Court in 2004 expanded the size of the Venezuelan Supreme Court from twenty to thirty-two justices and made it much easier for the congress to dismiss justices by annulling their appointments or by impeaching them.[226] These dismissal powers were used to force several key changes, including removing the court's vice-president. Thus, after 2004, the regime effectively has exercised complete control over the court.[227] Indeed, a study found that

221 *See* COUNCIL OF EUROPE, EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW; REPORT ON TERM-LIMITS PART I - PRESIDENTS 24-25 (2018) [hereinafter REPORT ON TERM- LIMITS], https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2018)010-e [https://perma.cc/93ZD-36SY].

222 *See id.* at 3-10.

223 *See id.* at 19 ("Term limits which most representative democracies put on the right of the incumbent president are a reasonable limit to the right to be elected because they prevent an unlimited exercise of power in the hands of the President and protect other constitutional principles such as checks and balances and the separation of powers.").

224 *See* Sanchez Urribarri, *supra* note 33, at 867-71.

225 *See id.* at 871-72.

226 *See id.*

227 *See id.* at 872-73.

after the law was passed, not a single Venezuelan Supreme Court ruling went against the national government between 2005 and 2014.[228]

Instead, the court has been a consistently reliable and valuable partner of an increasingly authoritarian government. Much of what it has done has been the "weak" form of abusive judicial review, where it has legitimated a series of regime actions of questionable constitutionality. For example, it upheld a series of laws passed by the regime that were dubious because of their effects on freedom of speech, freedom of the press, and other constitutional values, and which were then used as instruments of repression.[229] It upheld electoral changes that greatly favored the incumbent regime, and it also legitimated the government's decision to strip an opposition-held TV station of its license.[230] As noted above, it upheld efforts by Chavez to change the constitution in order to eliminate all term limits.[231] Furthermore, when a series of sweeping constitutional reforms narrowly failed in a 2007 referendum, the Chavez government and the legislature repackaged many of the changes as organic laws, despite the fact that the constitution had not been changed.[232] The Supreme Court upheld these changes against challenges, effectively allowing the Chavez regime to circumvent the procedure for passing constitutional amendments.[233]

The strong form of abusive judicial review became more prominent after the opposition won control of the National Assembly in December 2015. Chavez died in 2013; his hand-picked successor (and vice- president) Nicolas Maduro won an election shortly thereafter. Maduro governed in a sharply deteriorating economic environment and without the charisma or political skill of Chavez.[234] In the face of this, a well- organized opposition won an overwhelming electoral victory in 2015, winning about two-thirds of seats in the National Assembly.[235] The overwhelming opposition victory seemed to signal that the regime of Chavez's less-charismatic successor, Nicolas Maduro, would transition back towards a more democratic endpoint. But the role of the Venezuelan Supreme Court changed in this period — it has no longer been just a passive legitimator of dubious regime actions, but instead began playing an active role in nullifying the electoral power of the opposition and allowing President Maduro to rule unilaterally. Right after the 2015 election, the lame-duck congress re-packed the court in an emergency session by naming twelve new justices to it after a number of justices resigned or retired en masse, which prevented the National Assembly from gaining any ability to appoint new justices and kept the Court firmly in the hands of the regime.[236]

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228 *See* Javier Corrales, *Autocratic Legalism in Venezuela*, 26 J. DEMOCRACY 37, 44 (2015).

229 *See* Sanchez Urribarri, *supra* note 33, at 876.

230 *See id.*

231 *See supra* Part IV.A.

232 *See* Sanchez Urribarri, *supra* note 33, at 876-77.

233 *See id.*

234 *See* David Landau, *Constitution-Making and Authoritarianism in Venezuela: The First Time as Tragedy, the Second as Farce*, *in* CONSTITUTIONAL DEMOCRACY IN CRISIS? 161, 168 (Mark A. Graber, Sanford Levinson & Mark Tushnet, eds., 2018).

235 *See id.* at 169.

236 *See* Andres Cervantes Valarezo, Constitucionalismo Abusivo Y Amnistía En Venezuela, 17 REVISTA DE ESTUDIOS JURIDICOS 1, 5-6 (2017).

The newly-packed Venezuelan Supreme Court set out to prevent the new opposition-controlled Assembly from wielding any power or from being able to check Chavez. For example, the Supreme Court and other institutions effectively blocked the opposition's plans to legally remove Maduro from power. When the opposition suggested a constitutional amendment that would cut the length of presidential terms, the Supreme Court held that such an effort would constitute an unconstitutional constitutional amendment.[237] And when opponents attempted to recall Maduro (a mechanism explicitly called for in the Venezuelan constitution, and which Chavez had previously faced and won), electoral bodies effectively set impossible conditions for the recall before suspending it altogether due to supposed concerns of fraud found by regional courts in earlier stages of the process.[238] The Supreme Court also issued legally dubious decisions broadening the scope of the president's emergency powers, effectively allowing Maduro to bypass the National Assembly. For example, in February 2016, the Supreme Court held that even though the Assembly has explicit constitutional powers to disapprove economic emergency decrees issued by the president and thus exercise constitutional control over them, those actions by the Assembly nonetheless did not impact the "legitimacy, validity, state of being in force, or legal efficacy" of the decrees.[239] The decision effectively nullified the congressional power of political control over presidential emergency powers, and opened the door for the president to simply bypass the legislature.

The Supreme Court similarly struck down the important amnesty law passed by the new National Assembly in March 2016.[240] The law attempted to give amnesty to political opponents of the regime — those who had been convicted both of political crimes and closely related common crimes such as criminal defamation — and who had been locked up or threatened with charges by the regime.[241] The Supreme Court held that the law was unconstitutional because it transgressed the allowable limits on political amnesty under international human rights law and international humanitarian law.[242] Those limits have played a major role in contemporary Latin American law and politics, but their main use has been to stop outgoing military governments from putting self-amnesties in place that prevent prosecution of the most serious violations of international law, such as torture, grave war crimes, and crimes against humanity, that these regimes often committed.[243] The limits on amnesty, in these cases, are about avoiding impunity for the worst atrocities, and arguably are part of the longer democratization process by providing accountability for the most significant abuses by agents of the authoritarian regime.[244]

237 *See* Decision 274 of 2016 (TSJ, Constitutional Chamber) (Venez.).

238 *See* Albinson Linares, *Autoridades Electorales de Venezuela Paralizan el Proceso Revocatorio Contra Maduro*, N.Y. TIMES (Oct. 21, 2016), https://www.nytimes.com/es/ 2016/10/21/autoridades-electorales-de-venezuela-paralizan-el-proceso-revocatorio- contra-maduro/ [https://perma.cc/6W4R-HZR2].

239 *See* Decision 7 of 2016 (S. Ct. Venez., Const. Ch.).

240 *See* Cervantes Valarezo, *supra* note 236.

241 *See id.*

242 *See* Decision N. 16-0343, Apr. 11, 2016 (Venez.).

243 *See, e.g.*, Alexandra Huneeus, *Judging from a Guilty Conscience: The Chilean Judiciary's Human Rights Turn*, 35 LAW & SOC. INQUIRY 99, 104-05 (2010) (describing a Chilean judge's holding that an amnesty decree did not apply to the criminal actions of Augusto Pinochet).

244 *See* Christina Binder, *The Prohibition of Amnesties by the Inter-American Court of Human Rights*, 12 GER. L.J. 1203, 1227 (2011) (arguing that jurisprudence by the Inter- American Court regarding amnesty laws contributed to democratization in Latin American states).

The Venezuelan Supreme Court relied heavily on this jurisprudence. But it took it out of context, and indeed effectively inverted its purpose, by using it instead to overturn an amnesty law designed to aid resisters of an authoritarian regime in avoiding prosecution for (often trumped up) political crimes. International law of course does not limit amnesties for political crimes, in fact, it tends to encourage the broadest possible amnesties for political acts in order to incentivize reconciliation and democratization.[245] The decision was beset by procedural irregularities: it was issued only four days after the petition was presented, an extraordinary timeframe for such a significant decision.[246] The heavy reliance on Inter-American case law was peculiar because the Venezuelan government had withdrawn from the American Convention on Human Rights in 2013, at the behest of the Venezuelan Supreme Court itself, after losing a key decision regarding the dismissal of three judges from the bench.[247] The Supreme Court also ignored a report of the UN High Commissioner on Human Rights, issued around the same time and at the behest of the Venezuelan government itself, which found the amnesty law to be consistent with international law.[248] The amnesty decision is part of a larger attempt to completely prevent the opposition-controlled Assembly from legislating and to transfer its powers to the president. Immediately after the December 2015

elections, regime allies filed a number of suits in electoral courts challenging individual election results on the grounds of fraud. Most of these were dismissed, but the Electoral Chamber of the Supreme Court upheld three challenges drawn from remote areas of the country.[249] These three cases were significant because they would determine whether the opposition would have the requisite two-thirds majority in the Assembly to amend the constitution, amend organic laws, and carry out certain other key acts. The Assembly refused to comply with the decision and swore in the three contested deputies anyway.

At that point, the Supreme Court began to hold the Assembly in contempt. It held that laws passed by the Assembly were unconstitutional while the state of contempt persisted, preventing it from carrying out its powers. The court thus struck down the major laws passed by the National Assembly during this period. And it held that the president could exercise powers unilaterally as a result. For example, in late 2016 the court held that the president had the power to pass the national budget using emergency powers, even though the constitution gives the Assembly explicit powers to discuss and approve the budget.[250] It justified this decision because of the ongoing state of contempt in which it held the entire legislature, which it in turn held stripped it of any power to make laws. This created, according to the court, a "legislative omission" that had to be filled, given

245 *See id.* at 1225.

246 *See* Cervantes Valarezo*, supra* note 236, at 10.

247 *See* Alexandra Huneeus & René Urueña, *Treaty Exit and Latin America's Constitutional Courts*, 111 AM. J. INT'L L. UNBOUND 456, 456-57 (2018).

248 *See* Press Release, U.N. High Commissioner for Human Rights, ACNUDH: Sobre Declaración de Inconstitucionalidad de ley de Amnistía en Venezuela (Apr. 12, 2016), http://acnudh.org/acnudh-sobre-declaracion-de-inconstitucionalidad-de-ley-de-amnistia- en-venezuela [https://perma.cc/3D3V-PJPP].

249 *See* Decision 260 of 2015 (S. Ct. Venez., Elect. Ch.).

250 *See* Decision 810 of 2016 (S. Ct. Venez., Const. Ch.).

the constitutional duty to pass a budget. The court thus held that the president had to have the power to promulgate a budget unilaterally, which was then presented to the Court and approved.[251]

The most extraordinary decision in this line occurred in March 2017, when the Constitutional Chamber of the Supreme Court issued a decision nullifying all of the powers of the National Assembly and allowing them to be transferred to any other body.[252] In particular, the court held that "while the situation of contempt and invalidity of the actions of the National Assembly persists, this Constitutional Chamber will guarantee that the parliamentary powers will be exercised directly by this Chamber or the organ that it chooses, in order to ensure the rule of law."[253] The Supreme Court thus extended the reasoning of its earlier budget decision, holding that the situation of contempt created a "legislative omission" involving all of the Assembly's powers, which could be filled by transferring those powers to the Court or the president.[254]

The Supreme Court suffered fairly unusual domestic and international consequences for issuing such a brazen decision. The national Attorney General, who had been a regime loyalist, denounced it.[255] The United States issued direct sanctions on the Supreme Court justices for "consistently interfering with the legislative branch's authority."[256] The court ultimately backed down from its extraordinary position — a little bit. In the face of domestic and international condemnation, the court issued a "clarification" withdrawing the part of the decision allowing it to transfer legislative powers to itself or any other institution of its choosing.[257] But this clarification left intact the parts of the decision (and prior decisions) that held the Assembly in contempt and thus prevented it from passing any laws.

The Supreme Court's reasoning is notable for being rooted in the concept of "legislative omission." In regional Latin American doctrine, this occurs when the legislature violates a constitutional duty through inaction, rather than through action. Doctrine holds that in some limited cases (often where omissions are merely "relative"), courts may be able to fill them directly by adding language to a statute — for example where a statute exists that provide protections to certain groups but omits others.[258] In other cases, where the omission is "absolute" because no regulation at all exists, the Supreme Court cannot correct the omission itself, but is limited to exhorting or requiring the

251 *See id.*

252 *See* Decision 156 of 2017 (S. Ct. Venez., Const. Ch.).

253 *See id.* § 4.4.

254 *See id.*

255 Rafael Romo, *Venezuelan Attorney General Breaks with Maduro, Slams Court Ruling*, CNN (Mar. 31, 2017, 4:46 PM), https://www.cnn.com/2017/03/31/americas/ venezuela-attorney-general-supreme-court/index.html [https://perma.cc/U94X-CLQE].

256 Joshua Goodman & Christine Armario, *US Imposes Sanctions on Venezuela Supreme Court*, AP NEWS (May 18, 2017), https://apnews.com/ ed1a50389be74af799f4613caf1e4b1a [https://perma.cc/33NG-T5V8]; *see also* Gabriela Baczynska & Girish Gupta, *EU Confirms New Sanctions on Seven Senior Venezuela Officials*, REUTERS (Jan. 22, 2018, 4:46 AM), https://www.reuters.com/article/us- venezuela-politics-eu/eu-confirms-new-sanctions-on-seven-senior-venezuela-officials- idUSKBN1FB1L0 [https://perma.cc/DV6W-T3Z2] (noting EU sanctions on the Chief Justice).

257 *See* Decision 158 of 2017 (TSJ, Const. Ch.) (Venez.) (clarification of Decision 156).

258 *See, e.g.*, CEPEDA-ESPINOSA & LANDAU, *supra* note 170, at 139, 143-44 (discussing the distinction in Decision C-728 of 2009, a case about conscientious objection to military service).

legislature to take action within a certain period of time.[259] The legislative omission doctrine is thus about the realization of a constitutional project within a liberal democracy: It allows the court to make the separation of powers somewhat more flexible, or at least to exhort the legislature to carry out its constitutional duty, in cases where the latter institution has failed to protect constitutional rights.

But the doctrine of "legislative omission" does not allow the Supreme Court to arrogate all legislative power to itself, or to transfer that power to another body. Indeed, the constitutional text on which the court relied gave it the power "[t]o declare the unconstitutionality of omissions on the part of the municipal, state, national or legislatures, in failing to promulgate rules or measures essential to guaranteeing compliance with the constitution, or promulgating it in an incomplete manner; and to establish the time limit and, where necessary, guidelines for correcting the deficiencies."[260] The constitutional text thus fit within the existing regional tradition of omission, but the court's opinion distorted that concept. Indeed, the court's decision effectively inverted the purpose of the doctrine by transforming it from one that is about channelling legislative deliberation into one that disabled the legislature as a democratic organ.

In Venezuela, the Chavez and Maduro administrations both relied heavily on the instrument of judicial review to carry out core tasks undermining liberal democracy. In the case of the Chavez regime, this mostly involved the judiciary upholding, and thus legitimating, constitutionally dubious laws and executive actions — what we have called weak abusive judicial review. During the Maduro regime (and especially after the 2015 elections), the court shifted to stronger forms of abusive judicial review, using a number of different doctrines, in order to prevent the opposition from enjoying the electoral power that it had won. In so doing, the Venezuela Supreme Court has turned doctrines designed to enhance democratization and constitutionalism, such as the limits on amnesty and the legislative omission doctrine, into tools of authoritarianism.

V. THE LIMITS OF A STRATEGY OF ABUSIVE JUDICIAL REVIEW

If the control of a constitutional court offers such large potential benefits to a would-be authoritarian regime, one might ask about the limits of such a strategy: When might would-be authoritarians choose not to deploy it, and when might it fail? Abusive judicial review appears to be a fairly common but not universal strategy, and as the examples above suggest, it is not always successful.

259 *See id.*

260 CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA [CRBV] Dec. 1999 art. 336, cl. 7, *translated in Venezuela (Bolivarian Republic of)'s Constitution of 1999 with Amendments through 2009*, CONSTITUTEPROJECT, https://www.constituteproject.org/ constitution/Venezuela_2009?lang=en (last visited Nov. 27, 2019) [https://perma.cc/ 653S-NKDT].

To briefly outline three alternative (and not mutually exclusive) strategies: Authoritarian actors may (a) leave relatively independent courts intact; (b) retain considerable judicial independence but take steps to restrict courts from deciding politically sensitive matters; and

(c) try to sideline judiciaries entirely. If the control of a constitutional court offers such large potential benefits to a would-be authoritarian regime, when might would-be authoritarians choose not to deploy it?

Both the benefits and costs of abusive judicial review vary across cases. On the benefit side, some regimes need to rely more on judicial review than others to achieve their goals. This of course depends on other avenues, such as formal amendment and informal constitutional change, that are available in a given context. Poland, for example, offers a case where the regime put a substantial premium on capturing the court because it has lacked the votes to wield the power of formal amendment.[261] We should observe more exercises of abusive judicial review (especially of the strong form) in cases where political leaders lack other attractive avenues to achieve their goals.

For similar reasons, we may be more likely to observe abusive judicial review in transitional contexts where actors are actively trying to dismantle liberal democracy, as compared with stable authoritarian regimes. Courts operating in transitional or "hybrid" regime types may be very valuable tools for leaders who are attacking liberal democracy but who do not yet have full control over their countries, as the examples above show. In fully authoritarian regimes, in contrast, political leaders may have more levers to pull precisely because they control the entire state. Some evidence for this is provided by the work of Popova, who finds that in Eastern Europe in the 1990s the normal relationship between political competition and judicial independence was inverted.[262] In these transitional contexts with high authoritarian risks, she finds that greater political competition was associated with less rather than more judicial independence because the political pressure posed by rivals increased the need of would-be authoritarians to capture the court. In contrast, work on courts in fully authoritarian regimes has found a range of relationships between courts and regimes: Sometimes courts are highly weaponized, but in other cases they may be complete non-entities or imbued with a surprising amount of judicial independence so long as they avoid political issues and cases.[263]

The effectiveness of abusive judicial review may depend in part on domestic and international perceptions that judges have some degree of independence from the political branches of government, and that judges are engaged in a process that is "legal" rather than wholly political in nature. If the non-independence or political nature of a court is wholly transparent, a court may lose its

261 *See generally* Sadurski, *How Democracy Dies (in Poland)*, *supra* note 24.

262 *See* MARIA POPOVA, POLITICIZED JUSTICE IN EMERGING DEMOCRACIES: A STUDY OF COURTS IN RUSSIA AND UKRAINE 3-4 (2012); *see also* Alexei Trochev, *Less Democracy, More Courts: A Puzzle of Judicial Review in Russia*, 38 LAW & SOC'Y REV. 513, 513 (2004) (finding that stronger courts were associated with less political competition in post- Soviet Russian states).

263 *See* GINSBURG & MOUSTAFA, *supra* note 30, at 4; TAMIR MOUSTAFA, THE STRUGGLE FOR CONSTITUTIONAL POWER: LAW, POLITICS, AND ECONOMIC DEVELOPMENT IN EGYPT 6 (2007) [hereinafter THE STRUGGLE FOR CONSTITUTIONAL POWER] (arguing that the Egyptian constitutional court was given considerable power during Egypt's authoritarian regime to attract foreign investment).

capacity to contribute to the perceived legitimacy of "informal" court-led or sanctioned change. Perceptions of independence, in this context, may ultimately be influenced by three broad factors: (a) explicit and implicit signs of political influence or control over a court; (b) the way in which judges themselves approach the task of constitutional reasoning; and (c) the prior history of judicial review within a country.

Some countries have no history of independent courts. Co-opting judicial review in this context may be relatively easy since the judiciary will enjoy little external support, but may also offer relatively modest benefits to a regime since other actors will view the actions as merely political rather than legal. Other courts may have a stronger history of independent judicial review. These courts should be more difficult to capture, since they may have an internal culture that encourages resistance to outside political pressure, and broader support in civil society and among the public. But the benefits of capturing such a court may also be greater, since both local and international actors are likely to give courts of this kind the benefit of the doubt, helping to legitimate abusive actions. A reputation for judicial independence may take some time to decay.

An attempt to co-opt a court with a history of judicial independence can also carry with it potential risks for would-be authoritarians. In attempting to influence such a court, they may seek to maintain the appearance of respect for judicial independence in order to maximize the legitimacy benefit of judicial review. This may mean appointing judges with some existing reputation for judicial independence or legal skill — both attributes that can effectively be weaponized or turned against a regime, should a judge in fact prove to be politically independent of the regime. By preserving a strong but unsympathetic court, would-be authoritarians may thus create the conditions for undermining their broader efforts at abusive constitutional change.[264]

In response to this risk, as we noted above in Part II, some regimes have chosen to adopt a two-part strategy that involves, first, an attempt to undermine the credibility of courts, and second, an attempt to rebuild their power only if and when dominant elites are confident they control the court.[265] But such a strategy carries its own risks. If the first stage of the process is successful, it may then be quite difficult for political actors to rehabilitate public faith in the standing of a newly appointed court. Public faith in the court may be too badly damaged for a new court to exercise abusive judicial review effectively, especially of the strong form. But if it is not fully successful, and a regime moves too quickly to the second stage of seeking to deploy judicial review to its own ends, it may find that it faces a quite hostile court, which retains at least some capacity to engage in effective forms of pro-democratic strong form review.

Attacking courts in a more transparent or open way can also have significant costs. For example, a line of scholarship suggests that even authoritarian actors sometimes empower independent

264 *Cf.* MOUSTAFA, THE STRUGGLE FOR CONSTITUTIONAL POWER, *supra* note 263, at 1-2 (finding that the Egyptian constitutional court was staffed with high-capacity judges who sometimes ruled against the government in important cases).

265 *See supra* text accompanying notes 119-125.

courts as a way to attract or retain foreign investment.[266] But for this strategy to work, regimes must make at least a credible commitment to judicial independence. Openly packing a court may have value in political cases, but may undermine the utility of the court as a signal to outside investors. Similarly, Ginsburg has posited that courts can have value as an insurance mechanism for out of power political forces.[267] Here too, regimes must consider that an unsuccessful attempt to grab power through the judiciary may backfire: It may make the judiciary less useful as a trusted form of insurance in the event the regime were later to lose power.

Moreover, even where a regime is willing to run these risks and attempt to capture (or coerce or intimidate) a court, it may ultimate fail to produce the desired legitimation benefit. That is, observers of the court may conclude the courts are no longer independent, but have instead been captured by would-be authoritarian actors, such that their actions are no longer seen as the regime acting "legally." The abusive nature of judicial review may thus become so obvious or transparent that it loses its capacity to add to the perceived legitimacy of abusive constitutional change.

The prior Parts give some illustrations of attempts at abusive judicial review in circumstances where courts are widely distrusted and seen as mere extensions of political power. Term limits decisions in Senegal and Ecuador, for example, were met with significant resistance, in part due to perceptions that courts were clearly rigged against incumbents.[268] Neither country has had any history of judicial independence. Distrust in the courts may have contributed to the ultimate failure of both attempts to retain power. In Senegal, President Wade lost the subsequent election. In Ecuador, the opposition continued to gain traction by demanding a popular referendum, and Correa eventually was forced to accede to a temporary provision that lifted all presidential term limits, but nonetheless prevented him from standing for reelection in 2017. His handpicked candidate won that election but has since turned against Correa and reinstated term limits.[269]

In Venezuela, the Supreme Court decision holding that all legislative power could be transferred to the court or another institution of its choosing because of a "legislative omission" was met with massive domestic and international resistance, such that some important regime allies broke with Maduro, and the court was forced to issue a clarification.[270] By 2017, the non-independence of the court was arguably so severe, and transparent, that the court suffered unusual domestic and international consequences. International actors such as the United States sanctioned the justices of the court directly.[271]

266 *See* MOUSTAFA, THE STRUGGLE FOR CONSTITUTIONAL POWER, *supra* note 263, at 6.

267 *See* TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 18 (2003); Rosalind Dixon & Tom Ginsburg, *Constitutions as Political Insurance: Variants and Limits*, *in* COMPARATIVE JUDICIAL REVIEW 36 (Erin F. Delaney & Rosalind Dixon eds., 2018) (expanding on the insurance argument).

268 *See supra* Part IV.A.

269 *See supra* text accompanying note 191.

270 *See supra* text accompanying notes 255-257.

271 *See supra* text accompanying notes 255-257.

Despite all this, the court's line of decisions succeeded in the more basic sense that it prevented the opposition-controlled legislature from legislating. Thus, while abusive judicial review is likely most effective under circumstances where courts are perceived as retaining "law-like" features, an important question for future work may be examining its function and degree of success even where this condition is not present and the court is perceived by most actors as fully politicized.

VI. PREVENTING AND DETERRING ABUSIVE JUDICIAL REVIEW ALTHOUGH ABUSIVE JUDICIAL REVIEW IS NOT INEVITABLY SUCCESSFUL, IT DOES

pose a major challenge to comparative constitutional law and theory, at least for the large subset of actors who are interested in preserving liberal democracy. The specter of courts destroying, rather than protecting, liberal democracy poses a daunting challenge. In this Section, we first explore the implications of the practice for domestic constitutional law and design, and then we turn to potential responses in the international realm.

A. Responses in Domestic Constitutional Design

The practice of abusive judicial review naturally focuses attention on the design of judiciaries, especially high courts. This, by itself, is not new — scholars have long recognized that courts play an important role in protecting democracies and are often vulnerable to attack or backlash.[272] But our analysis here changes the nature of the threat. Rather than simply facing the possibility of becoming a weaker institution or even null entity, courts under certain conditions may be transformed into wrecking balls turned against the democratic order. This, we think, highlights the importance not merely of protecting courts, but doing so in particular ways that are sensitive to this risk.

As noted above in Part II.B, existing work distinguishes two broad routes to attacking a judiciary.[273] The first involves "curbing" the court by attacking its jurisdiction and powers; the second, "packing" it by adding a large number of regime allies.[274] Either route may succeed in weakening or nullifying it a court, making it less of an obstacle to the goals of antidemocratic actors. But they are not equally likely to lead to abusive exercises of judicial review. Regimes that have relied on abusive

272 *See, e.g.*, Gardbaum, *supra* note 55, at 285-86; Issacharoff, *Fragile Democracies*, *supra* note 59, at 13-14.

273 *See supra* Part II.B.

274 *Cf.* Daniel M. Brinks & Abby Blass, *Rethinking Judicial Empowerment: The New Foundations of Constitutional Justice*, 15 INT'L J. CONST. L. 296, 297 (2017) (separating power from independence).

forms of judicial review seem to lean very heavily on strategies of court- packing.[275] Abusive judicial review, especially in its strong form, requires muscular but controlled courts. Thus, the usual strategy seems to be court-packing, coupled with untouched capacity, strengthened capacity, or initial court-curbing, then followed by later attempts to strengthen judicial power once control has been achieved. The strong form of abusive judicial review may, in turn, be especially damaging to democracy. As we showed above, courts can use constitutional "reinterpretations" to run rough-shod over constitutional protections of democracy, shutting down legislatures, banning opposition parties, and eliminating presidential term limits, among other measures.

This point highlights not just the importance of protecting judicial independence in contexts where liberal democracy is unstable, but the way in which this might best be done. Protecting against court-packing is quite difficult. In some circumstances, would-be authoritarians may be able to use the natural turnover on a court to wrest control over it.

Given enough time in power, virtually any actor or movement may be able to gain control over the judiciary. Also, a range of informal factors, such as threats and bribes, may have an influence on judicial appointments, and it may be relatively difficult for constitutional design to deal with these issues.

Still, some designs will likely much function better during periods of antidemocratic threat than others. And a good design may act as a speed bump, slowing efforts to consolidate power by at least lengthening the amount of time needed for would-be authoritarians to take over a court.[276] At least three techniques seem important in doing this. The first is fragmentation of the appointment process, so that no single actor or movement can easily control it. Of course, it is probably not enough to divide power among a few different political institutions — as examples show, a surging antidemocratic movement may easily win the presidency and an overwhelming congressional majority.[277]

A second useful technique will thus be to give some appointment powers to other independent institutions, such as ordinary courts, merit commissions, ombudspersons, and similar actors. These institutions, too, can eventually be captured by an authoritarian regime,[278] but the capture process is likely to take longer, in turn slowing the process of packing a high court. Institutions of this kind might select a list from whom other institutions choose, or they might make appointments directly. As an example, consider the Constitutional Court of Colombia, where three different institutions — the president, Council of State or high administrative court, and Supreme Court of Justice — all compose three-member lists for one-third of the vacancies on the constitutional court.[279] The Sen-

275 *See, e.g.*, Sanchez Urribarri, *supra* note 33, at 878-79 (providing such an account in Venezuela).

276 *See* Dixon & Landau, *Transnational Constitutionalism*, *supra* note 6, at 613-14.

277 Most of the cases studied above in Part IV involved movements that controlled both the executive and legislative branches.

278 *See, e.g.*, DAVID KOSA□, PERILS OF JUDICIAL SELF-GOVERNMENT IN TRANSITIONAL SOCIETIES: HOLDING THE LEAST ACCOUNTABLE BRANCH TO ACCOUNT 2-3 (2016).

279 *See* CONSTITUCIÓN POLÍTICA DE COLOMBIA [CP] July 4, 1991, art. 239, *translated in Colombia's Constitution of 1991 with Amendments through 2005)*, CONSTITUTEPROJECT, https://www.constituteproject.org/constitution/Colombia_2015?lang=en (last visited Nov. 25, 2019) [https://perma.cc/6EZ7-FL95].

ate of Colombia then makes the final selection by plurality vote, from each list.[280] The system both fragments appointment power, and gives independent institutions (in this case, courts), a high degree of power over the process by giving them control of two-thirds of the lists. The result is a court that is quite difficult to pack by comparative standards.[281]

The third technique is the staggering of terms on a court. Few systems outside of the United States provide for life tenure for justices on an apex constitutional court — the majority view instead is to provide terms that are longer than those for political actors, often around eight to ten years, and which are ordinarily made non-renewable.[282] Most important, from this perspective, is that all or most of the slots on the court should not open up at once. Instead, ideally, a few vacancies would occur every few years. Again, given enough time, incumbents will likely be able to capture a court regardless, but staggering vacancies should at least slow the process, and in the meantime, political power may change hands.

The examples explored in this Article show though that regimes rarely leave capture of a court to the mere progression of time and natural turnover on the court. In addition, they *change* the existing rules, for example by making courts bigger, altering appointment or removal processes, or shortening the terms of existing justices. This has meaningful implications for the ways in which protections of appointment procedures should be entrenched. First, sensitive provisions dealing with appointment, removal, and tenure of high courts should be included in the constitution, rather than left to ordinary law. In a range of countries (including the United States), key details such as the size of a court are left to ordinary law.[283] This lowers the cost of making changes that may make a court easier to pack by allowing such changes to be made by law rather than constitutional amendment.

In Venezuela, for example, a 2004 law made major changes to the size of the Supreme Court and removal procedures through this route, and these changes rapidly tightened the grip of the regime over the court.[284] In Poland, the PiS government has likewise attacked the independence of the constitutional court via a range of formal and informal means — for example, restrictions on the jurisdiction, voting rules and scope for dissent on the court, and the publication of its decisions — but all the relevant formal changes occurred via legislation rather than constitutional amendment.[285] The same is true for attacks by the Polish government on the ordinary courts, which have involved the lowering of the mandatory retirement age for judges (including sitting judges), increasing the size of

280 *See id.*

281 *See* David Landau, Beyond Judicial Independence: The Construction of Judicial Power in Colombia 316 (2015) (unpublished Ph.D. dissertation, Harvard University), *available at* https://dash.harvard.edu/bitstream/handle/1/14226088/LANDAU- DISSERTATION-2015.pdf?sequence=10 [https://perma.cc/D3F9-64ZV].

282 *See, e.g.*, ALEC STONE SWEET, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE 49 (2000) (giving examples from European courts).

283 *See infra* Conclusion.

284 *See* Sanchez Urribarri, *supra* note 33, at 871-72.

285 *See supra* text accompanying notes 124-126.

the Supreme Court of Poland, and the creation of a new court chamber with special responsibility for "extraordinary control and public affairs," including election disputes.[286]

In some cases, merely including these protections in the constitution may not be enough, because powerful movements may gain sufficient legislative power to pass amendments to the constitution without difficulty. In Hungary, for example, the Fidesz party came to power in 2010 with over two-thirds of seats, after winning only a bare majority of votes.[287] The two-thirds supermajority was sufficient for the party to amend or replace the constitution unilaterally — it did both, in the process increasing the size of the court and changing the appointment procedure both for the justices and for the court's president.[288] These changes allowed Fidesz to gain control over the court more quickly than it would have been able to otherwise.

A further response to this problem, therefore, is to adopt what we have elsewhere called a "tiered" constitutional design, or a system of amendment that makes changes to certain provisions or principles especially difficult, by adding requirements such as a heightened supermajority or referendum.[289] It may be both impracticable and unwise to place all provisions related to the judiciary (or even high court) on a higher tier, but it may be sensible at least to protect those provisions that deal in a core way with the composition of a constitutional court, such as size, appointment rule, and removal.

These design suggestions, of course, hold contextually. They make sense, for example, only from a liberal democratic starting point. In an authoritarian or competitive authoritarian regime, in contrast, protections for appointment and removal may instead be used to insulate antidemocratic judges and thus prevent democratization. By the same token, we are not saying here that all attempts to pack a court will likely spark abusive judicial review. Some such efforts will be neutral from the standpoint of the democratic minimum core, although they may involve crucial disputes over broader substantive values. This is probably the best read, for instance, of Franklin Delano Roosevelt's infamous court-packing plan after his victory in the 1936 election.[290] Others may actually be beneficial for the democratic minimum core, particularly where, we repeat, a court has previously been captured by would-be authoritarians.

The relationship between court-curbing and abusive judicial review is, as we have seen, even more complex. Would-be authoritarians engaged in a strategy of abusive judicial review may prefer to leave the power of a court the same, or even strengthen it, because a more powerful court may be more helpful in carrying out tasks for the regime. Or, as we have seen, actors may seek a sequential strategy of first weakening a court, then capturing it and building its powers back up. From the standpoint of those interested in protecting liberal democracy, the broad point is that "backlash"

286 *See* Sadurski, *How Democracy Dies (in Poland)*, *supra* note 24, at 146.

287 *See* Bánkuti et al., *supra* note 120, at 138.

288 *See id.* at 139-40.

289 *See* Dixon & Landau, *Tiered Constitutional Design*, *supra* note 37, at 474-76.

290 *See infra* Conclusion.

against a court that weakens it, although a problematic outcome, may in fact be less bad than an attack that preserves or strengthens judicial power *and* captures the court.

The implications of this point for constitutional design are, however, murky and highly context sensitive. In some contexts, it may be that designers should worry less about protecting against court-curbing than court-packing, and thus for example might feel comfortable leaving provisions dealing with judicial power or budget less entrenched than those dealing with appointment and similar issues. Such an approach might allow for democratic input against overreaching or out of touch judges, while protecting against the potent threat posed by abusive judicial review.

More counterintuitively, in some especially precarious contexts designers may choose to construct weaker courts than they might otherwise, as a way to lessen the potential risks posed by abusive judicial review. Gardbaum has recently argued that in new democracies, weaker courts may be a good idea because this lessens friction with political actors, and thus the risk of backlash against a new court.[291] Our point here is different: In some contexts, creating a very strong court may risk handing opponents a loaded weapon that, if captured, can be turned into a devastating tool to attack the democratic order. It is true, of course, that antidemocratic actors may try to strengthen a previously weak court *after* capturing it, but given that abusive judicial review seems to trade off of a prior reputation for judicial legitimacy, such a strategy may be harder to pull off successfully.[292] It is too soon to draw firm conclusions about court-curbing for constitutional designers based on the phenomenon of abusive judicial review, but we have flagged issues that demand further attention.

Finally, we briefly note that although this Article focuses on courts, much of what we say here also has implications for the non-judicial independent institutions that have now cropped up in many constitutional systems, including anti-corruption commissions, ombudspersons, human rights commissions, media watchdogs, and electoral courts and commissions.[293] These institutions, too, are envisioned as core protections for the liberal democratic order, and they too are not uncommonly captured by antidemocratic regimes and turned into instruments that undermine liberal democracy. Anti- corruption commissions can be made to target political opponents, electoral commissions to rig elections or weaken opposition movements, media watchdogs to shut down or harass opposition outlets, and human rights commissions to limit rather than protect core political rights such as speech and association. Thus, much of what we have said here about the design of courts may apply to non-judicial institutions as well, especially regarding the importance of crafting and entrenching rules that raise the costs of capture.

291 *See* Gardbaum, *supra* note 55, at 311-12.

292 *See supra* Part V.

293 *See* Mark Tushnet, *Institutions Protecting Democracy: A Preliminary Inquiry*, 12 LAW & ETHICS HUM. RTS. 181, 181 (2018).

B. Responses from the International Community

A second set of implications focuses on the role of "outside" observers, such as international institutions and foreign countries, in the face of courts issuing decisions that undermine core democratic commitments.[294] Abusive judicial review often seems to trade on a reluctance on the part of those observers to question the propriety or legitimacy of court decisions.[295] The rule of law has been a central commitment of the international community in the post-Cold War era.[296] Building respect for court decisions has also been an integral part of many international rule of law programs, and this has led to a reluctance on the part of many international actors to criticize or attack the decisions of courts.

In many cases, of course, this international reverence for courts has been very helpful, for example, by allowing courts to push back against international actors and insist on compliance with core democratic or constitutional commitments. Scheppele has noted how courts sometimes give democratic actors the space to resist impositions by international actors and organizations, like harsh austerity measures, that are opposed by the vast majority of the domestic population.[297] But this asymmetry between the approach of outsiders to political and legal actions is also a contributor to abusive judicial review. If courts have the capacity to do things which the political branches cannot do as easily, then the institution of judicial review will have added value for would-be authoritarians. Courts will thus become more frequent targets for antidemocratic co-optation.

One response to the phenomenon of abusive judicial review, therefore, is for the international community to take a more nuanced, contextual approach to its commitment to the rule of law. On the one hand, recent attacks on the role and independence of constitutional courts in many democracies suggest the need for the international community to redouble its efforts to support the rule of law and democratic constitutionalism at a domestic level.[298] But on the other, the rise of abusive forms of judicial review suggests the need to weaken the current presumption that constitutional courts are always acting in ways that advance or embody these commitments. In effect, we suggest, to combat the danger of abusive judicial review, outside actors must adopt a deeper, more critical form of engagement with the decisions of a constitutional "court" — before determining whether the institution in fact has the hallmarks of independence to be worthy of the general form of deference that attaches in liberal democracies to court decisions. This more nuanced approach to judicial decisions would build on practices that may already be emerging. For example, consider the rejection by many outside observers that the Venezuelan decision on "legislative omission" (or

294 *See* Dixon & Jackson, *supra* note 76, at 149-50.

295 *See id.*

296 *See, e.g.*, Paul Craig, *Transnational Constitution-Making: The Contribution of the Venice Commission on Law and Democracy*, 2 UC IRVINE J. INT'L, TRANSNAT'L & COMP. L. 57, 61 (2017); Maartje de Visser, *A Critical Assessment of the Role of the Venice Commission in Processes of Domestic Constitutional Reform*, 63 AM. J. COMP. L. 963, 966- 67 (2015).

297 *See* Kim Lane Scheppele, *A Realpolitik Defense of Social Rights*, 82 TEX. L. REV. 1921, 1941-46 (2004) (explaining how the Hungarian constitutional court gave domestic institutions space to resist international austerity).

298 *See, e.g.*, Aziz Z. Huq, *Democratic Erosion and the Courts: Comparative Perspectives*, 93 N.Y.U. L. REV. ONLINE 21, 21-22 (2018).

its antecedents) deserved respect as a "court- like" decision or interpretation of the Venezuelan Constitution.[299] External observers instead tended to denounce the decision for what it was — an extension of the Maduro regime, aimed to repress an opposition-held institution won through recent democratic elections, and with a clearly authoritarian purpose and effect. The United States and European Union went so far as to impose direct sanctions on judges involved in the case.[300] The distortion of doctrine, evidence of court- packing, and antidemocratic effect of the Venezuelan decisions were particularly clear and egregious. But such an approach, or at least softer forms of critique, will likely be appropriate in other cases as well.

We do not suggest that international actors should adopt a "unity of state" principle, which makes no distinction at all between courts and the political branches of government in assessing abusive processes of constitutional change.[301] That approach would go too far. It would threaten to undermine transnational supports for the institution of judicial review, which has had a beneficial impact on liberal democracy and other values in many countries around the world. Moreover, such an extreme approach would fail to respect the difficulties inherent in acts of constitutional interpretation by outside observers. Our recommendation is therefore more modest, although still significant: In cases where the antidemocratic effect of a decision is quite clear, and where context, legal reasoning, and procedural irregularities offer strong evidence that that effect is intended, transnational observers should be more willing to adopt a critical stance towards the decision, similar to what they would adopt it were undertaken by non-judicial actors.

Furthermore, we note that there are strategic considerations involved in outsider interventions of this type. There are contexts where aggressive outsider interventions or critiques may backfire, by allowing authoritarian leaders to claim charges of western "imperialism."[302] This problem necessitates careful attention to context, in order to figure out when and how such interventions should occur. In some contexts, the best responses may be softer or more advisory. A recent example is the report commissioned by the Organization of American States from the Venice Commission on presidential term limits in Latin America.[303] The report found that there was no plausible support for a right to reelection in international law, thus exposing an argument that had been emphasized by many of the high court decisions surveyed in the previous part.[304] In other cases, a more robust response (as in Venezuela) may be warranted.

299 *See supra* text accompanying notes 250–260.

300 *See* Romo, *supra* note 255.

301 *See* Int'l Law Comm'n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, ch. II art. 4 (2001); *see also* André J.J. de Hoogh, *Articles 4 and 8 of the 2001 ILC Articles on State Responsibility, the Tadi□ Case and Attribution of Acts of Bosnian Serb Authorities to the Federal Republic of Yugoslavia*, 72 BRIT. Y.B. INT'L L. 255, 257 (2002).

302 *See, e.g.*, Aria Bendix, *U.S. Sanctions Venezuela's Supreme Court*, ATLANTIC (May 19, 2017), https://www.theatlantic.com/news/archive/2017/05/us-sanctions-venezuelas- supreme-court-judges/527358/ [https://perma.cc/KE69-KUSF] (quoting Venezuelan Foreign Minister Delcy Rodriguez as saying "[i]t's outrageous and unacceptable for the United States to impose sanctions on a sovereign and independent nation in violation of Venezuelan and international laws").

303 *See generally* COUNCIL ON EUROPE, REPORT ON TERM-LIMITS, *supra* note 221.

304 *See id.* at 17.

At a most general level, outside observers would do well to adopt a more skeptical, "realist" response to the actions of constitutional courts under conditions of democratic erosion. In the United States, the legal realist movement has taught us that the line between constitutional law and politics is in fact quite fine.[305] The embrace of a form of global legal realism toward the actions of constitutional courts may be similarly helpful in combatting the spread of abusive judicial review.

CONCLUSION: COULD IT HAPPEN HERE?

This Article defines and analyzes the phenomenon of abusive judicial review — judges issuing decisions that intentionally attack the minimum core of electoral democracy. The examples above have aimed to show that the phenomenon is an important, and undertheorized, aspect of democratic erosion or backsliding around the world. It has also tried to say something about the circumstances in which abusive judicial review is likely to be successful, and about how domestic and international actors can formulate a response.

A recent volume edited by Cass Sunstein, provocatively titled "Can it Happen Here?" asks whether authoritarianism could occur in the United States.[306] One might ask the related question of abusive judicial review: Are there elements of the practice already in the United States? Could it emerge?

Such a regime strategy seems to be largely absent from U.S. history. One moment frequently talked about in those terms is Roosevelt's "court-packing" plan to vastly expand the size of the U.S. Supreme Court.[307] But while the tactic of court-packing is commonly used by would-be authoritarians seeking to engage in a strategy of abusive judicial review, Roosevelt's aims were to resolve a broader dispute regarding the constitutionality of interventionist socio-economic policies, and not to attack the democratic minimum core.[308] Thus, even had the court-packing plan succeeded, it probably would not have led to abusive judicial review.

But the court-packing episode does highlight one key point: The formal defenses in the U.S. Constitution against the kind of judicial capture that usually forms part of a regime strategy of abu-

305 *See, e.g.*, Robert C. Post & Neil S. Siegel, *Theorizing the Law/Politics Distinction: Neutral Principles, Affirmative Action, and the Enduring Legacy of Paul Mishkin*, 95 CALIF. L. REV. 1473, 1474 (2007) (noting the distinction in modern U.S. Law is "ragged and blurred").

306 *See* SUNSTEIN, *supra* note 1.

307 *See, e.g.*, Laura A. Cisneros, *Transformative Properties of FDR's Court-Packing Plan and the Significance of Symbol*, 15 U. PA. J. CONST. L. 61, 67-77 (2012) (exploring how the court-packing plan subsequently became a powerful symbol of an out of bounds attack on judicial independence).

308 *See* Franklin D. Roosevelt, Fireside Chat 9: On "Court-Packing" (Mar. 9, 1937), *available at March 9, 1937: Fireside Chat 9: On "Court-Packing,"* U. VA. MILLER CENTER https://millercenter.org/the-presidency/presidential-speeches/march-9-1937-fireside- chat-9-court-packing (last visited Jan. 3, 2020) [https://perma.cc/8F7X-632C] (discussing these disagreements as motive).

sive judicial review are not especially strong. The Constitution is very hard to amend in comparative terms, and replacement of the existing Constitution in the near term is unlikely.[309] The text provides certain key protections, such as life tenure, guarantees of a fixed salary, and a requirement of impeachment for removal.[310] But other routes to capture the judiciary, including altering the size of the Supreme Court, are left to ordinary law.[311]

To the extent that the United States has any special protections against the threat of capture, these are probably found not in the constitutional text, but in informal norms surrounding it.[312] And commentators have argued that these norms may be eroding for a number of reasons, including the politicization of the judiciary as a whole and of appointment processes.[313] Indeed, as we suggested above, in some ways the history of judicial independence in the United States may actually create an incentive to commit abusive judicial review, since courts would be able to draw off of a substantial well-spring of legitimacy in issuing antidemocratic decisions.[314]

Many modern decisions that have been heavily criticized are not plausible exercises of abusive judicial review. The *Bush* v. *Gore*[315] decision, for example, could plausibly have been motivated by good- faith prudential grounds (a desire to resolve a messy political crisis) or, more darkly, partisan grounds (a desire to hand Bush the election).[316] Even if motivated by partisan values, the case did not have a significant negative impact on the democratic minimum core — it may have resolved an extraordinarily close election on dubious grounds, but it did not permanently tilt the electoral playing field or marginalize the opposition. The recent decision in *Trump v. Hawaii*,[317] likewise, has been criticized as an abdication to a president with authoritarian leanings.[318] But while the case certainly

309 *See* Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78, 144 (2018) (arguing that the difficulty of amendment in the United States largely "takes off the table" routes to constitutional retrogression that require formal constitutional change); *see also* Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, 88 AM. POL. SCI. REV. 355, 362 (1994).

310 *See* U.S. CONST. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.").

311 *See* Keith E. Whittington, *Yet Another Constitutional Crisis?*, 43 WM. & MARY L. REV. 2093, 2134 (2002) (arguing that court-packing is not unconstitutional).

312 *See* Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers*, 105 GEO. L.J. 255, 269-84 (2017) (arguing that court-packing was understood as a question of constitutional convention); Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 VAND. L. REV. 465, 467- 68 (2018) (arguing that protections for judicial independence in the United States are primarily a matter of informal norms rather than law).

313 *See* Grove, *supra* note 312, at 543 (noting that there are "reasons today to worry about a change in the protections for judicial independence").

314 *See supra* Part V (arguing that abusive judicial review is more likely to succeed in contexts where courts have a history of legitimacy in the country).

315 531 U.S. 98 (2000).

316 For a leading pragmatic defense of the decision as a way to avoid political chaos, see RICHARD A. POSNER, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS 4 (2001).

317 138 S. Ct. 2392 (2018).

318 *See* Shirin Sinnar, Trump v. Hawaii*: A Roadmap for New Racial Origin Quotas*, STAN. L. SCH.: SLS BLOGS (June 26, 2018), https://law.stanford.edu/2018/06/26/trump-v- hawaii-a-roadmap-for-new-racial-origin-quotas/ [https://perma.cc/9K84-EN6Q]; *see also* Dahlia Lithwick & Mark Joseph Stern, *Anthony Kennedy Stands Down*, SLATE (June 26, 2018, 4:13 PM), https://slate.com/news-and-politics/2018/06/anthony-kennedys- travel-ban-vote-shows-hes-done-playing-the-wise-centrist.html [https://perma.cc/L25L- DX8N].

dealt with issues, such as inclusion and equality, that are relevant to broader understandings of democracy, it did not undermine the minimum core.

Perhaps closest to the "weak" conception of abusive judicial review are the line of cases, culminating in *Rucho* v. *Common Cause*,[319] where the Supreme Court refused to adjudicate any partisan gerrymandering claims, no matter how egregious. These cases can, of course, be plausibly defended on pragmatic grounds or conceptions of judicial role, rather than as *intentional* attacks on the democratic minimum core.[320] But state-by-state partisan gerrymandering certainly can become a significant threat to tilt the electoral playing field nationwide, especially if (as has been argued in recent years) one party is playing the game far more effectively or more often than the other.[321]

Hints of the stronger form of the phenomenon are more difficult to find in the United States. Some scholars, and even judges, have argued that the First Amendment is becoming "weaponized" in order to intervene in economic and social policy on behalf of favored interests.[322] Effectively, this work argues that the First Amendment is ceasing to be a tool used by vulnerable individuals to resist governmental power, and has instead become an instrument of powerful economic interests seeking to pursue a deregulatory agenda. In the recent *Janus* case, for example, the Court overruled its own precedent and used the first amendment to disallow mandatory union dues for non-members of public-sector unions.[323] In *Citizens United v. Federal Election Commission*,[324] of course, the Court used the same tool to strike down campaign finance legislation. Most recently, following President Trump's calls to "open up" defamation law, Justice Thomas issued a concurrence from a denial of certiorari to argue that *New York Times* Co. v. *Sullivan*,[325] which protects journalists from defamation lawsuits brought by public figures without evidence of "actual malice," should be reexamined, and he suggested that it lacked a solid constitutional foundation.[326]

319 139 S. Ct. 2484 (2019) (holding partisan gerrymandering claims to be political questions); *see also* Gill v. Whitford, 138 S. Ct. 1916, 1933-34 (2018) (dismissing a partisan gerrymandering claim for lack of standing); Vieth v. Jubelirer, 541 U.S. 267, 305 (2004) (holding a partisan gerrymandering case to be a non-justiciable political question).

320 *See, e.g.*, *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring) (arguing that making partisan gerrymandering claims justiciable would commit the courts to "unprecedented intervention in the American political process").

321 *See* Huq & Ginsburg, *supra* note 309, at 158-59. The Court also struck down the pre-clearance regime of the Voting Rights Act of 1965, which made it easier for states to adopt changes to voting rules that might be motivated by racially discriminatory intent or have discriminatory effects. *See* Shelby Cty. v. Holder, 570 U.S. 529, 556-57 (2013).

322 *See* Janus v. Am. Fed'n of State, City, & Mun. Emps., 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting) (arguing that the majority opinion "weaponize[es] the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy"); Adam Liptak, *How Conservatives Weaponized the First Amendment*, N.Y. TIMES (Jun. 30, 2018), https://www.nytimes.com/2018/06/30/us/ politics/first-amendment-conservatives-supreme-court.html [https://perma.cc/JG9Z- ULWM]; *see also* Louis Michael Seidman, *Can Free Speech Be Progressive?*, 118 COLUM. L. REV. 2219, 2230 (2018) (arguing that after the Warren Court, "free speech law took a sharp right turn" and "the first amendment became a sword used by people at the apex of the American power hierarchy").

323 *See Janus*, 138 S. Ct. at 2485-86.

324 *See* 558 U.S. 310, 329 (2010).

325 376 U.S. 254 (1964).

326 *See* McKee v. Cosby, 874 F.3d 54 (1st Cir. 2017), *cert. denied*, 139 S. Ct. 675, 678, 682 (2019) (Thomas, J., concurring) (arguing that "[t]he constitutional libel rules adopted by this Court in *New York Times* and its progeny broke sharply from the common law of libel, and there are sound reasons to question whether the First and Fourteenth Amendments displaced this body of common law," that "[t]he States are perfectly capable of striking an acceptable balance," and calling for *New York Times* to be "reconsider[ed]").

There is scant evidence that these cases represent an intentional attack on the democratic minimum core. To the extent that they represent a political strategy, they are more readily explained via a deregulatory economic agenda rather than a desire to entrench one party in power. Similarly, not all of the "weaponization" cases would plausibly have a significant negative effect on the democratic minimum core of electoral democracy — some of them instead represent disputes about broader economic and social values.

Still, looking at these cases in conjunction, and from a comparative perspective, helps to give some insight into how such a strategy might emerge in the United States: Constitutional rules could be used to selectively strengthen one party while weakening the other, and increased allowance for defamation suits could likewise allow incumbents to harass and undermine opposition leaders, media outlets, and interests. Similar judicial actions have significantly undermined liberal democracy elsewhere.

A passive judiciary in the face of illiberal or antidemocratic action would be a perilous outcome for U.S. constitutionalism. But there is in fact an even more troubling possibility, illuminated through the cases explored in this Article: Courts may go so far as to become active participants in the destruction of the liberal democratic order. Thankfully, current U.S. constitutional practice remains some distance from such an outcome. But we should not take for granted this will always be true. Comparative experience teaches us that under the right conditions, previously independent courts can quite quickly and effectively become the enemies, rather than allies, of democracy.

David Zedelashvili*

RULE OF LAW IN THE JURISPRUDENCE OF "CHAMELEON COURT" — DECISION OF THE CONSTITUTIONAL COURT OF GEORGIA ON MANDATORY GENDER QUOTA IN LISTS OF POLITICAL PARTIES

INTRODUCTION

On 25 September, 2020 the Plenum of the Constitutional Court of Georgia delivered a judgement on the case "N(N)LE Political Unity of Citizens "New Political Center", Herman Sabo, Zurab Girchi Japaridze and Ana Chikovani v. the Parliament of Georgia."[1] Applicants requested the Court to declare the norm of the Organic Law "Election Code" (2nd sentence of paragraph 2 of article 203) as inconsistent with the Constitution, according to which "political parties and electoral blocks have obligation to present lists in which every fifth person must be of distinctive gender."

Although, the disputed regulation had a purpose of woman representation in the Parliament, it was elaborated by the legislator in a neutral language. Consequently, more generality with the aim to establish gender quota in the list of political party gave such content, that in altered factual circumstances, for instance, in case of political party list consisting of majority of women, it would require quota for men. The Constitutional Court did not value legislator's expression of respect, even illusional, towards the constitutional ideal of formal equality.

The plaintiff did not have better choice, except that, by protection of general logic of the principle of formal equality, to argue about contradiction with the Constitution of both occasions of mandatory gender quota. Therefore, the operative part of the Court decision was containing plenty of

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1 Decision of the Constitutional Court of Georgia N3/3/1526 from 25 September 2020.

irony, by which the complaint was partially approved and only requirement of possible male quota in lists of political parties was declared as contradicting the Constitution, and the requirement of female quota was considered as a constitutionally necessary positive norm in light of paragraph 3 of article 11 of the Constitution.

By this court decision the constitutional principle of formal equality was damaged the most. It must be noted that jurisprudence developed during two decades of existence of the Constitutional Court of Georgia, mainly advanced in the area (scope) of this ideal. Despite the fact that standards created by the Court and evaluating constitutional tests lack doctrinal unity, consistency and completeness, content wise it is still possible to see ideal od formal equality in their fundament.

One of the factors, which determined such jurisprudential direction of the court was the texts of article 14 of the Constitution of 1995.[2] The language of this constitutional norm corresponding to the classical ideal of formal equality gave possibility to the court to clearly distinguish concepts of essential equality, state (without explanations) their fundamental inconsistency with the constitutional (formal) principle of equality.[3]

Paragraph 3 of article 11[4] of the new edition of the Constitution enacted in 2018 made the jurisprudential work of the court more difficult. This amendment in the Constitution introduced the language of essential equality, and took from the court the comfort created by the constitutional text to avoid wrestling with the Heracles's mission and try to unify conflicting principles of formal and essential equality in one constitutional doctrine.

In the decision discussed the court was not prepared for such heavy doctrinal burden and lost in its overcoming. Instead of developing consecutive standard and overcoming doctrinal obstacles, the decision discussed is making the content of the constitutional principle of equality and evaluating standards even more inconsecutive and contradictory. Deep value-based collisions, which derive from the conflict of constitutional principles opposed to each other before contradiction, will be showed as trivial by the court and will be hidden in this way, or will be declared decided with prepared formal argumentation, which belongs to more ideological genre, than to serious doctrinal constitutional law discussion.

As a result, the quality of legal certainty by the doctrine and constitutional rules, as well as quality of security decreases significantly. In such way the ground of the rule of law, fundament of

2 Article 14 of the previous edition of the Constitution of 1995 existing before 2018 was stipulated as follows: "all persons are free by birth and equal before the law disregard the race, colour, language, sex, religion, political and other opinion, national, ethnic and social belonging, origin, material condition and ranking, place of living."

3 "For understanding essence of article 14, it is principally important to distinguish equality before the law from equalizing. In the framework of this principle the major aim of the state and its function cannot be fully equaling people, as this would contradict with the idea of equality itself, with the essence of right. The idea of equality serves for ensuring equality of possibilities, that is guaranteeing similar possibilities of self-realization to the people in different spheres. Whether equal chances will be applied equally, depends on skills of each individual. Trying to equalize skills with the effort of the state, in most cases causes discrimination itself." – Decision of the Constitutional Court of Georgia N1/1/493 from 27 December 2010 on the case "Political Unities of citizens "New Rights Party (Akhali Memarjveneebi) and" Conservative Party of Georgia" v. the Parliament of Georgia", II-1.

4 According to this paragraph: "the State ensures equal rights and opportunities for men and women. Th state takes special measures for ensuring essential equality of men and women and precluding inequality."

constitutional order is even more rocked, which if not portrayed in the jurisprudence with proper consistency and completeness of essential link with the formal principle of equality, may be considered as next systemic failure of the Constitutional Court of Georgia.

Moreover, the establishment of doctrinal connection between formal and essential principles of equality within the frame if the Constitution of Georgia still remains undecided by the court, also determination of constitutional content of positive measures for attaining essential equality and determination of limits of discretion of the legislator upon their adoption with clear and distinct rules and/or standards. This situation exists not only in the direction of equality and in general, is the problem of the Constitutional Court of Georgia, as of the institute. This problem clearly shows its fragile institutional condition in the non-consolidated, non-liberal democracy.

In such regimes, similar to authoritarian and hybrid regimes, constitutional courts weakened by light/political institutional attacks[5] are pressured by political and/or societal power centers.[6] Sooner or later, they fall under the influence of diverse formal and informal power actors. It is ironic, but elites of the Constitutional Courts, as in authoritarian and hybrid, as well as non-liberal democratic regimes, have "pragmatic" grounds for justifying their recruitment by the holders of power[7] - they "protect" the institute of the Constitutional Court itself. In the benefit of power holders, "by pragmatic compromises" they leave to the Constitutional Court the possibility to fulfill its constitutional function in such cases, where "red lines" of interests of actors of the power are not defined.

By progressive and/or constitutionally correct decisions made beyond the "red lines" drawn by the power, such Constitutional Courts, on the one hand hold up to their remains of social legitimation, on the other hand by preservation of the remains of this legitimation they reinforce legitimation of the political power, which they serve basically. Such operative system requires mastering art of chameleon from the side of the Constitutional Court.[8] "Red lines" change constantly even in consolidated authoritarian regimes.[9] As for the non-consolidated , so called "non-liberal democracies", here the centers of power change by themselves and therefore, the "red lines", which are drawn by transient powers, are unpredictably changing too. Georgia after restoring independence falls more under this category.

Learning to be chameleon from the side of the Constitutional Court is inconsistent with protection of such constitutional values, as clarity, consistency, certainty, predictability. The rule of law is

5 Wojciech Sadurski, Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a *Governmental Enabler*, 11 Hague Journal on the Rule of Law (2018).

6 Tom Ginsburg & Tamir Moustafa, Introduction: The Functions of Courts in Authoritarian Politics, in Rule by Law: The Politics of Courts in Authoritarian Regimes 1–22 (Tom Ginsburg & Tamir Moustafa eds., 2008).

7 Alexei Trochev & Peter H. Solomon, *Authoritarian constitutionalism in Putin's Russia: A pragmatic constitutional court in a dual state*, 51 Communist and Post-Communist Studies 201–214 (2018).

8 I borrowed the metaphor of programmer "judge-chameleon" from Adrian Vermeule, who develops it in the framework of liberal-democratic constitutionalism. However, it must be mentioned that Vermuele often is criticized for the sympathy of authoritarian constitutional ideas. His works often openly is based on theoreticians of authoritarian law and politics. Adrian Vermeuele, System Effects and the Constitution, 123 HARVARD LAW SCHOOL JOHN M. OLIN CENTER FOR LAW, ECONOMICS AND BUSINESS DISCUSSION PAPER SERIES (2009).

9 Tamir Moustafa, *Law and Courts in Authoritarian Regimes*, 10 Annual Review of Law and Social Science 281–299 (2014).

the first victim of chameleon, however, its sacrificing is not done publicly and completely. It is necessary to demonstrate minimum devotion to these values. Hence, their neglection is mainly done through hiding, abuse and strategic calculation.

In this view we will see the thing why we are criticizing the Constitutional Court with regard to the discussed decision, its modus operandi and mechanism of institutional self-preservation. Being constitutional chameleon damages the rule of law and gives possibility to the court to implement it selectively. Vague, contradicting standards, weak and inconsistent constitutional doctrine, chameleon is the core basis of the court. It gives possibility to court to adapt to varying and contradicting "red liners" and tasks defined by constantly changing power centers.

In order to use the analysis of this decision for discussing it in the frame of increasing literature existing about functions of the Constitutional Courts in authoritarian and non-liberal regimes, firstly we need to review main elements of the mentioned literature and outline theoretical basis.

In this regard, particularly important will be stressing attention on the central role of abusing practice of comparative constitutional law "borrowing" (norms and institutes, as well as arguments of normative justification) in the work of Constitutional Courts of authoritarian and non-liberal regimes.

After establishment of this frame, in following parts, we will discuss in details doctrinal inconsistency and superficiality of the decision of the Constitutional Court on gender quotas, by critical, normative-theoretical and comparative analysis of core doctrinal elements of argumentation of the Court, and we summarize conclusions in light of the ongoing and future state of the Rule of law and Constitutional Justice in Georgia.

The critical question, which is posed to such academic work is the following: whether the analysis of jurisprudence of Constitutional Courts obeying authoritarian/non-liberal regimes is justified, beyond the production of empirical evidence of their subordinate condition? In the conclusion of the article we will try to answer this question. Despite the fact that the value of such analysis in normative perspective is really small, especially in the direction of doctrine construction, the jurisprudence of subordinated court still has value in normative theory for developing critical perspective. As for the empirical and practical value of such work, it is not doubted by critics.

CONSTITUTIONAL COURTS IN THE AUTHORITARIAN AND NON-LIBERAL POLITICAL REGIMES

In the literature of comparative constitutional law and political science the leading role of constitutional courts is mainly presented in the context of global spread of constitutional democracy

and revolution of human rights.[10] In the end of previous century, in parallel with the third, uprising, wave of democratization, the authoritarian regimes has lost relevance, especially in the view of optimism of 1990-ies, according to which, the end of Soviet totalitarianism would bring final triumph of liberal democracy, as of the form governance.[11]

In the first decade of 21st century it was already obvious that autocracy, as a form of governance appeared to be resistant toward waves of liberalization and democratization and did not even plan to disappear, but rather showed signs of revival and broadening around the world.[12] Along with the increase of interest of political science towards authoritarian and hybrid political regimes, the interest for institutional particularities of such regimes increased as well.

In the political science already existed theoretical models of studying courts. The mentioned theories, comparing to normative perspective of the law, chose so called positive perspective. The object of their study was not normative legitimation and purposes of courts, but their reality of work in political and governmental system, those real aims and functions, which are performed by courts and which are definitely of political nature based on the consensus of political scientists.[13]

"The insurance theory" by Tom Ginsburg is one of the examples of such "positive political theory", which tries by analyzing motivational structure of actors in the political system to explain their decision, to introduce constitutional judicial control and create constitutional courts.[14] According to the "insurance theory", when political actors agree on creation of constitutional courts and giving out authority, mainly are not driven by normative aims and ideals of liberal democracy.

In the opinion of Ginsburg, by giving power to constitutional courts, political actors insure themselves, that in case of losing power the independent and impartial arbiter will exist, who will protect it from arbitrariness of opponent. The insurance proposed by an independent arbiter is also beneficial when powers that created the Constitution cannot agree and leave numerous key constitutional provisions vague on purpose. In such case the Constitutional Court can spread in time the management of dispute and facilitate development of stable constitutional regime by creative constitutional interpretation.

Therefore, according to the "insurance theory", in the process of liberalization and democratization motivation for creation of constitutional courts and giving them power mostly exists when none of the political actors holds leading position in the process and he/she doesn't expect that will hold such position in the nearest future. Hence, with the mentioned logic, where the democratiza-

10 Kim Lane Scheppele, *Democracy by Judiciary.*, *in* Rethinking the Rule Of Law After Communism 25–60 (Adam Czarnota, Martin Krygier, & Wojciech Sadurski eds., 1 ed. 2005).

11 FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN (1992).

12 Anna Lührmann & Staffan I. Lindberg, *A third wave of autocratization is here: what is new about it?*, 26 Democratization 1095–1113 (2019).

13 Martin Shapiro, Courts. A Comparative and Political Analysis, (1981).

14 Tom Ginsburg, Judicial Review in New Democracies: Constitutional Courts in Asian Cases (2003).

tion process in interrupted by appearance of political power or leader, the less motivation will exist for creating constitutional court and giving it power.

Despite this, spread of constitutional courts in authoritarian and hybrid regimes and their existence there throughout years and practice of work made it necessary to conduct new study and formulate new questions for research. In order to find out why would authoritarian regimes have made a decision to create constitutional courts/preserve their power, the political scientists and researchers of comparative constitutional law became interested in studying those functions, which are performed by constitutional courts and judicial institutions in such regimes.[15]

According to the study results it emerged that in authoritarian regimes courts, including constitutional courts, perform important functions. Some of them becomes similar to those functions, which courts have in constitutional-democratic regimes, however, despite the structural similarity, qualitative distinctions still remain. In the authoritarian regime normative purposes of constitutional democracy are neglected and courts depend on political purposes of the regime.

This also happens when authoritarian regimes create falseness of the fact, that courts are serving normative aims of the constitutional democracy, in particular, by abusing values of constitutional democracy and institutes, attain personal political and other aims.

Functions, which are performed by courts in the authoritarian regimes, on the one hand are related to legitimacy of the regime, stability and survival, but on the other hand – operative necessities of effective conduct of governance by the regime. According to Ginsburg and Mustafa, these functions are: 1) establishing and implementing social control, especially getting rid of political opponents through legal ways; 2) reinforcing claim on legal legitimacy of the regime; 3) controlling of state administrative apparatus and bureaucracy, and checking performance of their tasks, as well as deciding conflicts between different fractions of the regime and problems of coordination; 4) facilitating international investments and trade by implementing the rule of law in the private law with limited amount; 5) implementing controversial public policy in a way that the direct responsibility on it will be avoided from major elements of the regime.[16]

Similar functions are performed by courts in constitutional democracies as well, however in authoritarian regimes their work depends on the purposes of the regime. When the authoritarian regime gives possibility to constitutional courts to repeal certain laws adopted by the regime on the grounds of incompatibility with constitutional rights, they reinforce legal legitimation of the regime. This is attained by the court indirectly, firstly, by self-legitimation and reinforcement of public trust. This helps the court in institutional survival, however, on the other hand firms the legal legitimation of the entire regime.

Hence, the resource of legal legitimation, which is collected by the Constitutional Court within the limits of freedom given by the authoritarian regime, is wasted for attaining purposes of the

15 Ginsburg and Moustafa, Supra, footnote 6.

16 Ibid.

same regime. However, as the analysis of the experience shows, constitutional courts have poor and qualitatively one choice worse than other before the authoritarian regime.

As Martin Shapiro states, authoritarian regime creates kind of Catch 22 paradox situation for constitutional courts, when all choices finally are unreasonable – courts have choice, not to agree to work within the red lines drawn by the regime and therefore, take the burden of legitimation of the regime, or risk perspective of inevitable destroy from the side of regime.[17]

In case of courts the institutional destroy by the regime does not exactly mean the total cancellation. In the dilemma named by Shapiro, the authoritarian regime wishes to reach the first choice, by the real threatening with the perspective of inevitable destroy, it gives to composition of the court (stubborn) ground for rationalizing first choice and "pragmatic" justification. If these judges are not sufficiently "pragmatic", then the threat becomes active (enforced).

Techniques of taming the court, which are in the arsenal of authoritarian governors, are of different types and includes "overloading" court with obedient judges, as well as their bounding and disciplining, starting from restricting jurisdiction, ending with using disciplinary and legal pursuit tools uniformly. These techniques developed by authoritarian regimes are available and successfully used also those political forces and leaders, which stand on the road going backwards to autocracy of standing constitutional democracies.[18]

In such cases, "taking away" the Constitutional Court is often the primary step in transformation from constitutional democracy to hybrid regime, as the change of fundamental coordinates of the constitutional system, needs, at least, inactivity of the Constitutional Court, if not the active involvement. Considering what is the modality, in conditions of authoritarian/hybrid regimes, there are two forms of constitutional judicial control by the courts subordinated to the regime distinguished – strong and weak.[19]

In case of the weak form of abuse, the Constitutional Court "captured" by the regime considers such legislation and constitutional amendments in line with the Constitution, which contradict with the main essence of the constitutional democracy and cause essential degradation of whole constitutional system. In case of strong forms of abuse, the court is itself an initiator of such decisions, it "obliges" (constitutional) legislators with its own acts, to adopt respective norms, which turn upside down the identity of the constitutional democracy.

Such "pragmatism" of the "captured" courts suffers from deficit of consistency with regard to the valuable constitutional fundament. However, this does not mean that such courts reduce the effort (with more or less success) to justify their decisions beyond the pragmatic choice. The chameleon does not want to appear pale, but rather tries to express its flexibility towards the colorful

17 Ibid.

18 David Landau, Rosalind Dixon, Abusive judicial review: courts against democracy, 53 UC Davis L. Rev. 3 (2019)

19 Ibid.

diversity. However, diverse and inconsistent with each other are mostly the purposes of regimes, the burden of justification of which cannot be lifted by "pragmatic flexibility".

For overcoming this burden, the practice of abusing Constitutional judicial control knows several techniques. Including "borrowing" from another constitutional jurisdiction. When "borrowing", taking particular norm, institute or doctrinal-constitutional argument out of the context, distorting its normative aims and inversion takes place. "Borrower" court closes eyes in such case on the fact that in the original jurisdiction, institutional, valuable or other context gives completely other normative purpose to the "borrowed" norm, institute or doctrinal constitutional argument, comparing to the one having in local contexts.[20]

Abusing "borrowing" is done by the court to hide its doctrinal inconsistency. However, in most cases this is not done with proper success. The high quality of doctrinal inconsistency of the court decision, along with the procedural violations, are significant grounds for discovering and approving abuse of constitutional judicial control.[21]

According to one opinion, jurisprudential value of the analysis of cases of abusing constitutional judicial control is insignificant and may be useful only for confirming "captured"/"subordinated" condition of the respective court.[22] Despite the fact that the analytical consideration of cases of absurdly irrational inconsistency and breach of fundament does not give possibility to develop doctrinal jurisprudence, in the normative perspective, such analysis is still important.

It is important for the icon of normative ideal to remain lifeful within the constitutional system, based on which the critics of using abuse of constitutional control must preserve its perspective of restoration, firstly, in the legal profession and also – in the broad society. With this strive we will continue the critical analysis of this decision in the following part.

DISAGREED CONTROVERSY BETWEEN FORMAL AND ESSENTIAL PRINCIPLES OF EQUALITY AND UNDETERMINED CONSTITUTIONAL STANDARD FOR EXAMINING POSITIVE MEASURES

The strategy of plaintiff to argue only about constitutionality of the norm based on article 24 of the Constitution (election right), may be explained with the attempt to maximally avoid/restrict

20 Rosalind Dixon & David Landau, *1989–2019: From democratic to abusive constitutional borrowing*, 17 International Journal of Constitutional Law 489–496 (2019).

21 Dixon and Landau, Supra, footnote 18.

22 Jakab, András: Bringing a Hammer to the Chess Board: Why Doctrinal-Conceptual Legal Thinking is Futile in Dealing with Autocratizing Regimes, VerfBlog, 2020/6/25, https://verfassungsblog.de/bringing-a-hammer-to-the-chess-board/, DOI: 10.17176/20200626-003815-0.

definition/usage of constitutional mandate of the positive measures prescribed in paragraph 3 of article 11 of the Constitution of Georgia within the ongoing legal process.

It is obvious that complete realization of this strategy was impossible from the initial stage. Reading the clear text of the Constitution our of the Constitution itself and its ignoring is impossible without evident violation of the Constitution by the constitutional Court. In the current case the respondent, the Parliament of Georgia during the main hearing through its representatives directly indicated that the disputed legislative scheme of quotas was adopted by fulfillment of positive obligation envisaged in paragraph 3 of article 11 of the Constitution.

Therefore, the Constitutional Court faced the necessity to interpret and doctrinally formulate relation of paragraph 3 of article 11 with paragraph 1 of article 11 (constitutional guarantee of formal equality and prohibition of discrimination), as well as with the fundamental constitutional rights. For reaching this purpose, the court must have answered the clear response to several important questions.

First of all, the court had to answer the question whether discrimination prohibition guarantees of formal equality prescribed in paragraph 1 of article 11 of the Constitution are compatible content wise with positive measures envisaged in paragraph 3 of the same article. If the mentioned incompatibility exists and it is impossible to finally decide this conflict on the level of normative theory, whether the court uses in this case such doctrinal and jurisprudential means which are adopted for resolving such constitutional conflicts, such as for instance constitutional principle of proportionality?

Doctrinal regulation of resolving conflict in each particular case based on the principle of proportionality is one possible way, which is known by the comparative constitutional law in the constitutional jurisprudence of equality. This approach belongs to the Federal Constitutional Court of Germany, which it has developed in the interpretation of article 3(2) of the Basic Law of Germany and according to which positive measures adopted based on article 3(2) generally contradict with constitutional guarantee of formal equality, however they may be justified, if they satisfy constitutional requirements of proportionality.[23] This norm of the Basil Law of Germany, and especially its edition after constitutional amendments of 1994,[24] may be considered as inspiration for article 11(3) of the Constitution of Georgia, as similarity between them on the textual level is essential and visible.

Hence, borrowing German doctrinal frame would not be unjustified choice for constitutional regulation for relation between paragraphs 1 and 3 of article 11 of the Constitution of Georgia. However, according to the discussed decision, the approach of the Constitutional Court of Georgia with regard to this relation is ambiguous. On the one hand the majority of Plenum indicated on principal conflict between positive measures and principle of formal equality:

23 BVerfGE 85, 191 (207); 92, 91 (109).

24 "Men and Women have equal rights. The state must encourage real execution of equal rights for women and men, and take measures to eradicate existing inequalities" – see, https://www.bundesregierung.de/breg-en/chancellor/basic-law-470510

> "The Constitutional Court has never established in its practice, that with regard to any legal relation, the sex created the relevant characteristic, which created grounds for considering men and women essentially unequal people. Hence, deriving from the judicial practice, almost with regard to all legal relations, woman and man are considered as essentially equal subjects. Therefore, right to equality envisaged in paragraph 1 of article 11 of the Constitution of Georgia may require obligation for different treatment based on sex on very few occasions."[25]

On the other hand, the Constitutional Court talks about constitutional necessity of eradication of social-political inequality outside the law, as if it is organic continuation of principle of formal equality and there is no incompatible conflict between them:

> "The purpose of the right of equality before law is to ensure equal realization of their skills, equal access to societal benefits, by giving people equal possibilities. However, it must be noted that the realization of possibilities is affected by many social aspects outside the legal area. Equal treatment by the law in different fields, in some occasions, does not ensure equal realization of possibilities. The law operates in particular, given society and considering individualities of this society, it is probable, that in circumstances of completely equal legal regulations particular groups cannot equally implement possibilities, because of artificial barriers created by impact of social environment… In this way, the positive obligation of the state envisaged in paragraph 3 of article 11 of the Constitution of Georgia is directed against the social-political inequality existing outside the law and towards facilitation of equal implementation of possibilities."[26]

Contradiction between principle of formal equality and positive measures is evident from the cited part as well, however, the Court refuses to bring its argumentation to the logical conclusion. Consequently, the Court rejects to recognize principal contradiction of positive measures with the constitutional guarantee of formal equality, which, in case of appealing, would definitely require mandatory examination of *all* positive measures adopted in accordance with paragraph 3 of article 11 in relation to the constitutional principle of proportionality. This assessment is reinforced by the following standard established by the court: "therefore, in each particular case, considering the intensity of restriction of the right and other factors, compatibility of each of such measure with the Constitution may independently become subject of discussion by the Constitutional Court."[27]

From this standard is evident that constitutionality of positive norms adopted on the basis of paragraph 3 of article 11 does not require assessment of the Court in any case. The named relevant factor, which may be basis for examination by the court, is the "intensity of restriction of the right." Its argumentation does not give reasonable possibility to predict this.

25 *Supra*, footnote 1, II-23.

26 Ibid. II- 24,25.

27 Ibid. II- 29.

In line with this standard, the court, by using principle of proportionality, examines the disputed legislative scheme of quotas, as interference into the election right. It is understandable that the court is significantly restricted with the claim, however going outside of the limits of the claim would not have happened, if the court had completely and consistently outlined relation of positive measures (paragraph 3 of article 11) with the guarantee of forma equality (paragraph 1 of article 11) and had established constitutional standard for examination of positive measures in line with this compatibility.

With the existing situation, the doctrine of constitutional examination of equality consists of controversial and inconsistent elements. Because of the essential controversy it is impossible that court remains principle of formal equality and at the same time not recognizes that all positive measure in its essence contradicts with this principle and for resolving this conflict it is necessary to use principle of proportionality.

The only alternative way for overcoming this controversy and examining positive measures with less strict constitutional test, is the total refusal of principle of formal equality for the benefit of principle of essential equality. However, this is not the subject of doctrinal choice of the court and the firm basis for that must be given by the Constitution itself. The clear illustration of the mentioned approach is the Constitution of South Africa from 1996 and respective constitutional doctrine of the Constitutional Court of South Africa.

Firstly, it must be noted that before adopting the Constitution of South Africa there was a fight against legally institutionalized racism – regime of apartheid. The proclaimed purpose of creators of the Constitution of South Africa was eradication of result of apartheid and transformation of the society of South Africa on egalitarian grounds.

As stated by the Constitutional Court of South Africa: "the jurisprudence of this court evidences that proper limits of the right of equality must be determined by indicating to fundamental values of our history and constitution. As we see, the major constitutional aim is to create not racial and not sexist egalitarian society… The concept of equality derives from this, which goes beyond simple formal equality and simple prohibition of discrimination, which require identical treatment despite the initial conditions and impact."[28]

The Constitutional Court of South Africa distinguishes constitutional principle of essential equality from other constitutional jurisdictions, specifically from USA: "hence our Constitution fundamentally differs from other constitutions, which take it as implied that everyone is equal and, in this way, they strengthen inequality. Our Constitution recognizes, that the systemic racial discrimination built in during decades by the legal regime of apartheid cannot be eradicated without positive action to attain this result."[29]

28 Minister of Finance and Other v Van Heerden (CCT 63/03) [2004] ZACC 3; 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC) ; [2004] 12 BLLR 1181 (CC) (29 July 2004).

29 Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others (CCT 27/03) [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) (12 March 2004).

Finally, the Constitutional Court of South Africa develops comprehensive concept of essential equality: "the concept of essential equality recognizes, that along with the racial, class and gender related attributes of our society, other levels of social differentiation and systemic non-privilege exist, which still remain. The Constitution requires from us their demolishing and preventing creation of new patters for inconvenient situation."[30]

Therefore, after such systemic rejection of the ideal of formal equality, it is obvious that in the constitutional doctrine of South Africa positive measures are not considered as interference into right of equality/against the principle of equality and their constitutionality is assessed independently, by less strict test easy to cope by legislator.[31]

Hereby, it must be underlined, that comparing to constitutional documents of Georgia, section 9(2) of the Constitution of South Africa does not limit positive measures only by sex and gender, and prescribes general and comprehensive mandate of such measures: "for facilitating to reach equality, it is possible to adopt legislative, or other measures for protecting, promoting, persons, or categories of people, who are in vulnerable condition because of the unfair discrimination."[32]

The Constitution of Georgia, comparing to the Constitution of South Africa, does not include such strong concept of essential equality, that the court would have any, even insignificant ground, to read out guarantee for formal equality beyond the Constitution. Moreover, the court tries to retain in its argumentation the major doctrinal elements of the formal equality principle and, what is the most strange and lacks normative-theoretical ground, prove that the positive measures are not only principally compatible with the logic of the forma equality principle, but even more, serves for implementation of its purposes and strive:

> "The purpose of the named provision [paragraph 3 of article 11 of the Constitution of Georgia] is to create circumstances facilitating factual equality and not ensure equality artificially. The aim of the Constitution is to neutralize factors hindering people from showing their possibilities and not neglecting work of person for reaching success by providing simulated equality of results, ignoring the fact of attaining success with personal development and achievement. The purpose of paragraph 3 of article 11 of the Constitution is to create such environment, in which woman and man could make success with equal work and skills. The mentioned may be attained by introducing mechanisms balancing the artificial barriers related to sex and hindering the success deriving therefrom."[33]

30 Van Heerden, *Supra*

31 The test has three elements, in the frame of which the court examines the following: first, whether there are target group, or groups of people, of the measure, who are in the vulnerable condition because of unfair discrimination; second, whether there is a measure created for protection or promotion of such persons, category of persons; and third, requirement implies defining whether this measure facilitates achievement of equality. The named test was developed by the Constitutional Court of South Africa in case Van Heerden.

32 Section 9 (2) of The Constitution of the Republic of South Africa. იხილეთ, https://www.gov.za/documents/constitution/constitution-republic-south-africa-1996-1

33 *Supra*, footnote 1, II- 28.

If such positive measures, which, according to the court words, are directed to "ensuring artificial equality of results", are incompatible with purposes of paragraph 3 of article 11, then the Court might need better justification for considering such "fixed and result oriented quota" as constitutional, as the scheme of quotas considered as constitutional by the court itself. For overcoming this obstacle, the court applies standard argument,[34] that selective positions must be distinguished from professional positions, as in the latter case there are "objectively" determining factors, such as qualification, professionalism, etc.[35]

The strict contrast between elections and inner partial democracy seen by the Court, on the one hand, and on the other hand, between professional area, according to which the first one is entirely empty from such objective factors, which would create possibility to make choice based on the reasonable, valuable argumentation and individual virtues, is in significant contradiction with the principle of democracy, as well as – with the interpretation of political parties about constitutional role. As it will be discussed below, inconsistent and controversial interpretation of these principles is one more unfortunate result of this decision of the Court.

By the discussed decision, the parameters of constitutional discretion of the legislative body while taking positive measures remains undetermined. By the assertion of the court, paragraph 3 of article 11 of the Constitution does not require ensuring equal quantity of representatives of different sex in any field." On the first sight, this sentence is similar to the doctrinal rule, which narrows scope of operation of positive measures. However, this sentence does not satisfy requirements for necessary clarity not only for the rule, but also for the standard.[36]

From the argumentation of the Court it is unknown how those areas of societal life are determined, in which the Constitution does not require taking positive measures. Such indetermination damages legitimacy of the court decision and values of the rule of law, however, on the other hand, it is ideal for the role of "pragmatic chameleon", which is well played by the court.

For the opponent of positive measures this ambiguity gives hope that in the following legal processes they will manage to constitutionally restrict the scope of application of constitutionally admissible measures. Even though for supporters this indication is generally inconvenient, is does not create ground for particular worry.

The Court itself leaves for itself "pragmatic area" for future maneuver in both possible directions. In the discussed decision the court determines positive measure of paragraph 3 of article 11 on the ground of sex. However, it does not control what choice is made in scientific (or cultural) dispute existing around the concept of sex for the purpose of constitutional doctrine, and considers sex only as biological category, or as social construction (as well)?

34 See for example, M. Wrase, Gender Equality in German Constitutional Law, Discussion Paper P 2019–005 Wissenschaftszentrum Berlin für Sozialforschung (2019), https://bibliothek.wzb.eu/pdf/2019/p19-005.pdf

35 *Supra*, footnote 1, II- 63-66.

36 Regarding the difference between rules and standards see from the comprehensive literature for illustration: Frederick Schauer, The Tyranny of Choice and the Rulification of Standards, 14 J. CONTEMP. LEGAL ISSUES 803, 803 n.1 (2005); Cass R. Sunstein, Problems with Rules, 83 CAL. L. REV. 953, 961-962 (1995); JOSEPH RAZ, PRACTICAL REASON AND NORMS (1990).

When the Court states that "almost with regard to all legal relations, woman and man are considered as essentially equal subjects", here the word "almost" does not entail reservation, that certain differences may exist between sexes, which may justify representational disbalance in some areas, all the more, such discussion was already developed by the Constitutional Court of Georgia with regard to the mandatory military service?[37]

While leaving these questions unanswered, the Court does not reject the possibility to entirely refuse category of sex in the Constitutional doctrine on one day, similar to Federal Constitutional Court of Germany, and substitute it with gender, or even with nonbinary concept of gender, and cover the whole spectrum of gender identification, including for purposes of constitutional mandate of positive measures.[38]

In the discussed decision not less problematic is the limitation of legislative discretion of taking positive measures in the part of determining necessity and selecting measures. As stated by the Court: "It is natural that paragraph 3 of article 11 of the Constitution does not entitle the state with power to deviate from requirements of the right of equality before the law without proper factual necessity and use any measures aimed at encouraging any sex."[39]

It is vague, what is the "proper factual necessity"? It is constitutionally determinable notion, if the court "properly" takes any consistent justification presented by the legislative body, if it is not clearly unreasonable, that is demonstrates so called policy of "compromise" towards critics of the legislative body and its expert knowledge? These questions are not answered and are made even more vague by additional criterion "real necessity" (therefore it is important to evaluate, whether this regulation and restriction of election rights represent the real, echo of societal needs, and, deriving from these necessities, mean addressed to balance the results.)"[40]

We may suppose that the court does not follow here the total "compromise policy" and makes assessment of "proper" or "real" necessities independently. However, what is the constitutional-legal standard of assessment? The fact is that such assessment cannot be performed with clear legal standards. In the constitutional theory, especially when it relates to fundamental human rights, the

37 "Organizing State Defence and mobilization or training of human resource for this reason, falls under the governance of the highest bodies of the State Authority, and moreover requires professional military expertise. Therefore, the State must have possibility to make the group eligible for military registration and afterwards mandatory military service (which entails special military training and preparation for combat activities), people who satisfy special requirement for this job and with the extent, which is necessary, as well as according to what is the real capability of professional training, in order to maximally effectively reach the legitimate purposes mentioned above… the fact that different physical and normative may be required for men and women wishing to study in the National Academy of Defence, indicates not to the discriminatory treatment from the state, but on contrary, on protection from such treatment and finally serves for receiving professional quality education and developing contingent of military servants having high competence. Same strict physical standards could on contrary be unequal for women wishing to study in the academy, as well as by introducing less strict standards purposes of the state would not be reachable. However, this does not exclude that individually certain group of women may satisfy the physical norms defined for men, as well as, not all men may satisfy such requirement established for their group" – Decision of the Constitutional Court of Georgia N1/7/580, Citizen of Georgia Giorgi Kekenadze v. the Parliament of Georgia, 30 September 2016, II-31,35.

38 BVerfGE 147, 1 (28).

39 *Supra*, footnote 1, II- 28.

40 Ibid. II- 30.

approach giving up jurisdiction to the legislative body and recognizing its expert knowledge is not popular.[41] However, this approach has its justification as well.

In particular, the legislative body is widely representative body, which has more direct relation with all systemic elements and interests of the society, as well as it reacts faster to changed circumstances and, what is more important comparing to the Court, it has unmeasurably wide access to special expert competence and resources, which are necessary for finding dispersed information, processing, analyzing and forming as public policies.

Courts do not have such resources themselves. Therefore, the assessment of reasonableness of argumentation based on special knowledge and expertise is needed, for this they address expert witnesses for help and often study the arguments presented by parties during days. Such practice is not unfamiliar for the Constitutional Court of Georgia, however, somehow in this case the court felt itself particularly firm in the area of social sciences in terms of its expert knowledge.

Consequently, the courts diving in the direction of social sciences or theories, leaves more questions, rather than creating more persuasive arguments. For example, when examining usefulness of the women quota schemes, the Court asserts: "for the comprehensive argumentation on the disputable issue it is necessary to take into consideration results of the elections of the Parliament of Georgia in 2016 in the context of sex balance. "[42] It is an alphabet of methods of social study, that any methodological choice requires justification. The court does not have such justification.

However, the high status does not free the Constitutional Court from the obligation of such justification. Moreover, it uses scientific discourse unfamiliar for itself for giving additional weight and persuasiveness to the argumentation. It, therefore, is obliged to obey internal requirements of this discourse. Without deep methodological analysis, facts brought up in the argumentation of the Court cause legitimate doubts about the fact, why the "sex balance" of only results of 2016 elections is relevant.

Some paragraphs above, for demonstrating reality of problem of women's political representation, the Constitutional Court brings the following factual data: "index of women's representation in the Parliament is significantly low and during las three convocations it varies from 5 to 16 percent. There is a reality in the country that the best index, which was shown between elected deputies, through proportionate system, in terms of women representation in the history of independent Georgia, is 23,28 percent (Parliamentary elections 2016). The low representation of women is not occasional, but rather having continuous nature (in the circumstances of independent Georgia, women representations never was more than 16 percent.)"[43]

It is interesting, why the Constitutional Court is not interested in the dynamics of this data. In particular, whether the increase of women representation was recorded during years? Which

41 T.R.S. Allan, Judicial Deference and Judicial Review: Legal Doctrine and Legal Theory, 127 L. Q. Rev. 96 (2011).

42 *Supra*, footnote 1, II- 50.

43 Ibid. II- 31.

independent and dependent variables were used social scientists for analyzing these dynamics? Whether such analyses exist at all and what hypotheses or conclusions are possible to be made out of that by social scientists? Whether this information had any impact on formation of disputed legislative scheme? These questions remain unanswered and along with that, it remains unjustified why only the "sex balance" of last parliamentary elections of 2016 is relevant factor for deciding on the necessity of quotas.

Hereby we must repeat, that the court is not obliged to base its legal justification to social sciences or other scientific knowledge, however, when it refers to this knowledge for grounding or reinforcing doctrinal or jurisprudential argument, it is obliged to follow the criteria of validity established in these areas.

Beyond the discretion of defining necessity, for taking positive measures in the court decision, discretion of choosing particular means is not formulated with less determination. According to the court: "it must be noted, that mentioned constitutional provision does not restrict activity of the state with particular measures. The latter defined purpose, for attaining of which, while selecting used method and mechanism, the state has slightly wider discretion. Also, it is obvious that existence of such constitutionally declared purpose, despite its increased public importance, cannot justify any action of the state taken with the aim to eradicate disbalance between sexes."[44]

Notwithstanding indications of the Court, that this "comparatively wide discretion" may be subject to examination, as we already have mentioned, if there is not an issue of intensive restriction of fundamental right by the court, using principle of proportionality by the court is doubtful. Therefore, this impacts the severity of analysis of proportionality, when there is interference in other constitutional rights as well (as in the discussed case). In such case, examination of proportionality cannot be less strict, as the interference falls under guarantee of formal equality, as well as other constitutional rights. Not recognizing the mentioned in the discussed case by the Constitutional Court of Georgia, directly causes less severity of examination of proportionality.

This is the reality created by the discussed decision. When with this condition, the principle of formal equality remains as general principle of the Constitution of Georgia, and the logic of essential equality existing in the fundament of positive measure prescribed in paragraph 3 of article 11 – as an exception. Hence, the court may not be able to refuse resolution of this conflict by using the principle of proportionality.

Therefore, it is inconsistent and lacking constitutional logic to examine constitutionality of positive measures envisaged in paragraph 3 of article 11 based on the formal equality principle, only in case when the measure to be examined restricts any of the constitutional rights beyond the formal equality guarantee. It is necessary to examine all positive measures taken based on paragraph 3 of article 11, disregarding whether additionally other constitutional rights are interfered.

44 Ibid. II- 29.

FROM PREFERENCE OF THE CONTEXT TO BLINDNESS OF TOWARDS THE CONTEXT IN THE FRAME OF ONE DECISION – PRINCIPLE OF DEMOCRACY AND PARTY DEMOCRACY

For justifying necessity and proportionality of quotas in lists of parties the Constitutional Court showed particular sensitivity to social context. Certain paragraphs of the court decision are read as wide social commentary on sexist stereotypes of Georgian Society and factual inequalities and oppressing resulted or related thereto.

Considering this, maybe it was not ungrounded that the expectation of the court being interested in relatively narrow context, which is created by parties in the politics of Georgia, even more, considering the fact that major addressees of appealed measures are political parties.

Instead of this, the court was basically limited to repeating general principles and formally annulling several main arguments, which created basis for justification of European Constitutional Courts establishing unconstitutionality of quotas. The Court does not cite any of the decisions, however the newest out of them, argumentation of the Constitutional Court of the Thuringia Land of Germany on the unconstitutionality[45] of gender quotas had impact on the argumentation of the plaintiff on this case, as well as – court justification.

The Constitutional Court also responds for instance to arguments coming from older decision of the Constitutional Council of France from 1982. In particular, the Constitutional Council indicated on the constitutional principle of public sovereignty, where it comes from that "nation", as a political sovereign, is unified, it acts as one "electoral body", which develops common choice. It is impossible to preserve this normative assumption in practice, if the ideal of formal equality during the organization of elections will not be implemented exactly and inviolately.[46]

In response to this argument the Constitutional Court of Georgia proves that: "the disputed regulation does not reduce involvement of the society in governance of the State, but rather increases it. As a result of operation of the norm, the possibility that there will be 100 percent representation of the population in the parliament, instead of mostly men, increases." To forget about the mathematical element of this sentence and its logic for a brief period, the courts wants to prove that women quota does not divide "electoral body", but unifies it and more completely represents it in the execution of the power. Any ways, it "increases the possibility".

Predicting or studying such or any other effect of quotas is impossible without consideration of structure of parties and mechanisms for making decision within parties. In most empirical studies social scientists take as one of the variables the structure of party and mechanisms for internal

45 http://www.thverfgh.thueringen.de/webthfj/webthfj.nsf/8104B54FE2DCDADDC12585A600366BF3/$File/20-00002-U-A.pdf?OpenElement

46 See https://www.conseil-constitutionnel.fr/decision/1982/82146DC.htm; Éléonore Lépinard, The French Parity Reform, in Transforming Gender Citizenship: The Irresistible Rise of Gender Quotas in Europe 62–93 (Éléonore Lépinard & Ruth Rubio-Marín eds., 2018).

democracy/decision-making.[47] Other studies indicate that quotas have desirable effect in closed proportional lists of parties, only when obligation to implement quotas forces party elites to apply more centralized[48] and bureaucratized[49] mechanism for making party lists.

For the Constitutional Court which uses contextual arguments as selectively and inconsistently, as normative and doctrinal justification, these observations made by social scientists, probably, is completely uninteresting. By the conclusion of the Constitutional Court, the disputed scheme is an interference by the state into freedom of action, internal democratic process of parties and in the formation of the will of electorate, however not "essential", which would make it unconstitutional.

According to the court argumentation, nonessential nature of interference is based on the assumptions that quota is neutral in its point of view and depersonalized, it does not provide result guaranteed by identifiable opinions/ideologies and by legally forcing representation of persons. Here the Constitutional Court of Georgia neglects the argumentations developed in the decision of the Constitutional Court of Thuringia, which is based on specific role of political parties in the process of forming democratic political will and decisions. Taking into consideration this, the Constitutional Court of Thuringia requires that this process goes "independently from the state" ("staatsfrei").

"Freedom from state" is understood by the constitutional Court of Georgia as neutral interference, in terms of point of view, into rules and procedures of making decisions of parties. Hence, despite the fact that the Constitutional Court does not assess independently the compatibility of challenged measure with article 26 of the Constitution, in the framework of discussion on compatibility with the principle of democracy, there are still emerged certain parameters justifying interreference.

Obviously, the Constitution of Georgia allows interreference into the freedom of parties. However, deriving from the constitutional role of political parties, the mentioned interference even in case of serving legitimate purpose, must not be in conflict with structure of parties and constitutional principles of their activity, including internal principle of democracy of parties. One crucial part of requirements established towards parties by the legislative body serves for ensuring democratic frames for functioning of parties.

In circumstances, when closed system of parties urges internal democracy of parties and competitive selection of candidates, obligation to implement quotas created additional justifying terms for more centralization, bureaucratization and closing of this process. Obligation to implement quotas will be additional and quite firm argument for feudal parties of Georgia, in order to postpone

47 For example, according this recent study, internal rules of party are also important for those careerist politicians who have guaranteed places (incumbents). If the internal rotation rules of party do not change, gender quotas may have very important results. Stephen A. Meserve, Daniel Pemstein & William T. Bernhard, Gender, Incumbency and Party List Nominations, 50 British Journal of Political Science 1–15 (2020).

48 Maarja Luhiste, Party Gatekeepers' Support for Viable Female Candidacy in PR-List Systems, 11 Politics & Gender 89–116 (2015).

49 Elin Bjarnegård, Pär Zetterberg, Political Parties and Gender Quota Implementation: The Role of Bureaucratized Candidate Selection Procedures, Comparative Politics. 2016;48(3):393.

introduction of mechanisms ensuring internal democracy of parties and free competition for an indefinite period.

For this bargaining chip argument, they will be ready to pay as a tribute considering more women in the network of their clients. In such patrimonial system, if more women become part of elite clientelist network in politics, this would not transform this system qualitatively and neither in terms of freedom, and therefore would not make it equal. The Constitutional Court is indifferent towards this reality, and that does not give it possibility to properly realize threats of forced impact of the state on *results* of democratic political process, including political process of parties, which must be neutral in terms of point of view.

The mentioned position of the Court does not affect severity of assessing equality in this case, which finally ends with approval of constitutionality of the disputed scheme.

CONCLUSION

The decision of the Constitutional Court in the discussed case is built on inconsistent and controversial grounds. As it was already mentioned, this "chameleon court" derives from general strategy. With this decision, the constitutional status of positive measures is far from doctrinal development and constitutional-legal reinforcement.

In the introduction, when we indicated to pragmatic grounds for chameleon nature of the Constitutional Court, we on purpose did not limit argumentation among actors of outside influence by indicating branches of political government. Existence of so called "networks supporting court" is not less important for the Court, as the court cannot refuse cooperation perspective with oppositional political networks and preserving their kind-heartedness.

Considering this, the decision made on this case by the Court was predictable. Disputed scheme of quota was developed with the almost unanimous consensus of ruling parliamentary majority, big oppositional groups and civil society. The distinguished opinion for this court appeared to be in the minority of influential groups. Therefore, by this decision the Constitutional Court made more friends than enemies. The Rule of Law, which became the thing acceptable "for me and my friend", appeared to be less prioritized once more.

However, as we have mentioned, achievement of the "chameleon court" still leaves room for hope, that one day, in proper circumstances, other court will bring clarity and consistency to the doctrinal mess left.

Tamar Shavgulidze*

SIGNIFICANCE OF INTERPRETATION OF THE CONSTITUTION FOR COMMON COURTS' AND CONSTITUTIONAL NORM CONTROL

"The law may be more intelligent, than the lawmaker"[1]

ABSTRACT

The essential access to the Constitution and further realization in the common order, is the major mission for any legal system. As one of the means for reaching the mentioned aim are interpretation methods, which must not lose common striving – orienting on the Constitution. In this process, proper interpretation of the Constitution is particularly important, which creates significant basis for factual depicting of the constitutional principles in regular order. It evaluates norm of the law with constitutional measuring, and decides the collision between interpretation methods based on the Constitution.

In the present article, based on the mutual comparison of German and Georgian legal systems, topical issues existing around the respective interpretation of the constitution are discussed: significance of the topic to be discussed is expressed in theoretical, as well as practical viewpoint. Firstly, it is important in terms of systematization, in order to more accurately perceive legal norm and means for its interpretation. Moreover, the admissibility of relevant interpretation of the Constitution for the common court is interesting, as well as its possible intersection points with the constitutional justice.

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1 G.Radbruch, Rechtsphilosophie, 8. Aufl. 1973, S. 207.

I. INTRODUCTION

The hierarchy of normative acts indicates that the Constitution creates scale for application of the norm, however speaking only in the narrow hierarchical view and in general, indication to the primacy of constitution, often is not sufficient and requires more precision, in particular for solving difficult legal problem. In any case, standard methods of interpretation of norms cannot be useful, as the logical connection between the constitution and norm may be lost. Therefore, it becomes necessary to introduce interpretation method, the primary aim of which lies on the essential understanding of the Constitution and in particular, indicates to the explanation of norm in accordance with the Constitution.

The research method basically is based on the analysis of German legal doctrine and judicial practice, and its correspondence with the Georgian reality, on the example of certain cases of the Supreme Court and the Constitutional Court. Since nowadays there is no widely developed reasoning on this topic in the Georgian legal area, it is interesting to discuss its compatibility and problematic aspects, in order to create more clarity with regard to this method of interpretation.

II. ESSENCE OF PROPER INTERPRETATION OF THE CONSTITUTION

As a rule, the judge of common court must use norms of ordinary law, which have relative independence from the Constitution and result in direct binding of the judge.[2] In the methodological perspective, direct access to the Constitution is performed in 2 stages: firstly, the court, as a body using legal norms, according to the principle of legal state, is obliged to take into consideration major approaches of the Constitution within the framework of administrative discretion and interpretation of general civil law clauses.[3] This issue was outlined very well in the decision of Lüth of the Federal Constitutional Court of Germany,[4] which was based on the notion of fundamental rights, as order of the objective value and doctrinal figures developed from this foundation, that entailed direct binding with fundamental rights between private persons and obligation to protect fundamental rights, which caused constitutional law impact and constitutionalizing of normal legal order.

2 R. Wahl, Der Vorrang der Verfassung und die Selbständigkeit des Gestzesrechts, NVwZ 1984, S. 401 (406 ff.).

3 A. Voßkuhle, Theorie und Praxis der verfassungskonformen Auslegung von Gesetzen durch Fachgerichte- kritische Bestandsaufnaheme und Versuch einer Neubestimmung. AöR, Bd. 125 (2000), S. 180.

4 Compare, BVerfGE 7,1998 (205 ff.).

"The interpretation oriented on the Constitution" creates respective explanation of the Constitution.[5] Interpretation "oriented on fundamental rights" or "Constitution" in general entails obligation to interpret ordinary, subordinate norms, for instance Civil Code, Criminal Code or bylaws, in light of the elementary approaches of basic law.[6] As far as particularly fundamental rights create basis for objective value order, therefore, while interpreting subordinate norms it is necessary to take it into consideration, which causes so called "**radiation effect**".[7]

With regard to this issue the Constitutional Court has developed interesting position and in relation to paragraph 2 of article 4 of the Constitution (article 7 in old edition) it has stated that: "this is one of the fundamental principle norm, which gives possibility to perceive scale and importance of human rights, determines limits of entire constitution and, in particular, limits of interpretation and application of constitutional rights."[8]

On the other hand, if formulation of respective regulation, its history of origin, general context, as well as its aim gives possibility for diverse interpretations, the part of which causes controversial outcome with the Constitution, the priority shall be given to "such version" of the norm, which corresponds to the Constitution.[9] Therefore, operation of the Constitution is considered nor only as determining, establishing norm, but as controlling norm as well.[10]

Therefore, the objective meaning of fundamental rights particularly is revealed by proper interpretation of the Constitution. The norm established by the legislator often gives possibility to different interpretations, and choice between them must be made based on the compatibility with the Constitution.[11]

Proper interpretation of the Constitution represents the activity developed by the Federal Constitutional Court of Germany. It entails checking alternatives received from classical interpretation of the norm with regard to the Constitution.[12] Such interpretation has played crucial role in the decision of the Federal Constitutional Court of Germany from 7 May 1953,[13] which was related to performing control of norms in accordance with the paragraph 100 of the basic law, when deliberating constitutionality of the 1st paragraph of the law on emergency. In the mentioned case the Court state that the law does not contradict with the Constitutional when there is possibility for such

5 A. Voßkuhle, Theorie und Praxis der verfassungskonformenAuslegung von GesetzendurchFachgerichte- kritischeBestandsaufnahme und VersucheinerNeubestimmung. AöR, Bd. 125 (2000), S. 180.

6 BVerfGE 7,1998 (204 ff.).

7 C. Gröpl, Staatsrecht I: Staatsgrundlagen, Staatsorganisation, Verfassungsprozess, 11. Aufl. 2019, Rn. 216.

8 Decision of the Constitutional Court of Georgia from 28 June 2010 on the case #1/466 "The Public Defender of Georgia v. the Parliament of Georgia", II, 3.

9 A. Voßkuhle, Theorie und Praxis der verfassungskonformenAuslegung von GesetzendurchFachgerichte- kritischeBestandsaufnahme und VersucheinerNeubestimmung. AöR, Bd. 125 (2000), SS. 180-181.

10 F. Müller, JuristischeMethodik, 7. Aufl. 1997, S. 90.

11 G. Manssen, Staatsrecht II, Teil I. Grundlagen § 3. Funktionen der Grundrechte Rn. 63, beck-eBibliothek.

12 F. Bassier, VerfassungskonformeAuslegung, BRJ 02/2016, S. 109.

13 BVerfGE 2, 266 (282).

interpretation, which is compatible with the basic law and the law does not lose the sense after the interpretation.[14]

As R. Tsipelius states, during the relevant interpretation of the Constitution, the most important is not which interpretation is corresponding to the Constitution, but directly its compatibility with the interpretation of the Constitution. The mentioned is caused by the fact that the constitutional scale for measuring law is not fully determined and it also requires interpretation. As far as there might be several alternatives for interpretation and precision, consequently the question evolves, which interpretation of the Constitution has "primacy of precision" of the legal norm.[15]

In the legal science there is an opinion, that the relevant interpretation of the Constitution does not belong to the independent method of interpretation.[16] The reason for this is the factor, that in this case subordinate norms of the Constitution are considered in the scale of the basic law and represent type of systemic interpretation, because, as mentioned above, if in case of interpretation of the norm there is possibility of two or more interpretations, one of which brings us to the relevant outcome of the constitution, and the other to the contradicting outcome, only the interpretation corresponding to the Constitution must be chosen.[17] However, the interpretation which gives possibility to choose between methods of interpretation and suggests perception of constitutional adequacy, must not be irrational, if we name it as a separate method.

III. THEORETICAL GROUNDS FOR INTERPRETATION CONSISTENT WITH THE CONSTITUTION

It shall be interesting to review grounds for development of mentioned interpretation. In such case it will be reasonable if we search for the interpretation consistent with the Constitution in different methods of interpretation:

Literal meaning of the norm

The literal meaning of the norm plays important argumentative role in legal debates, however, it cannot be named as development of the interpretation consistent with the Constitution. The for-

14 H. Spanner, Die VerfassungskonformeAuslegung in der Rechtsprechung des Bundesverfassungsgerichts, AöR, Vol 91, No 4 (1966), S.504.

15 R. Zippelius, Science of Legal Methods, translation of L. Totladze, 2009, 50-51.

16 C. Gröpl, StaatsrechtI :Staatsgrundlagen, Staatsorganisation, Verfassungsprozess, 11. Aufl. 2019, Rn. 215.

17 C. Gröpl, StaatsrechtI :Staatsgrundlagen, Staatsorganisation, Verfassungsprozess, 11. Aufl. 2019, Rn. 215.

mulation of the norm does not indicate to the interpretation consistent to the Constitution, because it is not clear, and in general, the regular existence of versions of unconstitutional interpretation is recognized, which is covered by the language. The issue, that the formulation is consistent with the constitution, represents a normative fiction.[18]

Purpose (Telos)

There is a question whether the interpretation consistent to the Constitution must be considered as part of the teleological interpretation. In this case it is important to differentiate among each other subjective and objective purpose.[19] The first one is oriented on the regulating purpose of the legislator, objective-teleological interpretation finds norm according to the objective purposes of the law.[20]

For the objective-teleological interpretation diverse criteria are elaborated, one of which is named as "principle of comfort interpretation of the Constitution,"[21] because the interpretation is directed to constitutional values[22] and it implements "functions of ethical and pragmatic order existing in the constitutional law."[23] However, according to the contradicting position, this should not be persuasive, as it is true that the legislator can reach some purposes by the norm. But is it possible that law aims at leaving these purposes invariably? The answer shall be negative: the study of the purpose of the law is not less than the assignment of the interpreter, and teleological interpretation does not have hermeneutic value.[24]

Elimination of this position is possible on the example of §70 of the Criminal Procedure Code of Germany (StPO), which relates to the obligation of the witness to make an oath. In the decision of the Federal Constitutional Court of Germany[25] when defining this norm, the question was addressed whether it was possible to refuse making oath without "legal reasoning", for instance, only with religious motives. The court has established that within the framework of interpretation oriented on the Constitution, §70 StPO maybe discussed not only with the grounds listed in stop, but also with the freedom of religion recognized by the Constitution (article 4 of the basic law). This becomes

18 F. Bassier, Verfassungskonforme Auslegung, BRJ 02/2016, S. 110.

19 F. Bassier, Verfassungskonforme Auslegung, BRJ 02/2016, S. 110-111.

20 A.Götz, Die verfassungskonformeAuslegung –zugleicheinBeitragzuihrerStellungim System der juristischenMethodenlehre, StudZR, 1/2010, SS. 37-38.

21 G. Hassold, Strukturen der Gesetzesauslegung in FS für Larenz, 1983, 211 (228).

22 Ibid.

23 A.Götz, Die verfassungskonforme Auslegung –zugleich ein Beitrag zu ihrer Stellung im System der juristischen Methodenlehre, StudZR, 1/2010, S. 38.

24 Ibid.

25 BVerfGE 33, 23.

similar to "classical" objective-teleological interpretation and leaves impression that there is no more space for discussing interpretation consistent with the Constitution as a separate method.[26]

The interpretation consistent with the Constitution must not be considered directly under teleological interpretation. Firstly, this must be excluded on the example of subjective-teleological interpretation, as far as it depends on the purpose of legislator, which does not a priori foreshow compatibility with the constitution. As for the objective-teleological interpretation, it partially is similar to interpretation consistent with the Constitution in the context, that the objective purpose may lead to purposes of the Constitution, however similarly there is real possibility that as a result of this interpretation we get unconstitutional outcome, as far as it is bounded by the normative views.[27]

Systemic interpretation

There is an opinion that the interpretation consistent with the Constitution must be considered in the framework of systemic interpretation.[28] This is based on common (systemic) concept of legal order. The constitution, as basic system establishing particular norms also belongs to this unity. Hence, interpretation consistent with the Constitution serves for such adjustment of the norm, that it would be interpreted methodically. The mentioned classification does not leave without attention the issue that the interpretation consistent with the Constitution functions not only in the framework of **thematic norm**, but most of all in light of the **control norm**, in order to check ordinary legal norm with regard to the Constitution.[29] As a highest point of the hierarchical step of the legal order, systemic interpretation, consistent with the constitution, must be definitely considered when interpreting other norms. From the idea of unity of legal order, the relevant interpretation of the Constitution may derive.[30] The mentioned principle is based on the assumption that reaching fairness through legal order is possible only based on the unified normative values. In this view, the law must establish compatible unity, and discrepancies (collision)must be decided inside this unity.[31] Based on this the principle **Lex superior derogat legi inferiori**(superior law conformsthe subordinate), which at the same time indicates to necessity of interpretation consistent with the Constitution.[32]

However, it must be questioned, whether the hierarchical legal order is sufficient for proper interpretation of the Constitution. The interpretation consistent with the Constitution overall aims to make decision between alternative version of an action, however, the idea of unity of the legal

26 C. Lorenzen, Zur Rechtsnatur und verfassungsrechtlichen Problematik der erfolgsqualifizierten Delikte, Bd. 43, 1981, S. 142.

27 F. Bassier, Verfassungskonforme Auslegung, BRJ 02/2016, S. 111.

28 H.P. Prümm, „Verfassungskonforme Auslegung" –BVerfGE 35, 263 JuS 1975, S. 299 (303).

29 A.Götz, Die verfassungskonforme Auslegung –zugleich ein Beitrag zu ihrer Stellung im System der juristischen Methodenlehre, StudZR, 1/2010, S. 39.

30 K. Englisch/ T. Würtenberger, Einführung ind das juristische Denken, 1. Aufl. 2010, S. 103.

31 K.F. Röhl/ H.C. Röhl, Allgemeine Rechtslehre. 3. Aufl. 2008, S. 153 ff.

32 F. Bassier, Verfassungskonforme Auslegung, BRJ 02/2016, S. 112.

order is necessary for its creation and, hence, proper interpretation of the Constitution is hard to imagine without this unity.[33]

In the legal literature the interpretation consistent with the Constitution also is determined as "**sui generis**" principle,[34] which is not irrational. As it appeared, the interpretation consistent with the Constitution has very close connection with systemic interpretation and partially, as if it is not reasonable to distinguish them, however, it would be logical to say that it is more solely standing principle, which in any method of interpretation seeks for constitutional striving, in order to ensure their harmonization, demonstrate norm in the Constitutional mirror and suggest **objective perception, whether it corresponds to the supreme law**.

IV. THE EXTENT OF THE INTERPRETATION CONSISTENT WITH THE CONSTITUTION

It must be underlined that the monopoly of repealing the norm in German and Georgian models is in hands of the Constitutional Court, which is articulated in paragraph 4 of article 60 of the Constitution of Georgia and paragraph 1 of article 100 of the Basic Law of Germany. In this view, it is important to clearly determine border with interpretation consistent with the Constitution, as in the view of competence of the Common Court, as well as during Constitutional norm control, because the role of this interpretation is important for the Constitutional, as well as the Common and, in particular, the Highest (Supreme) Courts.[35]

IV.1. Admissibility of using interpretation consistent with the Constitution for the Common Court

Article 7 of the law of Georgia "on Common Courts" distinguishes powers of the Common Courts and the Constitutional Court, which lies on the particular institutional subordinance. In paragraph 3 of the mentioned article the significance of the Constitutional Submission is stipulated, when the judge considers that the norm related to the case may contradict with the Constitution, and paragraph 4 indicates to the direct application of the Constitution, however with the reservation that the normative act does not coincide with the Constitution and its examination is not in competence

33 Ibid.

34 A.Götz, Die verfassungskonforme Auslegung –zugleich ein Beitrag zu ihrer Stellung im System der juristischen Methodenlehre, StudZR, 1/2010, S.40.

35 Compare H. Spanner, Die Verfassungskonforme Auslegung in der Rechtsprechung des Bundesverfassungsgerichts, AöR, Vol 91, No 4 (1966), S.503.

of the Constitutional Court. In the entire context of the norm, with the significance of disputable topic, it must be more relevant whether, within the framework of the Constitutional Submission, in any case the judge has an obligation to address the Constitutional Court if he/she has possibility to make interpretation consistent with the Constitution?

In the decision of the Supreme Court of Georgia from 20 June 2019 we find a very interesting position,[36] in which the Cassation court states, that "in the judicial practice it must be ensures to use the norm interpretation consistent with the Constitution, the Common courts are not entitled to improperly interpret the decision of the Constitutional Court. According to article 7.4 of the organic law "on Common Courts", if the Court deliberating the case deicides that the normative act does not comply with the Constitution, the Court renders decision in accordance with the Constitution."[37] In the named decision we may find several important messages:

- The interpretation consistent with the constitution may be performed by the Common Courts;
- Interpretation done by the Constitutional Court has binding force. For instance, the Supreme Court applied the Constitutional Court with the Constitutional Submission, and by the interpretation consistent with the Constitution, the Constitutional Court has determined that the norm is constitutional, however, only in case of one of the interpretations, not all of them. This will lead to binding common courts by the constitutional essence of the norm interpreted by the Constitutional Court and they will not be able anymore to interpret norm differently, for instance, instead of teleological interpretation, which gives us Constitutional outcome, to use literal interpretation, which brings us to unconstitutional outcome.

However, it is difficult to read from the decision the connection between the paragraphs 3 and 4 of the Article 7 and whether it entails standard occasion of the interpretation consistent with the Constitution. The Cassation Court in the decision from 16 April 2015[38] considers the named paragraphs as alternative composition of the norm, in particular, indicates that according to article 19.2 of the organic law "on the Constitutional Court of Georgia" to suspend the hearing of the case or apply the Constitutional Court with the submission, or in line with article 7.4 of the organic law "on Common Courts" make a decision individually in accordance with the Constitution of Georgia."

This approach must be incorrect, as application of paragraph 4 comes forward when the Constitutional Court cannot examine constitutionality of the norm physically, hence, the Common Court becomes institutionally operable. In case of paragraph 3, considering the monopoly of the Constitutional Court to repeal the norm, the Common Court cannot discuss constitutionality of the normative act, if there is a doubt of unconstitutionality. Hence, it is impossible to speak about existence of the alternative, because both of them are related to absolutely unidentical legal circumstance. However, at the same time it is noteworthy that normative substance of paragraph 4 of article 7 is

36 We encounter the same opinion in previous decision, see. Decision/Order of the Chamber of Administrative Cases of the Supreme Court of Georgia N BS-776-768 (2k-4ks-15) from 14.07.2016.

37 Decision/Order of the Chamber of Administrative Cases of the Supreme Court of Georgia N BS-857-853 (k-17) from 20.06.2019.

38 Decision/Order of the Chamber of Administrative Cases of the Supreme Court of Georgia N BS-427-422 (k-14) from 16.04.2015.

lacking reality, as far as the Georgian legislation does not leave any normative act out of the constitutional control.

As for the general admissibility of interpretation consistent to the Constitutional by the Common Court, this must not be excluded by the constitutional submission. However, required prerequisite for its application is that at least any of the interpretations must give the outcome consistent with the Constitution, in other case the judge may not be allowed to directly use the Constitutional norm and consider the disputed norm unconstitutional indirectly, because it is clear there is no guarantee that the Constitutional Court would give the same interpretation and it could say on contrary, that the norm is not inconsistent with the Constitution. According to the judicial practice of the Federal Constitutional Court existing in Germany and dominating study, when interpreting ordinary law, the court is obliged to use interpretation consistent with the Constitution. Therefore, based on the first sentence of paragraph 1 of article 100 of the Basic Law, the submission to the Constitutional Court is inadmissible if there is still possibility of interpretation consistent with the Constitution.[39]

Interpreting the norm in correspondence with the Constitution by the Common Court somehow creates tension with the monopoly of the Constitutional Court to repeal the norm. If in doubtful situation the court anyway uses this interpretation, instead of constitutional submission, the risk of incompetent interference increases. The norm must be repealed by the Constitutional Court not only for the purpose of legal security and integrity, but because of its special expertise and knowledge in rights.[40]

Thus, when interpreting in accordance with the Constitution the Common Court must be particularly cautious, as the judge imposing the law must not transform into lawmaking judge, which violates the principle of separation of power.

IV.2. Limits of the constitutional norm control –overview of the practice of the Constitutional Court of Georgia

The interpretation consistent with the Constitution essentially represents a mission for the Common Courts,[41] however its role is also important during the constitutional legal procedure, as far as such interpretation of the norm is relevant not only within the limits of constitutional submission, when there is a doubt of unconstitutionality, also in general, in case of individual constitutional complaint,[42] when certain problems may emerge, mainly, when passing on the most difficult "roads" of preservation of "operation" and principle of certainty.

39 C. Burkiczak, §35 Fachgerichtliche Gesetzeskontrolle, in: W. Kluth/ G. Krings, Gesetzgebung: Rechtsetzung durch Parlamente und Verwaltungen sowie ihre gerichtliche Kontrolle, 2014, S. 881.

40 J.Reschke, Die verfassungs- und dreistufenteskonfrome Auslegung der Schranken des Urheberrechts - zugleich eine Überprufung § 52 b UrhG,2010, S. 30.

41 L. Michael, Normenkontrollen – Teil 3:Fragen der Zulässigkeit: Konkrete Normenkontrolle, ZJS 4/2014,S. 359.

42 Compare Decision/Order of the Chamber of Criminal Cases of the Supreme Court of Georgia N 2k-5-I-18 from 28.02.2018: „The Cas-

IV.2.1. Constitution as the uniform system

The Constitutional Court of Georgia while interpreting norm pays particular attention to system of the Constitution and tries to measure it with uniform scale. The purpose of interpretation is striving towards idea of "living constitution", which is attainable through complete analysis of content, limits and extent of each right, moreover, they are not considered separately and in general, the interpretation is based on fundamental values and principles of the Constitution.[43]

An interesting example of systemic interpretation of the Constitution by the Constitutional Court is in the case "Georgian Young Lawyers' Association and citizen of Georgia Ekaterine Lomtatidze v. the Parliament of Georgia", in which it is stated:[44] "the fundamental principles of the Constitution stipulate the content of the entire Constitution, at the same time, determine main directions of the development of the State. When deciding particular disputes, the Constitutional Court is obliged to analyze respective Constitutional norm, as well as the disputed norm and evaluate it in the context of fundamental principles of the Constitution, in order to avoid separation of these norms from the order of values envisaged in the entire Constitution. Only in such way the complete interpretation of the norm is reached, which facilitates correct assessment of the constitutionality of particular disputed norm. Principles of democratic and legal state are the most important among constitutional principles. They are basis for almost all constitutional norms, including rest constitutional principles. The constitutional system is entirely based on these principles. Moreover, they oblige the government, to be bound by the constitutional system, which implies,that none of the branches of government has right to act based only on the reasonableness, political necessity or any other motivation. The government must be based upon the Constitution, legislation and law entirely. Only in such way the fair legal order is created, without which it is impossible to establish democratic and legal state."

The Constitutional Court pays particular attention on principles of legal state and democracy, and their interrelation during determination of the content of fundamental right.[45] We must consider introduction of the principle of limit-to-limit proportionality of the fundamental right as a direct influence of the legal state.[46] The principle of proportionality represents material element of

sation Court does not stand before the necessity to adree the Constitutional Court, as it does not consider that the law used by the court contradicts with the Constitution. Moreover, to explain to the cassator that the convict himself/herself is not restricted to apply to the Constitutional Court for assessing constitutionality of those norms, which in his/her view violate the rights guaranteed by the Constitution."

43 K. Eremadze, Balancing interests in the Democratic Society, 2013, 9.

44 Decision of the Constitutional Court of Georgia N1/3/407 from 26December 2007 on the case "Georgian Young Lawyers' Association and citizen of Georgia – Ekaterine Lomtatidze v. the Parliament of Georgia." II, 1-2.

45 K. Eremadze, Balancing interests in the Democratic Society, 2013, 10-11.

46 Decision of the Constitutional Court of Georgia N1/2/384 from 2 July 2007 on the case "citizens of Georgia – David Jimsheleishvili, Tariel Gvetadze and Neli Dalalishvili v. the Parliament of Georgia." II, 19: "Principle of proportionality … ensures balanced, proportional interrelation between the freedom and its restriction, and prohibits restriction of human rights to the bigger extent than it is necessary in the Democratic society. The principle of proportionality is the constitutional criterion for assessing lawfulness of the restriction of human rights. Because of this it has essential importance for the constitutional control. In the legal state it is regular to expect that interrelation between private and public interests will be fair. The more the state interferes in the human freedom, the more are requirements for justifying the interreference."

the legal state.[47] It often is referred as prohibition of unproportionate interreference. In the public law area, the principle of proportionality represents constitutional requirement, which derives from essence of fundamental rights and principle of legal state.[48]

Therefore, the interpretation consistent with the Constitution, as a part of systemic interpretation may be considered as a precondition that the Constitution must be perceived entirely and interpretation of the norm must be performed in the Common Court, as well as in the Constitutional Court within these limits. At the same time, it is important to underline that during the systemic interpretation the hierarchy of the normative acts must be taken into consideration, in particular, **it is inadmissible to interpret constitutional norm based on the subordinate norm**.

IV.2.2. Preservation of the norm v. Certainty of the norm

"The purpose and mission of the Constitutional Court is to interpret constitutional rights in a way that this interpretation is compatible with the purposes of the Constitution, values established by it and with the essence of fundamental rights, which ensures application of right practically, realistically and effectively, and does not exhaust it to theoretical and illusory right."[49] Hence, the Constitutional Court must interpret the norm is such way that its wholeness is not lost and at the same time the importance of relevant norm of the Constitution is not diminished.

As we already have discussed, interpretation consistent with the Constitution, based on the norm, tries to decide the collision between methods of interpretation, which in total serves for salvation of the norm and aims at its repealing only ultima ratio. However, the question arises where is the limit of preservation the norm and whether it takes place without collateral effects.

The idea of preserving norm is based on – favor legis – which primarily is justified by the existence of interpretation consistent with the Constitution. In this case the main direction grounds on preservation of the norm, instead of repealing it because of the particular collision with the Constitution.[50]

It is interesting, whether comprehensive interpretation of the norm, the part of which contradicts with the Constitution, gives possibility to declare norm unconstitutional, for instance indicating the fact that this norm is not in line with the principle of certainty? The judicial practice of the Constitutional Court of Georgia with regard to the mentioned is different, therefore it will be interesting if we discuss it in more details:

47 W.Ergbuth/ A. Guckelberger, Allgemeines Verwaltungsrecht mit Verwaltungsprozessrecht und Staatshaftungsrecht, 9. Aufl. 2018, S. 248. See also. C. Gröpl, Staatsrecht I: Staatsgrundlagen, Staatsorganisation, Verfassungsprozess, 11. Aufl. 2019, Rn. 467 .

48 C. Gröpl, Staatsrecht I: Staatsgrundlagen, Staatsorganisation, Verfassungsprozess, 11. Aufl. 2019, Rn. 507; BVerfGE61, 126 [134].

49 Decision of the Constitutional Court of Georgia N1/1/477 from 22December 2011 on the case "The Public Defender of Georgia v. the Parliament of Georgia", II, 11.

50 F. Bassier, Verfassungskonforme Auslegung, BRJ 02/2016, S. 112.

The Constitutional Court on the case "Georgian Young Lawyers' Association and citizen of Georgia EkaterineLomtatidze v. the Parliament of Georgia", declared norm unconstitutional with the ground that "as a result of reasonable interpretation with the legal methodology, its one version contradicts with the Constitution," which violated the requirement of transparency and availability of the norm.[51]As we see, the court relates ambiguity of the norm to possibility of several interpretations, out of which one must be contradicting with the Constitution, this will be the guarantee for unconstitutionality of the entire norm, i.e. unconstitutionality of one of the faithful interpretation, becomes indicator of unconstitutionality of the norm. The mentioned decision is precedential in terms of defining principle of certainty, however still including contradicting provisions. For example, the Court states: "possibility to read norm in a nonuniform manner cannot always be ground for proving its unconstitutionality. Possibility to read the norm with several versions, and even more, existence of practice inconsistent with the Constitution, does not indicated on unconstitutionality of the norm, similarly as existence of correct practice based on the ambiguous norm cannot be an exhaustive argument for proving constitutionality of the norm."[52] Therefore, in the beginning it is indicated that existence of nonuniform interpretations of the norm does not portend uncertainty, however with this ground declares the norm unconstitutional.

In the same context the Decision from 27 August 2009 on the case "The Public Defender of Georgia v. the Parliament of Georgia" is important, and in this decision it is stated: "the Constitutional Court is limited in assessment of constitutionality of the normative acts, which principally differs from the decision on the problem of legality. If the Constitutional Court of Georgia decides the problem of constitutionality of the normative acts, by higher act consistent with the Constitution and bases the argumentation of compliance with the constitution on the existence of higher norm consistent with the Constitution, he/she practically is not able to fulfill its functions and direct assignment."[53] This approach, of course, does not exclude interpretation consistent with the Constitution, as this interpretation does not imply that the law must lose the sense after interpretation, but rather there must be at least one interpretation, which is consistent with the Constitution and exactly the interpretation compatible with the Constitution is used based on the hierarchy of normative acts, hence we cannot say that it takes away function from the Constitutional Court.

The attitude of the Constitutional Court with regard to the practice of Common Courts is interesting. During certain period there was an approach established, according to which, evaluation of the issue of practical usage of the norm exceeds the authority of the Constitutional Court. As it is stated in the Decision from 31 May 2006, "we must differ from each other the legal (normative) reality and factual reality resulted after its application. The Constitutional Court is entitled to assess constitutionality only of the provision of disputed norm in the view of the Constitution… But if the real-practical implementation of the norm does not comply with its content, then the source if

51 Decision of the Constitutional Court of Georgia N1/3/407 from 26December 2007 on the case "Georgian Young Lawyers' Association and citizen of Georgia – Ekaterine Lomtatidze v. the Parliament of Georgia." II, 30.

52 Ibid. II, 16.

53 Decision of the Constitutional Court of Georgia N1/2/434 from 27August 2009 on the case "The Public Defender of Georgia v. the Parliament of Georgia", II-9.

infringement of plaintiffs' rights (the content of the norm) must not be looked for in here, but in its practical implementation. And the Constitutional Court cannot discuss the constitutionality of application of the disputed norm."[54]

The approach of 2007 changes already in the decision of 2011, which was related to the constitutionality of mandatory reserve military service. By the literal interpretation of the disputed norm it was outlined that the military reserve service was obligation for every citizen of Georgia.[55] The court considers this law as neutral law, as far as it establishes general obligation. The law with such content cannot envisage interests of all citizens. Hence, the Court considered that there must not be reservation from imposing general obligation from the state with the motive that this obligation is by itself contradicting with the Constitution.[56] In this case it indicated that the decision cannot affect and put under question the legality and constitutionality of the mandatory military service institute[57] and declared unconstitutional the normative content of the norm, which imposes obligation of reserve military service for those, who refuse the mandatory military service with religious motives.[58] Thus, the Constitutional Court declared the norm unconstitutional in the framework of particular normative content and not entirely unconstitutional.

The modern practice of the Constitutional Court when interpreting the norm, pays particular attention to the practice of using norm by the Common Courts, which was disregarded previously.[59]

In the case "JSC "Liberty Bank" v. the Parliament of Georgia" we read: "when determining content of the disputed norm the Constitutional Court, along with many other factors, takes into consideration the practice of its application. Common Courts, in the framework of their competence make final decision about the normative content of the law, about its practical usage, and therefore, about its implementation. Deriving from the mentioned, the interpretation made by the Common Courts has a big significance for determining real content of the law. The Constitutional Court, as a rule, takes and discusses legislative norm with the normative essence, which was used by the Common Court."[60] However, using the practice established by the Common Court is not made with absolute rule and we encounter such exceptions, such as: **contradiction between interpretations made by same court** or **unreasonableness of the interpretation suggested by the Common Court**.[61]

54 Decision of the Constitutional Court of Georgia N1/1/357 from 31May 2006 on the case "Citizens of Georgia – Tamaz Kilinava, Nugzar Kandelaki, Manana Nasaridze, Madona Ghibradze and Lali Archvadze v. the Parliament of Georgia." This approach is described in other decisions as well: Order of the Constitutional Court of Georgia N2/1/481 from 22 March 2010 on the case "Citizen of Georgia Nino Burjanadze v. the Parliament of Georgia," II, 10; Order N2/16/404; Order N2/8/448, II-12; Decision N1/1/428,447,459, II-20; Order N1/2/440, II-3)

55 Decision of the Constitutional Court of Georgia N1/1/477 from 22December 2011 on the case "The Public Defender of Georgia v. the Parliament of Georgia", II, 74.

56 Ibid. II, 81.

57 Ibid.

58 Ibid. III, 1.

59 Compare the Decision of the Constitutional Court of Georgia N1/1/357 from 31 May 2006 on the case Citizens of Georgia – Tamaz Kilinava, Nugzar Kandelaki, Manana Nasaridze, Madona Ghibradze and Lali Archvadze v. the Parliament of Georgia.

60 Decision of the Constitutional Court of Georgia N1/2/552 from 4March 2015 on the case ""JSC Liberty Bank" v. the Parliament of Georgia", II-16.

61 Ibid.

In this context the decision of the Constitutional Court on the case "JSC "Silk Road Bank" v. The Parliament of Georgia" is important, in which there was a certain approach regarding the disputed norm, interpretation of article 1488 of the Civil Code, from side of the Supreme Court, however the plaintiff indicated that uniformity of the practice was not a guarantee that in future the interpretation of norm's content would not change. The Constitutional Court shared the opinion of the plaintiff regarding the unconstitutionality of the norm and stated, that "the final decision on the normative content of the law and on its practical application is made by the Common Courts. Therefore, uniform interpretation and application of the norm by the Supreme Court clearly shows that the disputed norm has the mentioned content. In such conditions the Constitutional Court cannot consider the plaintiff's argument, according to which the disputed norm also has the normative content suggested by it, which contradicts with the interpretation of the Supreme Court. In general, the norm may change after legislative amendments, however, this may not be used as an argument for declaring non adopted law as unconstitutional. The Constitutional Court assesses constitutionality of the disputed norm with the content, which it has during deliberation of the case."[62]

On first sight, analogue approach is shared by the Constitutional Court in the resonant case ""Ltd Broadcasting Company Rustavi 2" and "Ltd. Television company Sakartvelo" v. the Parliament of Georgia", where the legal issue was constitutionality of articles 54 and 55 of the Civil Code.

The plaintiff indicated to the ambiguity of the norm, however based on such standard of certainty, which was not yet used in the judicial practice. In the mentioned case, the court distinguished from each other norms establishing responsibility[63] and general norms. The disputed norms of the Civil Code were perceived as manifestation of the abovementioned, and it was stated that "annulling contract with any ground does not imply determination of the action as an offence or imposing responsibility in any way. In addition, annulment of the contract does not restrict limits of persons free activity. By defining grounds for the annulment of contract the state does not negatively interfere in the autonomy of two people, for leading civil relations according to their will, but it refuses implementation its positive obligations (recognizing and implementing the contract)."[64] At last, the Court has established that "regulating civil relations with general norm cannot indicate on infringement of the principle of certainty. Moreover, general norms represent only tool by which legislator may regulate as completely as possible civil relations and reduce to minimum cases of using analogy

62 Decision of the Constitutional Court of Georgia N2/2/656 from 21July 2017 on the case "JSC "Silk Road Bank" v. the Parliament of Georgia", II-7.

63 In the practice of the Constitutional Court requirements for predictability are different in relation of various norms. For instance, with regard to the norm establishing responsibility, in the case "Citizens of Georgia – AleksandreBaramidze, LashaTughushi, Vakhtang Khmaladze and Vakhtang Maisaia v. the Parliament of Georgia" it is mentioned that "making decision on the punishment of the activity represents an exclusive power of the legislator. Therefore, it must use this power in a way not to allow institution applying law, create the description of punishable action, based on the judicial practice." See. Decision of the Constitutional Court of Georgia N2/2/516, 542 from 14May 2013 on the case "Citizens of Georgia – AleksandreBaramidze, LashaTughushi, Vakhtang Khmaladze and Vakhtang Maisaia v. the Parliament of Georgia", II, 37.

64 Decision of the Plenum of the Constitutional Court of Georgia N3/7/679 from 29December 2017 on the case "Ltd. Broadcasting Company Rustavi 2" and "Ltd. Television Company Sakartvelo" v. the Parliament of Georgia", II, 40.

of law. The condition that in each particular case the Court will determine the content of the norm, may not be sufficient ground for considering this norm uncertain, and therefore unconstitutional."[65]

Similar to previous decisions, the Constitutional Court indicates that, in general, it evaluates the disputed norm with the content, which it was given by the Common Courts, except the occasions when the practice is not uniform and definitely there is unreasonable interpretation in place.[66] In given case the Constitutional Court based its decision on the interpretation of the Grand Chamber of the Supreme Court, with the argumentation that "it will be incorrect if any court of Georgia, including the Constitutional Court, considers unreasonable interpretation of the named body."[67] The mentioned opinion is criticized in the distractive opinion of 4 judges, which does not consider decision of the Grand Chamber a priori the scale for evaluation, as for the purpose of effective constitutional control the new interpretation of the disputed norm by the Supreme Court cannot be sufficient,[68] in particular, when judicial practice with regard to the disputed norm is not uniform.[69] Hence, it may be said that the Constitutional Court, despite the existence of distinctive practice, accentuates interpretation of the Grand Chamber, which may sound conflicting with its opinion itself. However, on the other hand, this must not indicate on the infringement of certainty by all means, which is explained by purpose of existence of general norms in the Civil Law and determination of its content by the Common Court.[70]

Even though, at last the Court indicated that with regard to certainty it uses standard established by the decision of the Constitutional Court N1/3/407 from 26 December 2007 (on the case "Georgian Young Lawyers' Association and citizen of Georgia - EkaterineLomtatidze v. the Parliament of Georgia"), however this must not be perceived as the Court refuses approaches developed after 2007 and goes back to "old", but rather in this case only guiding provisions of the principle of certainty are taken , as far as there was no necessity in the disputed case for establishing new, special constitutional standard.[71]

Analysis of the practice of the Constitutional Court shows that the ongoing practice of the court is mainly oriented on harmonization of practice of the Common Courts and the Constitutional Court, which must be very important, as two parallel interpretations of the norm must be avoided. Contours of interpretation consistent with the Constitution is expressed in it quite significantly.

65 Ibid. II, 51. Compare distinguished opinion of members of the Constitutional Court of Georgia – IrineImerlishvili, Giorgi Kverenchkhiladze, Maia Kopaleishvili and TamazTsabutashvili, II, 13, in which it is indicated that when evaluating constitutionality of the norm, the interreference into the right (intensity) is relevant and not connection of the norm to a certain are of law.

66 Ibid II, 78.

67 Ibid.

68 See. distinguished opinion of members of the Constitutional Court of Georgia – Irine Imerlishvili, Giorgi Kverenchkhiladze, Maia Kopaleishvili and Tamaz Tsabutashvili, on the case "Ltd. Broadcasting Company Rustavi 2" and "Ltd. Television Company Sakartvelo" v. the Parliament of Georgia", 80.

69 Ibid 81-93.

70 Decision of the Plenum of the Constitutional Court of Georgia N3/7/679 from 29December 2017 on the case "Ltd. Broadcasting Company Rustavi 2" and "Ltd. Television Company Sakartvelo" v. the Parliament of Georgia", II, 51.

71 Ibid. II, 52.

The issue itself will be presented incorrectly, if we directly confront interpretation consistent with the Constitution and the principle of certainty, as far as the latter is the part of Constitutional order, from which these two "contradicting" interests are deriving.[72]It is inadmissible to interpret the principle of certainty in narrow and contentless manner: certainty of the norm is disrupted when the legal security is demolished, thus if the danger is not concrete, indication only to its abstractedness, which more probably will not be completed, cannot be relevant. This danger is balanced by tying up the constitutional court interpretation from the side of Common Courts[73] and at the same time considering interpretations of the Common Courts by the Constitutional Court with reservation, that this must not become absolute and in exceptional cases, the Constitutional Court must be able to interfere.

It must be underlined that the interpretation consistent with the Constitutionis the competence of Common Court and not the Constitutional Court. The judge of the Common Court, as applier of the law, has the Constitution as guide through interpretation methods and in case of possible collision obliges to choose such method of interpretation, which will be compatible with the constitution. As for the Constitutional Court, its role prevails only in terms of certainty and it declares norm uncertain and, therefore,unconstitutional when "all methods of interpretation are tried, but its real content is still uncertain, or the essence is clear, but the scope of application is vague."[74]

V. CONCLUSION

Interpretation consistent with the Constitution is necessary for unified and harmonious perception of the legal order. Its theoretical basics show, that on the first sight, the interpretation falling under the systemic interpretation makes important connection between Common Courts and the

72 The principle of certainty is the essential part of the legal state and, therefore, it has a constitutional rank. C. Gröpl, Staatsrecht I: Staatsgrundlagen, Staatsorganisation, Verfassungsprozess, 11. Aufl. 2019, Rn. 469-473. Considering principle of certainty in the part of constitutionality of the norm and considering as limit of limit of the fundamental right is the result of systemic interpretation.
According to the practice of the Constitutional Court, "Principle of legal security is an integral part of the principle of legal state. On the one hand, the principle of legal certainty is one of the important elements of legal security. The law must address requirements of legal security and, therefore, of principle of certainty" - Decision of the Plenum of the Constitutional Court of Georgia N3/7/679 from 29December 2017 on the case "Ltd. Broadcasting Company Rustavi 2" and "Ltd. Television Company Sakartvelo" v. the Parliament of Georgia", II, 29.

73 Compare also Decision/Order of the Chamber of Criminal Cases of the Supreme Court of Georgia 17.01.2018 case N445ap-17, in which the indication of the Appellate Court is shared on considering interpretation of the Constitutional Court as the scale of evaluation: "The Appellate Chamber pointed at the Decision of the Constitutional Court from 2 July 2007, by which the Constitutional Court has approved constitutionality of confiscating property as a punishment envisaged under article 52 of the Criminal Code, however explained that confiscating subject of crime, gun or any other item used for commitment of crime, is justified only it is used for the purpose for which it is selected as the most effective mean. For this reason, in each particular case, along with satisfying conditions envisaged under article 52 of the Criminal Code of Georgia, the issue of public necessity must be evaluated correctly. In other case it will be doubtful in terms of reaching public aim, and justifying interference in the right to property."

74 Decision of the Constitutional Court of Georgia N1/1/428, 447, 459 from 13May 2009 on the case "The Public Defender of Georgia, citizen of Georgia Elguja Sabauri and citizen of Russian Federation Zviad Mania v. the Parlliament of Georgia", II, 19.

Constitutional Court and overall, tries not to lose logical tie between the law and constitutional norms.

Idea of reservation of the norm is not an end in itself, but is the mean for attaining the aim, in order to adequately analyze legal security and its component part, principle of certainty, and avoid creation disproportionate barrier in the legal area, which may be inflexible for practice. Hence, the modern strive of the Constitutional Court, which shares ideas of interpretation consistent with the Constitution, must be distributed and welcomed, and maybe in future it will become even more complete.

Ana Kuchukhidze*

REVIEW OF JUDICIAL PRACTICE OF THE CONSTITUTIONAL COURT OF GEORGIA IN THE VIEW OF SUSPENSION OF DISPUTED NORM

ABSTRACT

In recent years the number of cases in which plaintiffs ask for suspension of the disputed norm has grown, and this proves the topicality of the issue. Moreover, based on the judicial practice of the Constitutional Court it is evident that often motions presented with the query to suspend norm are not approved, which in most occasions is the result of incorrect formulation of the request from the plaintiff's side. Hence, the purpose of the article is to analyze the procedure used by the Constitutional Court of Georgia for making decision on the suspension of disputed norm and outline those criteria, which are used by the Court while making such decision.

Based on the systemic and logical analysis of the judicial practice of the Constitutional Court of Georgia, the article gives exhaustive information on the procedure of suspension of disputed norm.

In parallel with demonstrating judicial practice of the Constitutional Court of Georgia, the article criticizes the part of the Georgian legislation according to which it is inadmissible to suspend norm only in relation to the plaintiff.

Information presented in the article is kind of a guideline on applying Constitutional Court of Georgia with the motion on suspension of norm and it is useful for students, as well as for practitioner lawyers.

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INTRODUCTION

Despite the common purpose – ensuring supremacy of the constitution – world's constitutional courts significantly differ from one another by competence and the extent of authority. This clearly is demonstrated in the part of authority to implement temporary and preventive measures.

In the constitutional justice there are several forms of temporary measure. For instance, the Constitutional Court of Latvia has the authority to suspend enforcement of the court decision.[1] "In Germany, temporary measure is understood as right of the court to suspend enactment of the law."[2] "In South Africa, while deciding constitutional matter, the court may make a "Just and Equitable" order, which also includes order of temporary nature."[3] Similar to the Constitutional Court of Africa, Bosnia and Herzegovina also exercises wide authority.[4]

Constitutional Court of Georgia is entitled to use wide range of temporary and preventive measures. "Acting legislation on constitutional legal proceedings prescribes only one type of preventive measure protecting right – mechanism of suspending norm."[5]

The institute of suspension of norm "serves for avoiding irreversible outcome for the plaintiff before the final court decision on his/her case."[6] According to explanation of the Venice Commission, "suspension of disputed act represents necessary continuation of the principle of protecting individuals from irreversible damage."[7] "Therefore, using this institute in needed time with needed extent, is a necessary and irreplaceable measure for plaintiffs being under danger of infringing their fundamental rights irreversibly."[8]

1 See. Article 192 (5) Constitutional Court Law (Latvia), available at: https://www.satv.tiesa.gov.lv/en/2016/02/04/constitutional-court-law/ (last seen on 18.12.2020)

2 Rodina A., 2013. Essene of temporary measure and problematic issues in the judicial practice of the Constitutional Court of Latvia. *Constitutional Law Review*, N6, p. 118.

3 European Commission for Democracy Through Law (Venice Commission), Study on Individual Access to Constitutional Justice Adopted By the Venice Commission at its 85th Plenary Session (Venice, 17-18 December 2010), On the basis of comments By Mr Gagik Harutyunyan (Member, Armenia) Ms Angelika Nussberger (Substitute Member, Germany) Mr Peter Paczolay (Member, Hungary) available at: https://www.venice.coe.int/WebForms/documents/default.aspx?pdffile=CDL-AD(2010)039rev-e (last seen on 18.12.2020) p.38.

4 See Article 64, Rules of the Constitutional Court of Bosnia and Herzegovina, available at: http://www.ccbh.ba/osnovni-akti/pravila-suda/drugi-dio/?title=poglavlje-ii-odluke-i-drugi-akti-ustavnog-suda (Last seen on 18.12.2020)

5 Baramishvili T., Matcharashvili L., 2019. Institute of suspension of disputed norm in the Constitutional legal proceedings. *Constitutional Law Review*, edition 1 (2019), p. 91.

6 Coalition for an Independent and Transparent Judiciary. 2016. Application on planned amendments to the laws on Constitutional Court. Available at: https://transparency.ge/ge/post/general-announcement/gantskhadeba-sakonstitutsio-sasamartlos-shesakheb-kanonebshi-dagegmil-tsvlilebebze (last seen on 18.12.2020)

7 European Commission for Democracy Through Law (Venice Commission), Study on Individual Access to Constitutional Justice Adopted By the Venice Commission at its 85th Plenary Session (Venice, 17-18 December 2010), On the basis of comments By Mr Gagik Harutyunyan (Member, Armenia) Ms Angelika Nussberger (Substitute Member, Germany) Mr Peter Paczolay (Member, Hungary) ხელმისაწვდომია: https://www.venice.coe.int/WebForms/documents/default.aspx?pdffile=CDL-AD(2010)039rev-e (last seen on: 18.12.2020) p.38

8 Baramishvili T., Matcharashvili L., 2019. Institute of suspension of disputed norm in the Constitutional legal proceedings. *Constitutional Law Review*, edition 1 (2019), p. 92.

It must be mentioned, that despite the importance of this institute with regard to the human rights protection, "some countries deriving from legal security reasons, do not allow give possibility to suspend norm."[9] For instance, "in Czech Republic the constitutional court is entitled to terminate acts having erga omnes effect, however, according to the Law on Constitutional Court, it does not have title to suspend them."[10] The other fact is also interesting, that "instead of suspending norm in Russia the Constitutional Court may suggest to respective institutions to suspend appealed act."[11] Authority to suspend norm is particularly rare in countries having diffusional constitutional control.[12] Such approach is not approved by Venice Commission, which "supports suspension of disputed individual or normative act when its operation may cause such irreparable damage, that will be impossible to eradicate after declaring disputed act as unconstitutional."[13]

Opinion of the Venice Commission is shared by various states. For instance, "Constitutional Court of Albania may, by its own initiative (ex officio), or by parties' request, issue order on suspension of normative act, when it considers that its operation may damage rights of individuals, or public and state interests."[14] Similar system operates in such countries as: Austria, Armenia, Belgium, Croatia, Estonia, France, Germany, Israel, Lichtenstein, Poland, Serbia, Spain, Switzerland, Turkey, etc.[15] As already mentioned, Georgia is among these countries. According to paragraph 4 of Article 25 of the organic law of Georgia on "the Constitutional Court": "if the Constitutional Court considers that operation of the normative act may result in irreparable outcomes for one of the parties, it may suspend the disputed act or its relevant part before the final decision is rendered or for less period."[16]

9 For instance: Algeria, Andorra, Azerbaijan, Belarus, Bulgaria, Cyprus, Czech Republic, France, Hungary, Latvia, Luxembourg, Moldova, Montenegro, Portugal, Romania, Russia, Sweden, Ukraine, etc. European Commission for Democracy Through Law (Venice Commission), Study on Individual Access to Constitutional Justice Adopted By the Venice Commission at its 85th Plenary Session (Venice, 17-18 December 2010), On the basis of comments By Mr Gagik Harutyunyan (Member, Armenia) Ms Angelika Nussberger (Substitute Member, Germany) Mr Peter Paczolay (Member, Hungary)
Available at: https://www.venice.coe.int/WebForms/documents/default.aspx?pdffile=CDL-AD(2010)039rev-e (last seen on 18.12.2020) p.38.

10 Conference of European Constitutional Courts XIIth Congress, The relations between the Constitutional Courts and the other national courts, including the interference in this area of the action of the European courts, Report of the Constitutional Court of Czech Republic Available at: https://www.confeuconstco.org/reports/rep-xii/Tsjechie-EN.pdf (last seen on: 18.12.2020) p.10

11 European Commission for Democracy Through Law (Venice Commission), Study on Individual Access to Constitutional Justice Adopted By the Venice Commission at its 85th Plenary Session (Venice, 17-18 December 2010), On the basis of comments By Mr Gagik Harutyunyan (Member, Armenia) Ms Angelika Nussberger (Substitute Member, Germany) Mr Peter Paczolay (Member, Hungary) Available at: https://www.venice.coe.int/WebForms/documents/default.aspx?pdffile=CDL-AD(2010)039rev-e (last seen on: 18.12.2020) p.38

12 Ibid. p 38

13 Ibid. p. 39

14 Conference of European Constitutional Courts XIIth Congress, The relations between the Constitutional Courts and the other national courts, including the interference in this area of the action of the European courts, Report of the Constitutional Court of the Republic of Albania. Available at: https://www.confeuconstco.org/reports/rep-xii/Albanie-EN.pdf (last seen on: 18.12.2020) p. 5

15 European Commission for Democracy Through Law (Venice Commission), Study on Individual Access to Constitutional Justice Adopted By the Venice Commission at its 85th Plenary Session (Venice, 17-18 December 2010), On the basis of comments By Mr Gagik Harutyunyan (Member, Armenia) Ms Angelika Nussberger (Substitute Member, Germany) Mr Peter Paczolay (Member, Hungary) Available at: https://www.venice.coe.int/WebForms/documents/default.aspx?pdffile=CDL-AD(2010)039rev-e (last seen on: 18.12.2020) p.38

16 Article 25(4), Organic Law of Georgia on "the Constitutional Court of Georgia", Parliaments' gazette, 001, 27/02/1996

Admittance of the institute of suspension of disputed norm by legislator in Georgia must be evaluated positively, however, effective application of this important measure for protection of right mostly depends on the procedure of norm suspension. In this regard, opinion of G. Luashvili is interesting, who considers that there is "very strict, high standard established for suspension of operation of the disputed normative act" in Georgia.[17] Analysis of judicial practice of the Constitutional Court gives evidence that the court applies measure of suspension of the disputed norm only in extreme occasions.[18] Studying the practice gives us possibility to say, that often, along with the strict standards, reason for the refusal of suspension of disputed norm is incorrectly formulated query. Hence, studying procedure of the suspension of disputed norm represents a topical issue of practical importance. That is why this article is an attempt to demonstrate standards established by the Constitutional Count with regard to the suspension of operation of disputed norm, based on the systemic and logical analysis of judicial practice of the Constitutional Court of Georgia, and carry out systematization of the practice.

Based on the analysis of recording notice N3/2/717 from 1 June 2016 of the Constitutional Court of Georgia and general practice it may be said that for making decision on the suspension of operation of disputed norm the court must be assured that in the occasion of suspension of norm the following circumstances are in place cumulatively:

1. There is a danger of irreparable outcome for the party, which may not be eradicated in case of approval of the complaint;
2. The danger of irreparable danger for the party is instantaneous and real;
3. Suspension of operation of the norm may prevent complaining party from irreparable outcome (effectiveness criterion);
4. Suspension of operation of the norm will not cause unjustifiable restriction of interests of thirds parties and/or public.

All these circumstances comprise in themselves various sub criteria. The article aims to analyze these criteria in details.

17 Luashvili G., 2018. Standard of the suspension of operation of normative act (according to the judicial practice of the Constitutional Court of Georgia), Constitutional Law Review XII, p.28

18 Decision of the Constitutional Court of Georgia from 24 December 2014 (case N3/2/577) paragraph II-34.

1. DANGER OF IRREPARABLE OUTCOME FOR THE PLAINTIFF, AS THE PRECONDITION FOR SUSPENDING OPERATION OF THE DISPUTED NORM

The criterion of irreparable outcome for the plaintiff is fulfilled when: a) one of the parties may face the possible damage caused by suspension of the disputed norm and b) there is a danger of irreparable outcome in place. Let us discuss each of the circumstance.

According to the first sentence of paragraph 5 of article 25 of the law of Georgia on "the Constitutional Court of Georgia": "if the Constitutional Court considers that operation of the normative act may cause irreparable outcomes for one of the parties, it may suspend operation of the disputed norm or part of it, before making final decision or for less period." Therefore, on first sight, suspension of norm is admissible only in case if there is direct damage to one of the parties (as a rule, plaintiff) and not the third party, however in-depth analysis of this issue gives possibility to make other conclusions.

First of all, it must be mentioned that when we talk about authority of the constitutional court to suspend the disputed act or part of it, the organic law of Georgia "on the Constitutional Court of Georgia" prescribes general rule for suspension of the disputed norm or its part, which aims to prevent irreparable outcome, despite the type of the dispute and who are the disputing subjects. Hence, authority to suspend the norm is relevant for each power of the Constitutional Court and each subject using this power. Consequently, the author of the motion on suspension of operation of the disputed norm may be a natural person and legal person, as well as public official/institution. For the purposes of suspension of the disputed norm "the damage caused to one of the parties" is defined taking into account which subject and in the scale of which capacity applies to the court with constitutional complaint or submission.

When the Constitutional Court is applied by natural and/or legal persons, which challenge the issue of constitutionality of normative acts in the view of human rights recognized by chapter two of the Constitution, they may require suspension of the norm only in case when their rights are directly endangered. The mentioned principle operates differently in case of public defender, who is entitled to ask for suspension of the disputed norm or its part for protecting rights of others. As for the state institution/public official, for them as for parties the irreparable damage is related to endangering those purposes, protection of which was the motive for applying the constitutional court.

Regarding the abovementioned issue, the Constitutional Court of Georgia in the recording notice N3/6/668 from 12 October 2015 has established: "in the Constitutional Court the party may be a private person (natural or legal), as well as state institutions and public officials. In this case, the purpose of their application to the Court is different. While people apply the Court to protect their rights, state institution are driven by public purpose – facilitate government to function within the framework of the Constitution. Obviously, the possible irreparable outcome for the natural person, caused by the disputed norm, always is connected to the irreversible risks of infringement of his/

her right. However, when court is applied by state institutions or public officials (president, public defender), for them, as for the parties, the danger of irreparable outcome cannot be related to the infringement of their rights, as persons representing state in public law relations, have no personal rights. … For state institution/public official, as for the party, the irreparable outcome is related to creation of danger to the purpose, protection of which is the motive for possibility to apply the Constitutional Court.[19] Therefore, in such time the quality of competence must be taken into account, in the framework of which parties oppose each other.[20]

Along with proving the possibility to cause damage to one of the parties, the evidence must be presented to the court attesting the irreversibility of damage. According to the practice established by the Constitutional Court, "causing irreversible damage implies a situation when operation of the norm may cause irreversible infringement of right."[21] Under the legislation of Georgia, decisions of the Constitutional Court do not have retrograde power and their effect does not apply to legal relations emerged in period before the decision was made.[22] Therefore, there is a threat that the person's right may not be restored even if the Constitutional Court declared the disputed norm unconstitutional. The legislation foresees suspension of the disputed norm exactly in such cases. However, whether the disputed normative act may cause irreparable damage to one of the parties, as well as what is "irreparable damage", is defined in each individual case based on evaluation of particular circumstances.[23]

It must be mentioned that proving existence of the threat of "irreparable damage" is extremely difficult vis-à-vis criminal law norms, as far as compared to civil and administrative legal proceeding, the legislation foresees possibility to reconsider verdict rendered in the criminal law case if there is a decision of the Constitutional Court, which declared unconstitutional the law applied in this case.[24] Deriving from the abovementioned, in case of approving complaint by the Constitutional Court and declaring the disputed norm unconstitutional, the plaintiff is entitled to require revision of the verdict rendered in his/her regard, including in the part of the used sentence."[25] This is why the Constitutional Court considered numerous motions on suspension of criminal law norm unjustified and indicated, that the risk of "irreparable damage" is not evidenced.

It must be mentioned that the Constitutional Court made important explanation in the decision N3/2/577 from 24 December 20, by which it established: "in some cases criminal law/criminal procedure norm may cause such irreversible and irreparable damage, that after the Constitutional Court makes decision, declaring the norm unconstitutional loses sense for the plaintiff and it is im-

19 Recording Notice from 12 October 2015 (case N3/6/668) of the Constitutional Court of Georgia, paragraph II-9-10.

20 Recording Notice from 12 October 2015 (case N3/6/668) of the Constitutional Court of Georgia, paragraph II-8.

21 Recording Notice from 20 May 2008 (case N1/3/452,453) of the Constitutional Court of Georgia, paragraph II-2.

22 Decision of the Constitutional Court of Georgia from 24 December 2014 (case N3/2/577) paragraph II-31-35.

23 Recording Notice from 3 April 2014 (case N2/1/565) of the Constitutional Court of Georgia, paragraph II-12.

24 Decision of the Constitutional Court of Georgia from 24 December 2014 (case N3/2/577) paragraph II-33.

25 Recording Notice from 20 December 2016 (N1/21/701,722,725) of the Constitutional Court of Georgia, paragraph II-29.

possible to restore his/her infringed rights."[26] The mentioned precedent gives us ground to prove that in some particular cases, considering individual circumstances, proving realty of the danger of "irreparable outcome" may be also successful with regard to criminal law norms.

Separate definition is needed for "irreparable outcome" component in case when there is a continuous infringement of the plaintiff's right. According to practice of the Constitutional Court, only "the fact that possible infringement of plaintiff's rights takes place in the period between issuing recording notice by the Constitutional Court and final decision on the case, may not serve as condition evidencing the irreparable outcome. The possible restriction of right, as a rule, exists in all those cases which is admitted by the Constitutional Court for deliberation. Continuous character of restriction of right does not imply that there is an irreparable damage caused by disputed norm. Irreparable damage, existence of which leads to suspension of norm, implies such critical occasions when even in case of declaring the norm unconstitutional, it would be impossible to eradicate negative outcomes caused by the norm."[27]

When deliberating on the issue of suspending the disputed norm, it must be mentioned that to suspend operation of the norm, in parallel with demonstrating danger of "irreparable outcome", the Constitutional Court must be provided with sufficient evidence which proves that apart from suspension of the norm there is no other possibility to avoid the damage caused by operation of the norm.

Under other possibilities to prevent damage, for instance alternative means of protection of right are intended. By the recording notice N1/3/452,453 from 20 May 2008 the Constitutional Court refused to suspend the disputed norm because the existence of alternative means for protecting right. In this case the plaintiff disputed rules established by the Election Code by which he/she was to certain extent restricted to fully access the data of video camera. The Court collegium considered that operation of the disputed norm would not cause irreparable outcome and explained: "recording of video camera is not the only mean to receive full information about elections, interested person has many other alternatives for receiving information. It must be noted that the plaintiff himself/herself mentions it as additional and effective mean for observing elections, preventing violations and ensuring reaction thereto. According to the Election Code of Georgia supervisor has several means to observe election process on any stage, get and spread information on the process of elections after the observation. Moreover, according to paragraph 4 of Article 67 of the Election Code of Georgia, the person having right to be in the polling building may unlimitedly conduct photo video shooting. Representatives of media also have right to film. Besides, when deliberating the dispute prescribed under legislation, in case of necessity, the court is not restricted to obtain any part of the video recording. The named factors indicate to the circumstances that the video recording is not an only mechanism, without which it would be impossible getting information of election

26 Decision of the Constitutional Court of Georgia from 24 December 2014 (case N3/2/577) paragraph II-33.

27 Recording Notice from 29 December 2016 (N2/8/665,683) of the Constitutional Court of Georgia, paragraph II-16.

process or possible violations, or reaction to such violations.[28] Considering the mentioned, the Constitutional Court did not approve plaintiff's motion on suspension of the disputed norm.

Considering all the above mentioned, it must be said that danger of irreparable outcome represents necessary prerequisite for suspension of the disputed norm and when evaluating it, the Constitutional Court takes into account two circumstances:

1. It will be impossible to correct the caused outcome in case of declaring the norm unconstitutional;
2. There is no other effective mechanism to prevent the damage caused by operation of the norm.

2. REALITY OF THE DANGER OF INSTANTANEOUS VIOLATION OF RIGHT, AS PRECONDITION FOR SUSPENSION OF THE DISPUTABLE NORM

The judicial practice of the Constitutional Court evidences that when requiring suspension of the disputed norm, the general indication to the fact that there might be "irreparable damage" caused by operation of the norm is not sufficient. For making positive decision on the motion, it is necessary to substantiate reality of danger of "irreparable damage" before court makes decision.

For proving the reality of danger of violation of the right, precise and non-abstract/hypothetical evidence must be presented to the court. In the case "Citizens of Georgia – Nikoloz Tsalughelashvili, Kakhi Tsalughelashvili, Makvala Barbakadze v. the Parliament of Georgia" abstract arguments on possible violation of right became the reason for rejecting query on suspension of the norm, where the court clarified: "while asking for suspension of the disputed norm, the plaintiff is obliged to substantiate the existence of real danger of irreversible violation of his/her rights in predictable future, in circumstances when the disputed norm operates." The argumentation of plaintiff relies on the fact that deliberation of the case in the Constitutional Court may be prolonged significantly and in this period the query of mortgagees may exceed the market value of the subject of the mortgage. In such case, the motion of plaintiffs is based on the abstract assumption, the subjective opinion about the period of discussion of the case and this argument does not demonstrate the risk of irreversible violation of plaintiffs' rights."[29]

28 Recording Notice from 20 May 2008 (case N1/3/452,453) of the Constitutional Court of Georgia, paragraph II-2.

29 Recording Notice from 23 March 2018 (case N2/3/868) of the Constitutional Court of Georgia, paragraph II-37.

It must be mentioned, that while proving reality of danger, in some cases it may be reasonable that plaintiff indicates on "the existence of insufficient guarantees for avoiding such danger, which would clearly show to the court reality of the danger and would convince in high possibility of such negative outcome."[30] Based on the analysis of judicial practice of the Constitutional Court of Georgia it is evident that it is desirable to present to the court evidence that clearly demonstrates what type and of what extent the damage maybe caused to the plaintiff. Moreover, if the plaintiff is natural or legal person, it must be indicated in the motion under which article of second chapter of the Constitution the right is protected, which may cause the damage.

When substantiating reality of danger of violating constitutional right, it is obligatory that the party proves that possible damage is irreversible not only in general, but before the Constitutional Court makes a decision. If such risk does not exist, the Constitutional Court does not suspend operation of the disputed norm. The example for this is the recording notice from 1 June 2016 N3/3/763 of the Constitutional Court, as well as recording notice on the case "citizen of Georgia Kakha Kukava v. the Parliament of Georgia", in which the Constitutional Court of Georgia established: "regarding the motion of the plaintiff on suspension of the disputed norm, the Constitutional Court of Georgia states that before next self-government elections there is a year ahead. Until this period the disputed norms objectively cannot cause any outcome, including negative one, as far as there is no necessity for applying these norms. At the same time, before next elections, considering the terms of Constitutional legal proceedings, the Constitutional Court will make a decision on the mentioned case, which ensures preventing possible violation of right. Hence, the plaintiff's motion on suspension of the disputed norms before the court decision shall not be approved."[31]

Therefore, when plaintiff indicated that there is a possibility of violation of right in abstract future, which in terms of time diverges from the assumed date of making final decision by the Constitutional Court, the Constitutional Court a priori rejects the motions on suspension of the disputed norm. However, even in case when violation of the right is assumed in the period before constitutional court renders decision, the party may have to prove that for the prevention of his/her right, immediate reaction from side of the Constitutional Court, and suspension of the disputed norm is needed. The criterion of "necessity of instantaneous suspension" is particularly topical after decision of the Constitutional Court of Georgia N3/5/768,769,790,792 from 26 December 2016. Hence, it is interesting to have overview of this decision and factual circumstances preceding this decision.

With regard to suspension of the disputed norm, the primary edition of the organic law of Georgia on "the Constitutional Court of Georgia" prescribed: "if the Constitutional Court considers that operation of the normative act may cause irreparable outcomes for one of the parties, it can suspend the disputed act before the decision is made." On 3rd June 2016 the organic law on the Constitutional Court was amended and the mentioned paragraph was stipulated as follows: "if the Constitutional Court considers, that operation of the normative act may cause irreparable outcomes

30 Recording Notice from 24 October 2019 (case N2/13/1348) of the Constitutional Court of Georgia, paragraph II-36.

31 Recording Notice from 4 December 2014 (case N1/5/600) of the Constitutional Court of Georgia, paragraph II-16.

for one of the parties, the issue is transferred for discussion to the plenum of the Constitutional Court, which may, by the decision made on the preliminary session, suspend the disputed act or its respective part before the final decision is made, or for less period…" Therefore, by the mentioned provision it was established that the decision on suspension of the norm is made on the preliminary session.

The above-mentioned provision became subject of deliberation by the Constitutional Court on the main hearing in case N3/5/768/769/790/792. Plaintiffs considered that by the disputed norm the possibility to put motion regarding suspension of the norm and period for making decision was procedurally restricted. The Constitutional Court agreed to the plaintiffs' position and clarified: "identification of irreparable outcome may be done before the preliminary session, as well as after its conduct. It is completely possible that the factual circumstance that existed on the stage of preliminary session, changes in the period before the final decision is made on the case. … The right guaranteed by the Constitution of Georgia to apply court, which entails the right to apply to the Constitutional Court as well, must not be illusory, but it must create real possibility to restore person's right properly and must represent effective mean for protection of right. The plaintiff must have expectation and real possibility to protect his/her rights in the Constitutional Court. The Constitutional Court considers that deriving from the purposes of effective justice, the Constitutional Court must be entitled to suspend the disputed norm, if it considers that its operation may result in irreparable damage for the plaintiff."[32] Deriving from the all mentioned above, the Constitutional Court declared unconstitutional the words on "preliminary session". Hence, according to the acting legislation there is no restriction on the period of presenting motion regarding suspension of the disputable norm or its part and parties can ask for suspension of the disputable norm any time before the final decision of the Constitutional Court. Thus, there is no more time barrier with regard to using authority of suspension of the norm, but in parallel the standards for proving reality of irreversible danger increased.

In the existing legal reality, when person has right to apply constitutional court with the query to suspend the norm any time before the final decision is made on the case, the Constitutional Court while deliberating the issue of suspending norm, in first place, evaluates the question of operation of the mentioned mechanism in time.[33] In the decision of 26 December 2016 N3/5/768,769,790,792 the Constitutional Court stated that "the mechanism of suspension of the norm is used for preventing immediate, instantaneous danger. … The Constitutional Court will not suspend the disputed norm in case if the danger of irreparable outcome is not instantaneous and it is possible to exist in future, before making final decision, in other period, as he/she will still have this possibility later."[34] On this ground the Constitutional Court of Georgia by Recording notices N1459 and N3/5/1491 rejected suspension of the disputed norm.

32 Decision of the Constitutional Court of Georgia from 29 December 2016 (case N3/5/768,769,790,792), paragraphs II-132-133

33 Recording Notice from 17 December 2019 (case N3/24/1459) of the Constitutional Court of Georgia, paragraph II-24.

34 Decision of the Constitutional Court of Georgia from 29 December 2016 (case N3/5/768,769,790,792), paragraphs II-154.

Discussion of the judicial practice of the Constitutional Court of Georgia is interesting in the view of the period of suspension of the disputable norm. According to the first sentence of paragraph 5 of article 25 of the acting edition of the organic law on "the Constitutional Court of Georgia": "if the Constitutional Court of Georgia considers that the operation of normative act may cause irreparable outcomes for one of the party, it may suspend the disputed act or its part for period before the final decision is made or for lesser period." Therefore, operation of the disputed norm, considering the objective circumstances of the case, may be suspended for particular period of until the final decision is made by the court.

It must be noted, that based on the regulations prescribed by the organic law from 30 May 2013 introducing amendments to the organic law on "the Constitutional Court of Georgia", the party could require suspension of the disputed normative act before the final decision is made, however, if the Constitutional Court could not render a decision on this particular case with 30 calendar days (or in certain cases in 45 calendar days), the decision made with regard to the suspension of disputed act or its relevant part unconditionally would be repealed on the next day after expiry of this term. This regulation was problematic, as if in case the court would not be able to make final decision on the case within 30 (in particular case 45) days because of the difficulty of the case or any other reason, the decision on suspension of operation of the norm would be revoked even in case there is no objective necessity to suspend it.

This regulation became the subject to discussion by the Constitutional Court in the view of constitutionality in the case "N(N)LE The Human Rights Education and Monitoring Center (EMC) and citizen of Georgia Vakhishti Menabde v. the Parliament of Georgia." In this case the respondent named as a legitimate purpose of the restriction prescribed by the norm the avoidance of long-term "legislative vacuum" caused by suspension of the disputed act and protection of interests of third parties. The court shared defendant's position about the fact that for reaching the named legitimate purpose it is admissible restriction of constitutional right, however, because of infringement of the proportionality principle it declared the mentioned regulation unconstitutional and explained: "the challenged norm prescribes general restriction, which covers all cases of suspension of disputed act by the Constitutional Court and defines unconditional restoration of all disputed acts after expiry of suspension term. Including the case when suspension of the disputed act does not cause infringement of third persons' rights or damaging of other important interests."[35] Suggested mechanism in inflexible and does not give possibility to evaluate, weight in particular case, on the one hand, the interest of plaintiff to avoid irreparable outcomes, irreversible infringement of right and, on the other hand, interests of thirds persons and society, which is protected by the disputed act. The disputed act a priori gives priority to the interests of third persons and does not give possibility to the Constitutional Court to balance opposing interests in particular case.[36]

35 Decision of the Constitutional Court of Georgia from 24 December 2014 (case N3/2/577), paragraphs II-41.

36 Decision of the Constitutional Court of Georgia from 24 December 2014 (case N3/2/577), paragraphs II-44.

The acting edition of the organic law of Georgia "on the Constitutional Court of Georgia" does not include any more the provision similar to norm declared unconstitutional. Therefore, on the query of the party, in case of the existence of respective objective necessity, the disputed norm or its part may be suspended before the final decision on the case, regardless the time which the court will need for making decision.

It is clear that the acting legislation of Georgia, namely, paragraph 5 of article 25 of the organic law of Georgia "on the Constitutional Court of Georgia" entails grounds, when decision on suspension of the disputed norm may be repealed before the final decision of the Court. However, the acting legislation gives possibility, in case of repeal of the decision on suspension of the norm, to study in details and take into account particular circumstances of the case. Hence, the rough approach of suspension of the norm is not present any more in the acting legislation of Georgia.

3. EFFECTIVES OF MECHANISM, AS PREREQUISITE FOR SUSPENSION OF THE DISPUTED NORM

While discussing issues related to suspension of the disputed norm, the Constitutional Court of Georgia pays attention to the effectiveness of this mechanism. In particular, whether the suspension of norm will impact legal condition of the party in terms of preventing irreparable damage.[37] The ground for suspension of the disputed norm may exist only in case when its suspension changes legal condition of the plaintiff, makes it possible to avoid the damage, which may be caused by operation of the disputed norm. In the judicial practice of the Constitutional Court there are cases in which ineffectiveness of mechanism is indicated as the ground for refusing suspension of the norm. For instance, in the Constitutional complaint N679, plaintiffs indicated that there was a real danger of rendering decision based in the disputed norm on active civil case in the City Court of Tbilisi, which would cause irreparable outcomes for plaintiffs. The Constitutional Court ascertained: "the judicial practice of the Supreme court is noteworthy, according to which, when checking legality of agreements, grounds for their annulment, the legislation existing in time when the agreements were stipulated is used. … Hence, in line with the established practice, the issue of annulment of the agreement is decided according to norms acting in period of stipulation of this agreement. Deriving from the abovementioned, the Constitutional Court considers that… suspension of the disputed norm will not affect legal condition of plaintiff, he/she may not alter ground for the annulment of the agreement stipulated in 2005 and/or 2006.[38] Consequently, the Constitutional Court did not ap-

37 Recording Notice from 7 February 2019 (case N2/2/1337) of the Constitutional Court of Georgia, paragraph II-6.

38 Recording Notice from 2 April 2016 (case N1/3/679) of the Constitutional Court of Georgia, paragraph II-5-6.

prove the query of plaintiff on suspension of the disputed norm. With similar reasoning the plaintiff was refused to suspend the disputed norm in the case "political union "Alliance of Patriots of Georgia" v. the Parliament of Georgia."

It must be noted explicitly, that proving effectiveness of suspension of the disputed norm is particularly difficult in cases where the negative outcome is already in place. This is determined by the fact that suspension of the disputed norm, comparing to its declaration as unconstitutional, does not define its unconstitutional content.[39] Therefore, suspension of the disputed norm, as a rule, is not considered as ground for reviewing already rendered decision. On the other hand, in complaints of such type, proving the component of "irreparable damage" is complicated, as far as, with high probability, if suspension of the norm gives possibility to restore already infringed right, similar outcome will come also later, in case of declaring the norm unconstitutional. Thus, it may be stated that, when before starting discussion of the motion on suspension of the disputed norm, the right of plaintiff is already infringed and the outcome is in place, the practical chance, that the Constitutional Court will suspend operation of the disputed norm, is very low. For example, in the Recording notice of the Constitutional Court N1/5/535 from 14 December 2012 it is stated: "from the presented complaint and attached material it is evident that, based on the disputed norm, an administrative penalty was already imposed on plaintiff and the court decision was in enforced, thus, the outcome of the disputed norm was already in place. Therefore, there is no ground prescribed by the law for suspension of the disputed norm and plaintiff's query is unjustified."[40]

Taking into account all mentioned above, for receiving positive decision on suspension of the disputed norm it is necessary to present to the Court the evidence, which will convince it, that suspension of the norm represents an effective mechanism for protecting the right, that can change factual legal condition and prevent possible violation of the right.

4. NECESSITY TO PROTECT REASONABLE BALANCE BETWEEN INTERESTS, AS PREREQUISITE FOR SUSPENSION OF THE NORM

Generally obligatory rules of conduct prescribed by normative acts are aimed at regulating respective fields of social life and achieving particular legitimate purpose, protecting private and public interests. In certain cases, suspension of the disputed normative act may restrict private, as well as public interests and damage the value, which is protected by this act,[41] that is why, regarding

39 Recording Notice from 2 April 2016 (case N1/3/679) of the Constitutional Court of Georgia, paragraph II-7.

40 Recording Notice from 14 December 2012 (case N1/5/535) of the Constitutional Court of Georgia, paragraph II-16.

41 Decision of the Constitutional Court of Georgia from 24 December 2014 (case N3/2/577), paragraphs II-20.

the query of plaintiff on suspension of the disputed norm, while making decision on suspension of the disputed norm in every particular case the court must evaluate the danger of infringing others' rights caused by suspension of the norm.[42]

The risk of infringing others' rights and damaging public interests represents an important factor when making decision on suspension of the disputed norm. In the judicial practice of the Constitutional Court, there are several cases when the Constitutional Court considered as an approved the fact that there was a real danger of causing irreparable outcome and infringement of plaintiff's rights in case of refusing suspension of the disputed norm, however, with the motive of protecting others' rights and/or public interests, it refused to suspend the norm. Thus, if there is indication to real danger for damaging rights of other persons or public interests, while making decision on suspension of the disputed norm, it is very important for the Constitutional Court to protect fair balance between these opposing interests.

Deriving from practice of the Constitutional Court, it may be stated that for receiving positive decision on suspension of the disputed norm, the Constitutional Court must be provided with the evidence proving following circumstances:

1. Private interest of plaintiff significantly exceeds interest of third persons, or the public interest, which may be damaged;
2. In case of suspension of the disputed norm there are other regulations, which will decrease to minimum the damage, which may be caused for public interest and rights of other persons.

These two factors were underlined by the Court in case "citizen of Georgia Levan Gvatua v. the Parliament of Georgia".

The plaintiff needed liver transplantation, which was approved by experts' conclusion and relevant documents. According to the legislation, transplantation of organs is permitted only for family members. In the family of plaintiff there was not a person who would be compatible as donor, however a friend could help him, and legislation did not give such possibility.[43] Hence, the plaintiff asked for suspension of the disputed norm before making final decision on constitutionality of this norm.

In the current case, on the one hand the right to live was opposed to the public interest on the other hand. As the respondent explained, suspension of the norm would endanger public security and right of third persons to be protected from trafficking of human organs.[44] Based on the complex analysis of circumstances of the case and legislation of Georgia, the Constitutional Court determined: "the Court considers the argument presented by the defendant related to danger of trafficking of human organs in case of broadening the circle of persons having right to be living donors. At

42 Recording Notice from 7 November 2012 (case N1/3/509) of the Constitutional Court of Georgia, paragraph II-9.

43 Bardzemishvili T. 2016. "Amendments are expected in the law related to "transplantation of human organs". Article available at:https://tamtabardzemishvili.wordpress.com/2016/06/21/%E1%83%90%E1%83%93%E1%83%90%E1%83%9B%E1%83%98%E1%83%90%E1%83%9C%E1%83%98%E1%83%A1-%E1%83%9D%E1%83%A0%E1%83%92%E1%83%90%E1%83%9C%E1%83%9D%E1%83%97%E1%83%90-%E1%83%92%E1%83%90%E1%83%93%E1%83%90/" (last visit on 31.09.2020)

44 Recording Notice from 25 November 2015 (case N3/9/682) of the Constitutional Court of Georgia, paragraph I-20.

the same time the Court indicates that suspension of the disputed norm does not cause legalization of trafficking of human organs and acting legislation provides many other mechanisms for preventing trafficking of human organs. … Suspension of the disputed norm may, indeed, cause danger of trafficking of human organs and require more effort from the state to fight against this danger, but the acting legislation provides other mechanisms to combat the mentioned threat, which must ensure protection of life and health of the donor.[45] On the other hand … before the final decision is made by the Constitutional Court, operation of the disputed norm may cause irreversible aggravation of the plaintiff's health, including death. The Constitutional Court defines that within the framework of acting legislative regulations suspension of the disputed norm does not create such danger which may cause objective observer to think that public interest of operation of the disputed norm exceeds interest of plaintiff's life and health.[46] Thus, in the this case the Constitutional Court considered that the private interest of plaintiff significantly prevails the public interest and, at the same time, in case of suspension of the disputed norm, the legislation of Georgia provides other mechanisms for protecting public interests. Therefore, the Constitutional Court has approved plaintiff's query and suspended operation of the disputed norm.

While discussing the issue of opposing private and public interests in the view of suspension of the disputed norm, in the judicial practice of the Constitutional Court one fact is noteworthy, that when evaluating quality of possible damage caused by operation of the norm, in case of filing complaint by the natural or legal person based on the second chapter of the Constitution of Georgia, the Constitutional Court considers only the damage, which may be caused directly to the plaintiff. It is interesting that the Judge Irine Imerlishvili has distinguished opinion on this issue. She outlined distinguished opinion on the Recording Notice N1384, that the Court should have evaluated the danger deriving from operation of the norm in general and not toward a precise plaintiff. In her opinion we read the following: "I do not share the vision of the Constitutional Court that while evaluating the scale of irreparable outcome we shall take into consideration only the volume of outcome resulting for only particular plaintiff. Suspension of the norm concerns not only the plaintiff, but – all persons, who are subject to this norm and there might be danger of causing irreparable damage towards them. Therefore, when determining scale of irreparable outcome, the Court must take into account interests of other people falling in the category of plaintiff and oppose it to consolidated interests."[47]

Despite the argumentation of Irine Imerlishvili, the Constitutional Court opposed to the public interests only interests of particular plaintiff. Deriving from the mentioned, considering the recent practice of the Constitutional Court, it is desirable, that when outlining scale and quality of possible damage caused by the disputed norm, the argumentation of plaintiff is clearly connected to the fact that the damage caused directly to plaintiff exceeds public interests by its importance.

45 Recording Notice from 25 November 2015 (case N3/9/682) of the Constitutional Court of Georgia, paragraph I-10-11.

46 Recording Notice from 25 November 2015 (case N3/9/682) of the Constitutional Court of Georgia, paragraph I-13-14.

47 Distinguished opinion of the member of the Constitutional Court Irine Imerlishvili on the Recording Notice of the Constitutional Court of Georgia from 24 October 2019 N 2/13/1384, paragraph 10.

It must be mentioned that according to the existing legislation, the plaintiff may ask for suspension of the disputed norm in general and not for the precise circle of persons, even if it significantly decreases the scale of danger caused to the interests of other people. The prove of the mentioned is the case "citizen of Georgi Beka Tsikarishvili v. the Parliament of Georgia", in which the plaintiff applied court with the motion to suspend the disputed norm personally towards him. Moreover, in case if his precise query would not have been approved, the plaintiff would require suspension of the norm towards everyone. On this matter the Constitutional Court clarified: according to paragraph 5 of article 25 of the organic law of Georgia "on the Constitutional Court of Georgia", "if the Constitutional Court of Georgia considers that operation of the normative act may cause irreparable outcome to one of the parties, it may suspend the disputed act and its relevant part." Firstly, it must be noted that the essence and purpose of this regulation is not a suspension of disputed norm for particular persons individually, personally."[48]

This regulation of the legislation of Georgia became subject to critic by various judges of the Constitutional Court and the Constitutional Court numerously. In the decision N3/2/577 from 24 December 2014 the Constitutional Court stated that "it was possible to enact less restricting mechanism by the legislation, which would protect fair balance, … between protection of private and public interests. For instance, … possibility to suspend operation of the disputed norm not generally, but only towards the plaintiff. In some cases, for instance, when the probability of possible damage caused by suspension of the norm is high, such mechanism may indeed represent more precise for solving problem, more adapted mechanism, which, on the one hand, protects interest of plaintiff to prevent irreversible infringement of his/her rights, and, on the other hand, suspension of the norm would cause less danger for infringing public interests or rights of third persons. Hence, negative effects caused by suspension of the disputed norm would be decreased."[49]

It must be noted that, despite the critical position of the Constitutional Court and its members towards the regulation providing suspension only generally, for everyone, there were no amendment introduced to the legislation of Georgia in this regard and the acting legislation does not give possibility to personify the restriction. The plaintiff may require suspension of the norm only generally, towards everyone.

48 Recording Notice from 13 February 2015 (case N1/1/592) of the Constitutional Court of Georgia, paragraph II-11.

49 Decision of the Constitutional Court of Georgia from 24 December 2014 (case N3/2/577), paragraphs II-25.

CONCLUSION

The Constitutional Court of Georgia has extensive practice on the issue of suspending the operation of the disputed norm. Considering the approaches and requirements established in this practice will significantly assist authors of constitutional complaint and submission when formulating the motion on suspending the operation of the disputed norm. It must be noted, that the Constitutional Court of Georgia has contributed significantly to the development of this institute by its activity. Based in its decisions several amendments were introduced to the legislation of Georgia. According to the legislation acting nowadays, the query to suspend the disputed norm is admissible on any stage of discussion of the case, besides, decision made on the suspension of the disputed norm is in force for maximum the period of making the decision and term of this decision is not limited to 30 (in some cases 45) days any more. These amendments must be evaluated positively, however, legislative authority has not yet enacted amendments in the legislation of Georgia, which would give possibility to the Constitutional Court to suspend the operation of the norm only towards plaintiff, or particular group. It is desirable that the legislative authority considers position of the Constitutional Court and implements respective legislative amendments.

Sopio Asatiani*

GEORGIA V RUSSIA: JURISDICTIONAL CHAOS AT EUROPEAN COURT OF HUMAN RIGHTS

ABSTRACT:

The article analyses the European Court of Human Rights' recent judgment in case of Georgia v. Russa (II). Coupled with its historic relevance the case presents significant developments with regard to issue of extraterritorial application of the Convention. The latter notion has become increasingly important as more States Parties to the Convention engage in cross-border activities and cases that have arisen out of inter-state conflicts are on the rise. The article critically examines the reasoning behind the judgment and attempts to trace the novel standards offered by the court with respect to extraterritorial jurisdiction and arguments put to support it. Hence, the first part will examine the notion of state jurisdiction as developed by the court in its previous case-law, the second part will proceed to apply those principles to the findings of the court and identify deficiencies in its reasoning. The author takes the position that the court was wrong on its assessment of law and facts with respect to extraterritorial jurisdiction during the active phase of hostilities.

INTRODUCTION

On January 21, 2021 the European Court of Human Rights, sitting as a Grand Chamber, issued a long-awaited judgement in the second inter-state case: *Georgia v. Russia (II)*. The case concerns events occurring in 2008: five-day war and subsequent occupation of Georgian territories by the Russian Federation, therefore the historical and moral relevance of the decision is tremendous. After all, the judgement marks the first victory for the victims of aggression in their quest for justice. It is also a strong advantage for Georgian state in its claim over regions of South Ossetia and Abkhazia. The main objective has been achieved- the court has recognized continuous occupation of Georgian

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territories by the Russian Federation and the large scale violation of the rights of Georgians are now not only an allegation but rather facts proved in the court of law.

The court has affirmed mostly with unanimous support that the repeated violations and/or official tolerance towards grave breaches of Human rights is attributable to Russia. In particular, the killing of individuals, torching and looting of houses in Georgian villages, treatment of civilians and prisoners of war in detention facilities in South Ossetia and in the "buffer zone" amounted to violation of Articles 2, 3 and 8 of the Convention and Article 1 of Protocol No. 1.[1] Importantly enough, the court has also acknowledged 23, 000 Georgians right to return to their homes and subsequent duty placed on Russian federation.[2]

Unfortunately, the same enthusiasm cannot be shared with respect to Courts' approach towards the primary question of extraterritorial jurisdiction in times of international armed conflict. It shall be hereby noted, that it was the first time the Court had been asked to examine military operations (armed attacks, bombing, shelling) in the context of an international armed conflict among two high contracting parties to the Convention. Therefore, the expectations as well as stakes were placed high enough for the court to finally clarify and reverse troubling legacy of *Bankovic* it has so steadily tried to improve over the last decade.[3] However, in an unexpected move the court has made what many have correctly labeled predominantly "policy decision." It has essentially avoided the adjudicate merits of legally and politically extremely difficult aspects of the case by simply drawing an artificial line among active phase and occupation and declared the former part (*id est* 8-12 August 2008) inadmissible.[4] In fact the court has unapologetically stated that the "*the large number of alleged victims and contested incidents, the magnitude of the evidence produced, the difficulty in establishing the relevant circumstances"5* coupled with the context of "chaos" during the armed conflict, were the primary hurdles in the road towards jurisdiction.

As a result, even the most serious violations of unlawful killings committed during the five days of war were left behind, while other abuses, even the ones which started during the active phase of hostilities (prisoners of war, detention of civilians) proceeded to the merits stage. Consequently, the court created a legal reality whereby "vacuum in the system of Human Rights protection"[6] is created for the individuals of High Contracting state. In particular, told Georgian citizens that during an international armed conflict they are essentially unprotected, even though the country they

1 *Georgia v. Russia (II),* ECtHR, App. No. 38263/08, 21 January 2021, para: 222

2 *Ibid* at para.298

3 *Al-Skeini and others v. United Kingdom,* ECtHR, App. No. 55721/07, 7 July 2011; *Solomou and Others v Turkey, ECtHR, App. No. 36832/97*, 24 June, 2008; *Issa v. Turkey*, ECtHR, App. No 31821/96, 16 November 2004;

4 Jessica Gavron and Philip Leach, *Damage control after Georgia v Russia (II) – holding states responsible forhuman rights violations during armed conflict,* available at: https://strasbourgobservers.com/2021/02/08/damage-control-after-georgia-v-russia-ii-holding-states-responsible-for-human-rights-violations-during-armed-conflict/; Marko Milanovic, *Georgia v. Russia No. 2: The European Court's Resurrection of Bankovic in the Contexts of Chaos,* available at: https://www.ejiltalk.org/georgia-v-russia-no-2-the-european-courts-resurrection-of-bankovic-in-the-contexts-of-chaos/?fbclid=IwAR08olzOJrvwSh-dZusoXD0NQdx1qjbZt0Eec84r1ZEtjPZsvpgiz5JEoJ4

5 *Georgia v. Russia (II),* ECtHR, App. No. 38263/08, 21 January 2021, para:141

6 *Cyprus v Turkey*, ECtHR, App. no. 25781/94, 10 May 2001, para.78

reside(Georgia) and the invading power (Russia) are both bound by the European Convention.[7] The judgement has serious implications not only for the victims of the 2008 war, but will also have serious effect for the Council of Europe member states, that are currently counting on the court as the last resort to justice (cases of Ukraine, Armenia and Azerbaijan).

I. EXTRATERRITORIAL APPLICATION OF CONVENTION

According to the public international law "jurisdiction" defined as the power of the state to regulate its own public order, and limitations placed on this authority stemming from the equal sovereignty of other states is an uncontested principle.[8] The concept of jurisdiction is closely linked with control, since State exercises jurisdiction only where it has control. It is assumed that the states have exclusive control over their territories hence the jurisdiction is predominantly territorial. However, international law has long acknowledged the need for its application beyond national borders. International Court of Justice *(hereinafter ICJ*) in its *Wall Advisory Opinion* did not attach particular significance to the territorial effects of jurisdiction but rather interpreted jurisdictional clause of the International Covenant in Political and Civil Rights (ICCPR) to apply to the occupied Palestinian territory.[9]

The concept of jurisdiction under Human Rights treaties has even more arguments to support its extraterritorial application, since the very aim of post-World War II multilateral agreements and declarations was to safeguard peace and acknowledge universal character of human rights. It is precisely the principle of universality that "sets a benchmark against which all other considerations are to be tested."[10] The European Convention on Human Rights(ECHR) which came into force in 1952 is an attestation of the latter approach and is based on two concepts: universality of rights, as well as regional aspiration of uniting "like-minded" states.[11]

Article 1 of the Convention sets grounds for jurisdiction and states that the State parties "shall secure *to everyone within their jurisdiction* the rights and freedoms." It has been interpreted as so-called "framework provision" since it enables and gives effect to the Convention's system of

7 *Georgia v. Russia (II),* ECtHR, App. No. 38263/08, 21 January 2021, *Partly Dissenting Opinion of Judge Grozev*, p.169;

8 Ian Brownlie, *Principles of Public International Law* , Oxford University Press, 6th edn, 2003, p. 297; A. Cassese*, International Law*, Oxford University Press, 2nd edn, 2005 p. 49.

9 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ, 9 July 2004, paras: 109-111

10 M. Milanovic, *Extraterritorial Application of Human Rights Treaties: Law*, Principles and Policy, Oxford University Press, Oxford, 2011, p.106

11 Robin C. A. White & Clare Ovey: Jacobs, White and Ovey: *The European Court of Human Rights*, 5th ed., Oxford University Press, Oxford, 2010, pp. 64-81

rights.[12] The exact meaning of the words 'within their jurisdiction' remains controversial however it has managed to evolve over the years due to Courts willingness to view convention as a "living instrument."[13]

Additionally, The ECtHR is bound to interpret the "jurisdiction" of states in compliance with the Vienna Convention on the Law of Treaties (VCTL). Under art. 31(1) VCLT, the interpretation of a norm must take into account not only the wording used, but also the context, object and purpose of the treaty. Therefore, to establish a case for the meaning and interpretation of the jurisdiction reference shall be made back to the purpose of the Convention as a whole.[14]

In the Preamble of the Convention the intent of signatories is clearly stated, the reference to the Universal Declaration of Human Rights is specifically made, since the signatories viewed Convention as the first step for the collective enforcement of rights stated in the declaration. The convention also clearly indicates that it aims to support and bring together states who share the desire for common European public order, have a common heritage of political traditions, ideals, freedom and rule of law.[15] Hence for the Council of Europe the convention is the "constitutional instrument"[16] that operates to achieve the latter aims.[17] The court has further stated that the Convention: *"creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a 'collective enforcement*."[18] Hence, the Convention does not allow: *"vacuum in the system of human rights protection*."[19]

The arguments above expanded to apply to the notion of jurisdiction and since the extraterritorial application was the only logical conclusion that can be drawn from the broader aims of the convention. Regardless, the Court has always been careful its initial judgements to emphasize the "primarily territorial" scope of the article 1, however the possibility to expand the convention rights to apply extraterritorially was never excluded.[20] At the same time, it was also acknowledged that the jurisdictional link is necessary precondition. As a result, over the years of practice the Court has identified certain typical situations with an extraterritorial dimension that may be categorized as "control over a territory" (Spatial Model) or "control over persons".

12 *Ireland v. United Kingdom,* ECtHR, App.No. 5310/71, 18 January,1978, para. 238

13 *Tyrer v. United Kingdom,* ECtHR, App. No. 5856/72,1978, para 31; Barbara Miltner, Revisiting Extraterritoriality after Al-Skeini: The ECHR and Its Lessons, 33 MICH. J. INT'L L. 693 (2012).

14 Dobrosława C. Budzianowska ,*Some reflections on the Extraterritorial Application of the European Convention on Human Rights,* Wroclaw Review of Law, Administration & Economics, April 2014

15 European Convention on Human Rights, Preamble.

16 *Al-Skeini and Others v. the United Kingdom, ECtHR, App* no. 55721/07, 7 July 2011, para. 141

17 Juka Viljanen, *The Role of the European Court of Human Rights as Developer of International Human Rights Law, available: https://www.corteidh.or.cr/tablas/r26759.pdf*

18 *Ireland v. United Kingdom,* ECtHR, App.No. 5310/71, 18 January,1978, para. 239

19 *Cyprus v Turkey*, ECtHR, App. no. 25781/94, 10 May 2001, para.78

20 *Loizidou v. Turkey, ECtHR,* Application No. 15318/89, 18 December 1996, para. 52.

A) Spatial Concept: Jurisdiction as control of an area

The spatial model of jurisdiction or the "control over an area" was developed by the court in the case of *Loizidou v. Turkey*.[21] The case originated out of Turkish military intervention in Northern Cyprus in 1974. The applicant claimed that the Turkish forces had prevented and continued to prevent her from returning to Northern Cyprus and peacefully enjoy her property, violating article 1 of Protocol No. 1 and article 8 of the Convention.[22] The decision was groundbreaking for two reasons. Firstly, the court established that the responsibility of a Contracting state arises when as a consequence of military action-it exercises effective control over an area outside its territory. As for the level of control required, according to the facts 30 000 Turkish armed forces stationed throughout the Northern Cyprus and check-points on all main lines of communications were considered sufficient for the effective control. Secondly, the court stated that it was not necessary to determine whether the nature of control exercised by Turkey over the policies and actions of the TRNC was detailed and *effective overall control* was sufficient to engage responsibility.[23]

In the subsequent cases of Turkish occupation, the court has developed another important jurisdictional argument: *vacuum juris.* The argument stems from the aim that the convention envisaged as of document of European *public order*. According to the Court, Turkey's effective control of Northern Cyprus makes it impossible for the Cypriot government to fulfil the obligations it has undertaken under the Convention and thus, deprives the inhabitants of Northern Cyprus their conventional rights. Hence, it places on Turkey responsibility to secure the entire range of rights set out in the Convention, since to state otherwise, the situation would create a "*regrettable vacuum in the system of human rights protection in the territory in question by removing from individuals there the benefit of the Convention's fundamental safeguards and their right to call a High Contracting Party to account for violation of their rights in proceedings before the Court*"[24]

In the case of *Ilascu and others v.* Moldova and Russia, the Court examined the matter of jurisdiction of a Member State which had lost effective control over a separatist area and the extraterritorial jurisdiction exercised by another member state-Russia over the same separatist area.[25] On the one hand , the court stated that a state party, which has lost effective control over certain parts of its territory to a separatist forces, does not *cease* to have jurisdiction under article 1, however, the scope of jurisdiction is reduced to positive obligations.[26] On the other hand, the Court has expanded

21 *Ibid*

22 *Ibid* para 11-12

23 *Ibid* para 56

24 *Cyprus v Turkey*, ECtHR, App. no. 25781/94, 10 May 2001, para.78

25 *Ilaşcu and Others v. Moldova and Russia, ECtHR App.* no. 48787/99, 8 July, 2004

26 *Ibid* para. 333

components of control to involve not only military presence, but also *military, economic and political support* provided by the State to the local subordinate administration.[27]

B) State Agent Authority and control

The extraterritorial application of the Convention can also be engaged through "personal model." The notion is based on the idea that the respondent State can bringing the applicant within its *defacto* control through the actions of its agents outside its own territory.[28] The principle was applied by the Commission in Northern Cyprus cases, when the conflict with Turkey was in its initial stages and effective overall control test could not have been satisfied, but at the same time *authority over persons* was considered sufficient to engage Article.[29]

The Courts' positive development with respect to jurisdiction took a different and regrettable turn in the case of *Bankovic v Belgium and Others*.[30] The case concerned NATO member states air strikes at the building of Radio Televizije Srbije (RTS) in Belgrade. Six of the victims/their relatives, filed applications to Strasbourg against seventeen NATO member States on grounds of violations of article 2 (right to life) and 10 (freedom of expression). Adopting quite restrictive approach to the extraterritorial application of the European Convention, the Court held that individuals killed outside a State's territory through air bombing did not fall within the State's jurisdiction.[31] The decision is heavily cited in case of *Georgia v. Russia (II)* and hence it is important to outline the primary tests established therein.

First, the court establishing a closed list of exceptions under which the extraterritorial jurisdiction of a state can be engaged.[32] In particular, the court has stated that extraterritorial jurisdiction is engaged: "*when the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government*."[33] The court introduced the new criteria in the assessment of effective control. Namely, the State should also exercise *"all or some of the public powers"* normally exercised by local Government. The similar criteria was never employed to assess the effective con-

27 *Ibid* at para 392-393

28 M. Milanovic, *Extraterritorial Application of Human Rights Treaties: Law*, Principles and Policy, Oxford University Press, Oxford, 2011, p.173

29 *Cyprus v Turkey,* ECommHR (admissibility decision) Appl. no. 8007/77, 10 julY 1978, para.8

30 *Banković and Others v. Belgium and 16 other Contracting States*, ECtHR 12 December 2001, Appl. no. 52207/99

31 *Ibid* paras-80-82

32 Ress, G., *"The jurisdiction of the European Court of Human Rights: The Bankovic case"* in Italian Yearbook of International law, 2002, p. 62.

33 *Banković and Others v. Belgium and 16 other Contracting States*, ECtHR 12 December 2001, Appl. no. 52207/99 para. 71

trol of Turkey over Northern Cyprus. Applying this interpretation to the facts of the case, the court has concluded that bombing missions could not be treated as giving rise to effective control by military forces over that territory.[34]

Secondly, the court altogether has rejected the "*divided and tailored"* approach. The applicants suggested that the positive obligation under Article 1 be proportionate to the level of control exercised. Basing their argument on the *Cyprus v Turkey* case, the applicants argued that if Turkey as the state having effective overall control was obliged to secure the entire rage of Convention rights, in the *Bankovic* case the respondent States would have obligation to secure at least those rights which were in their control in the actual situation. The Court's "all-or-nothing" approach is troublesome since it states that the degree of control over a territory has to be such that either all Convention rights are applied, or no guarantees at all are available.[35] The approach also contradicts findings in *Ilascu* case (discussed above) in which the Court held that States were still obliged to fulfil some positive obligations proportional to their level of control.[36]

Lastly, to reason its rejection on admissibility the court has introduced novel *espace juridique* notion. In particular, court interpreted ECHR as regional multilateral treaty, operating in an essentially regional context and notably in the legal space (*éspace juridique*) of the Contracting States, thus limiting jurisdictional link to situations where the forces operate within the space of another State party.[37] It is the latter point that has received great criticism mainly for its incompatibility with the principle of universality of human rights. As it was claimed by many authors the Court has conceded to policy driven consideration and post 9/11 context of the time.[38]

In the following years the Court continuously attempted to backtrack the damage done by the restrictive and vague definitions given in the *Bankovic* judgement. In the case of *Issa v. Turkey* decided shortly after the former case, the court has asserted different definition of effective control. Namely, the one encompassing *"State's authority and control through its agents operating – whether lawfully or unlawfully."*[39] Moreover, the claim that a state is bound by the Convention wherever it acts, and its obligations abroad are no different from its obligations at home, are radically contradictory to the notion of *éspace juridique* applied above.[40]

34 *Ibid* at para. 82

35 Ibid at paras. 71-75; Alex Conte, *Human Rights Beyond Borders: A New Era in Human Rights Accountability for Transnational Counter-Terrorism Operations",* Journal of Conflict & Security Law , Vol. 18, No. 2 (2013), pp. 233-258

36 *Ilaşcu and Others v. Moldova and Russia, ECtHR App.* no. 48787/99, 8 July, 2004, para. 318

37 *Banković and Others v. Belgium and 16 other Contracting States*, ECtHR 12 December 2001, Appl. no. 52207/99 para. 80

38 Marko Milanovic, *Al-Skeini and Al-Jedda in Strasbourg*, The European Journal of International Law Vol. 23 no. 1, 2012; Wilde*, Triggering State Obligations Extraterritorially: The Spatial Test in Certain Human Rights Treaties'*, 40 Israel L Rev (2007) 503.

39 Issa v. Turkey, ECtHR, App. No 31821/96, 16 November 2004, para. 71

40 Ibid; Sarah Miller, *Revisiting Extraterritorial Jurisdiction: A territorial Justification for Extraterritorial Jurisdiction under the European Convention,* The European Journal of International Law Vol. 20 no. 4, 2010, 1228

Furthermore, the case of *Öcalan v Turkey* appears to broaden the scope of Article 1 to almost any instance where a state exercises authority or control over an individual outside its own territory in a way which engaged Convention rights. The applicant in the present case had been arrested by Kenyan officials and, in the international zone of Nairobi airport, was handed over to members of the Turkish security service. What is more important, the jurisdiction in this case was spontaneously engaged *"directly after being handed over to the Turkish officials by the Kenyan officials."*[41]

While the instances of arrest or the physical custody over individuals might seem an easier to link with the concept of *"state agent authority*" the Court has not shied away to establish applicability of the convention in cases that do not involve direct contact. In *Pad and others v. Turkey*, the applicants were Iranian nationals living close to the Turkish border. They were killed by a Turkish helicopter. Applying *Issa* standards, the Chamber held them to have been within Turkey's jurisdiction under the "state agent authority", regardless of on which side of the border the deaths took place.[42]

Similarly, the case of *Andreou v Turkey,* involved shooting and injuring an applicant by Turkish Army forces while she had been standing outside the UN buffer zone and in the area which was close to the Greek-Cypriot checkpoint. The court unequivocally admitted that: *""In these circumstances, even though the applicant sustained her injuries in territory over which Turkey exercised no control, the opening of fire on the crowd from close range, which was the direct and immediate cause of those injuries, was such that the applicant must be regarded as 'within [the] jurisdiction' of Turkey"*[43]

Despite the wide array of expansive case-law, it was still not a decade after *Bankovic* that its legacy could be said to be overturned or at least mitigated in the case of *Al-Skeini and others v. UK*.[44] The case concerned the deaths of six Iraqis as a result of British troops involvement in Basra region in southern Iraq. At the outset the Court first outlined the two main strands of jurisdiction: special and personal. It has classified personal or *"state agent authority and control"* into three categories:

- Acts of diplomatic and consular agents present on foreign territory-through these agents exert authority and control over others;[45]
- On the *"consent, invitation or acquiescence"* of the government of a foreign territory, a contracting State *"exercises all or some of the public powers"*[46]

41 *Öcalan v Turkey, ECtHR, App. No.* 46221/99, 12 May 2005, para. 91

42 *Pad and others v. Turkey,* ECtHR, App. No. 60167/00, 28 June 2007, paras 53-54;

43 *Andreou v. Turkey*, ECtHR, App. no. 45653/99, 3 June 2008;

44 *Al-Skeini and others v. The United Kingdom,* ECtHR, App. no.55721/07, 7 July, 2011

45 Ibid at para 134

46 Ibid at para. 135

- The use of force by a State's agents operating outside member state's territory, bringing the individual under their control[47]

The court has also referred to the "exercise of physical power and control over the person in question" as the test of authority. Another important divergence from the *Bankovic* relates to the possibility of "dividing and tailoring" rights. The court has stated that when state through its agents exercises control and authority over an individual it has an obligation to secure rights "that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be "divided and tailored."[48] Most importantly, the court has clearly changed the notion of "European legal space" when rejecting that the obligations under the Convention cannot spread beyond the territories of member states of the Council of Europe.[49] Interestingly enough, the Court applied a *personal* model of jurisdiction to the *killing* of applicants, but it did so on an *exceptional basis*, recalling the principle of "public power" which it established to had been practised by the UK. As Milanovic correctly pointed out despite its progress the judgement did not completely erase *Bankovic's* ambiguity, since the ability to kill is 'authority and control' over the individual if the state has public powers, however killing might not be authority and control if the state is merely firing missiles from an aircraft.[50]

Overall it can be said that ECtHR has thus far, developed a practice that is occasionally straightforward and frequently quite controversial. Regardless, over the last decade the Court has put substantial efforts to expand the notion of jurisdiction and interpret it in line with universal nature of human rights. Drawing on this precedents, some principles can still be carved out: first, the jurisdiction is primarily viewed as territorial, secondly the extraterritorial application of convention can be engaged through *effective overall control* of the territory or *state agent authority* over a person. The former can be exercised by direct involvement or through military, economic and political support and the latter is engaged the when the authority exercises physical power and control over the persons.

47 Ibid at para. 136

48 Ibid at paras 136-137.

49 Ibid at para. 142

50 Marko Milanovic, *Al-Skeini and Al-Jedda in Strasbourg*, The European Journal of International Law Vol. 23 no. 1, 2012, 130

II. GEORGIA V. RUSSIA (II) IN FRONT OF THE COURT

A) Relevant Facts of the case

Georgia appealed ECtHR on August 11, 2008, a day before the EU-mediated six-point ceasefire agreement was signed with Russia in an attempt to stop massive invasion and gross ongoing violation of Human rights on its territory. Even though the formal application that followed in February 2009 alleged violation of eight rights guaranteed under the Convention, the one and the most important question from the purely legal perspective placed in front of the court was that of jurisdiction. Namely, *whether or not Russia had a jurisdiction over the human rights violations that occurred prior, during and immediately after the international armed conflict?* Therefore, the analysis below will be limited to the subject of jurisdiction in the present case.

At the outset, the applicant state argued that the violations of the Convention of which they complained fell within the jurisdiction of the Russian Federation. Firstly, prior to the conflict, the Russian Federation had already controlled the majority of those regions, both directly, through its armed forces, and indirectly, by controlling and supporting the *de facto* South Ossetian and Abkhazian authorities, moreover, during the 7-8 August and 22 August 2008 the Russian forces had taken control over the remaining parts of South Ossetia and Abkhazia. Secondly, the applicant considered that the actions of Russian federation should be alternatively or cumulatively considered as exercise of effective control over territory and State agent authority engaged on account of the acts and omissions of its armed forces and separatist groups.[51] It shall be specifically emphasized that the applicant state also explicitly requested the Court to take into account the jurisdictional situation affecting South Ossetia and Abkhazia prior to the outbreak of the active phase of the hostilities while applying the principle of extraterritoriality.[52]

According to the relevance evidence admitted by the court as guiding in its decision, long before the actual outbreak of conflict Russia *"was promoting progressive annexation of Abkhazia and South Ossetia by integrating these territories into its economic, legal and security space*."[53] In particular, active "passportisation" process for the residents of these regions started years before the outbreak of conflict. In addition, as affirmed by the EU Independent fact-finding mission, the separatist governments and security forces were staffed by Russian officials: *"Russia appointed its former civilian and military leaders to serve in key posts in Abkhazia and especially in South Ossetia, including the*

51 *Georgia v. Russia (II),* ECtHR, App. No. 38263/08, 21 January 2021, para.78

52 *Georgia v. Russia (II),* Partly Dissenting opinion of judge Chanturia, ECtHR, App. No. 38263/08, 21 January 2021, para.35

53 Independent International Fact-Finding Mission on the Conflict in Georgia Report, The Council of the European Union 2009, Volume II, pp. 18-19

de facto Defence Ministers of Abkhazia (Sultan Sosnaliev) and South Ossetia (Anatoly Barankevich) and the de facto Chief of the Abkhaz General Staff (LtGen Gennadi Zaytsev).”[54]

Based on these mounting evidence the court in paragraph 168 clearly indicates its position by affirming the “*pre-existing relationship of subordination between the separatist entities and the Russian Federation, which lasted throughout the active phase of the hostilities and after the cessation of hostilities.”*

Another aspect of evidentiary materials concerns the very “phase of hostilities”, level of control of the military operations and dates that will later be proved to be important. The court has established that the actual hostilities commenced on 7th of August 2008. It is also affirmed by the court that within next four days in total 25 000 - 30 000 Russian troops were on the ground in Georgia, with more than 1 200 pieces of armour and heavy artillery.[55]

By 10 August 2008 Georgian forces withdrew not only from Tskhinvali region but also from Gori (undisputed Georgian territory). At the same time, the mounting evidence, satellite images submitted to the court and witnesses questioned all show that by 10 of August Russian ground forces controlled entirety of ethnically Georgian villages. American Association for the Advancement of Science (AAAS) report as well as Witness 32 employee of the organization, indicated that the most damage sustained by Georgian villages pre-10 August 2008 was caused by shelling whereas after the 10 August till 19 August 2008, the Georgian villages have been burned to the ground.[56] In total, during the period of 8-12 August 2008 alone there had been more than 75 aerial attacks on Georgian territory by the Russian Federation, as well as destruction of property and capture of civilian population.

B) Finding of the Court

At the outset the Court the court decided to divide the case in two parts. Namely the period between 8-12 August was labeled as “active phase of hostilities” and the period after 12th as the continuous occupation. Applying the spatial jurisdiction, the court had no difficulty finding a jurisdiction of Russian federation in the occupation phase, however it is the “active hostilities” part that is reason of confusion and chaos. The court essentially made three separate but interconnected findings:

1. *It lacked jurisdiction whether personal or special to assess violation of rights during the active phase of hostilities;*

54 Ibid

55 Ibid at p. 215-217

56 *Georgia v. Russia (II),* ECtHR, App. No. 38263/08, 21 January 2021, paras: 190-193

2. *It had jurisdiction to assess the rights of civilians and prisoners of war(PoW) taken during the active phase;*
3. *It had jurisdiction to establish that Russia failed to comply with procedural limb of Article 2 even with respect to period of 8-12 August;*

These findings on the surface do indeed look inconsistent and contradictory, however the Court tries its best to justify the expansion of jurisdiction either by referring to civilians *"mostly"* being detained after hostilities ceased or that PoW were "*inter alia"* detained after 12 August.[57]These justifications imply that on the one hand the Court was cognizant how arbitrary and cruel it would look, if some PoWs/civilians would have had conventional protections and others not, while on the other hand it lacked any desire to expand jurisdiction over what it considered matters of active phase, *id est* International Humanitarian law. Even though a lot could be analyzed and assumed from the policy perspective of above arguments, it is far more essential to address the arguments or the lack of thereof in the judgement.

1. Division of phases

As mentioned above, even before answering the question of jurisdiction the court has divided the case among two phases. It has done so within two paragraphs (83-84) without giving any clear justification as towards the dates or the need to separate them artificially. It is indeed true that the ceasefire agreement was concluded on 12 August 2008, however this fact alone cannot be assumed to imply that it should be also the demarking line between active phase and occupation, since end of military actions from Georgian side does not mean that the International Armed conflict ceased to exist.[58]

In addition to being artificial, the division also contributed to assessment of a conflict within limited scope, that is looking at an effective control test only from 8 August 2008, while it is clear from the mounting evidence that the Russian involvement in these regions, their support towards separatist regimes legitimately raised questions of effective control. The court tries to address the issue by claiming that prior assessment of *"hostilities is immaterial in the present case, given that the majority of the fighting took place in areas which were previously under Georgian control"*[59] As correctly argued by the dissenting judge Chanturia, this approach precluded the Court from possi-

57 Ibid at paras: 239, 269;

58 Marko Milanovic, *Georgia v. Russia No. 2: The European Court's Resurrection of Bankovic in the Contexts of Chaos,* available at: https://www.ejiltalk.org/georgia-v-russia-no-2-the-european-courts-resurrection-of-bankovic-in-the-contexts-of-chaos/?fbclid=IwAR08olzOJrvwSh-dZusoXD0NQdx1qjbZt0Eec84r1ZEtjPZsvpgiz5JEoJ4

59 Georgia v. Russia (II), ECtHR, App. No. 38263/08, 21 January 2021, para.119

bility of assessing whether the "state agent authority" could be claimed over the separatist powers operating in Georgia far before the actual military intervention.[60]

Even if the commencement of the conflict was correctly chosen by the court, it is even more unclear why the court could not have looked at occupation phase from August 10, 2008? As mentioned above, the fact-finding mission, as well as satellite images and witness accounts clearly indicated that at least on 11August 2008 Russia had a total military control over conflict regions and buffer zones nearby, sufficient to bring individuals at least under *"state agent authority"* if not spatial. The military actions were not limited by aerial bombardments but rather included active military forces burning villages down to the ground, arresting civilians and conducting executions.

2. Context of International Armed Conflict and control test

The court has initially examined the possibility of establishing *spatial control* during the alleged active phase. In its assessment the court has categorically stated that: *"in the event of military operations – including, for example, armed attacks, bombing or shelling – carried out during an international armed conflict one cannot generally speak of "effective control" over an area."*[61] The approach is regrettable, since there might well be circumstances whereby control over an area is gradually established and hence it would have been better to apply " divided and tailored" approach. Parallels with the case of *Bankovic* would not be useful here, provided that the court in that case altogether rejected tailoring rights (the position which has been alter later) and the fact that the armed conflict has arisen within the *éspace juridique* of the two high contracting States.

The court later proceeded to explore possibility of applying "*state agent authority"* test with respect to bombing, shelling, artillery fire. It is here where the court disregarding its previous case-law takes the argument of "chaos" to the further farthest extremes claiming: *"fighting between enemy military forces seeking to establish control over an area in a context of chaos not only means that there is no "effective control" over an area as indicated above (see paragraph 126 above), but also excludes any form of "State agent authority and control" over individuals."*[62]

Affirming that state agent control over individuals is excluded in every case of international armed conflict is contradicted by the very same court when in cases originating from Iraq court rejected the similar argument of the UK government.[63] At the same time, the court in the present

60 Ibid at Partly Dissenting opinion of judge Chanturia, para.34

61 Ibid at para. 126

62 Ibid at para. 137

63 Hellen Duffy, Georgia v. Russia: Jurisdiction, Chaos and Conflict at the European Court of Human Rights, available at: https://www.justsecurity.org/74465/georgia-v-russia-jurisdiction-chaos-and-conflict-at-the-european-court-of-human-rights/

case still managed to apply convention guarantees to active phase in instances of arrest and obligation to investigate.

The case-law developed *post-Bankovic* indicates that the decisive factor in establishing State agent authority and control was *"the exercise of physical power and control over the person in question"*[64] Moreover, the court has established jurisdiction even in cases going clearly beyond the physical power and control. In case of *Andreou*,(discussed in part II) the applicant was shot while standing completely outside Turkish-occupied territory, however the court still established that "the opening of fire on the crowd from close range, which was the direct and immediate cause of those injuries" was enough to bring applicant under Turkish control.[65] As well as case of *Pad* where the fire from helicopter was considered sufficient to engage jurisdiction.[66]

The court tries to justify this divergence by claiming that the cases above *"concerned isolated and specific acts involving an element of proximity."*[67] Interpreting the extraterritoriality in this way would essentially mean that killing of individual outside state territory even from the helicopter would be considered sufficient but if we increase the scale and number of affected individuals the court would have no role?!

As correctly mentioned by multiple dissenting judges the court also failed to examine separately the question of "power" of a state exercises while making various military decisions.[68] In particular, classical theory of the State, one of the forms of the exercise of State power is the so-called "military power" or "military sovereignty." Hence, it would have been logical for the court to explore whether the very fact of pre-planned extraterritorial actions (as it is proved in this case) involving the use of instruments of State power creates a jurisdictional link.

In another attempt to justify restrictive approach the court refers to Article 15 of the Convention and claims that non-derogation from the state parties during International Armed Conflict somehow implies no jurisdiction.[69] This is rather illogical assumption given that States might have wide array of considerations giving them incentive not to derogate. It is even less appealing when compared against the findings of the court in case of *Hassan v. UK*, whereby the lack of official derogation did not hinder the establishment of the extraterritorial jurisdiction in Iraq.[70]

The court also seems to suggest that active hostilities "*situations are predominantly regulated by legal norms other than those of the Convention* (specifically, international humanitarian law or

64 Al-Skeini and others v. United Kingdom, ECtHR, App. No. 55721/07, 7 July 2011, para.136

65 *Andreou v. Turkey*, ECtHR, App. no. 45653/99, 3 June 2008 para.11

66 *Pad and others v. Turkey,* ECtHR, App. No. 60167/00, 28 June 2007, para.54

67 Georgia v. Russia (II), ECtHR, App. No. 38263/08, 21 January 2021, para. 132

68 Ibid dissenting Judges Yudkivska, Wojtyczek andChanturia p. 198

69 Ibid at para. 139

70 *Hassan v. the United Kingdom, ECtHR*, App. No. 29750/09, ECHR 2014, paras: 74-80

the law of armed conflict)" as a bar to adjudication of the present case. However, in other passages of the case the court underlines that "Convention must be interpreted in harmony" with rules of IHL, the position also clearly established in *Hassan.* Therefore, had the court established the jurisdiction it could very well apply article 2 either alone or where necessary in the light of international humanitarian law (*jus in bello*).[71]

Regardless of abovementioned, probably one of the most regrettable paragraph of the decision relates to the court's technical difficulties argument. In particular, after recalling suffering of the victims and the fact that its interpretation of the notion of "jurisdiction" *may seem unsatisfactory to them, the court claims that: "having regard in particular to the large number of alleged victims and contested incidents, the magnitude of the evidence produced, the difficulty in establishing the relevant circumstances…* the Court considers that it is not in a position to develop its case-law beyond the understanding of the notion of "jurisdiction" as established to date." [72] Not only is the view insensitive to the 12 year struggle of war victims but is also factually wrong. The court had previously dealt with high number of victims within the scope of military intervention in case of *Cyprus v. Turkey* or adjudicated complicated CIA rendition cases. Therefore, the complexity of the case should not as such been referred by the court as a legitimate argument to reject jurisdiction.

CONCLUDING REMARKS

Article 1 jurisdiction reveals itself to be highly complex, operating more clearly in territorial contexts, while its extraterritorial application is subject to courts' interpretations evolving gradually and consistent with its "living instrument" ideology. At the same time, the expansion of jurisdictional scope did not rely on *travaux préparatoires but rather on two initial arguments.* First, it has asserted that the convention provides a regional framework of European Public order ensuring protection and collective enforcement. Second, it has prohibited any "*vaccum in the human rights protection" which* would be inconsistent with the aims and fundamental principles of Convention.

The term "jurisdiction" in the Convention therefore reflects the scope of public power effectively exercised by the State which can take form of "control over a territory" or "control over persons." The former was established over an area, when the control was established either directly through State's armed forces or indirectly through a subordinate local administration. The "state agent au-

71 *Georgia v. Russia (II),* ECtHR, App. No. 38263/08, 21 January 2021, Jiont Partly dissenting Opinion of Judges Yudkivska, Pinto de Alburquerque and Chanturia

72 Ibid at para. 141

thority" was gradually extended to include cases of people taken directly into custody, to shots fired at UN buffer zones, territories of another state, or from a helicopter. The process was not usually straightforward or the control test always clear, however it was only the case of *Bankovic* so far that accumulated great deal of criticism towards court's overly restrictive approach, inconsistent with its role of guarantor of peace and human rights.

The case of Georgia v. Russia (II) marked the first time after *Bankovic* the court was asked to examine the question of jurisdiction in relation to military operations in the context of International armed conflict and thus given a chance to revisit the case and possibly rectify its shortcomings. While the case is a historic win for Georgia and the victims of war in many respects and the work of the court is commendable, the same is not true with respect to active phase of hostilities. The entire spirit of the judgement indicates that the Court does not want to deal with cases of International armed conflict. The arguments provided are especially troublesome when viewed in conjunction with court's previous case law. In particular, it seems that the Court denies jurisdiction with respect to of military control-killings via bombs, but accepts detention performed in the same timeframe, it establishes jurisdiction in case of close-range and isolated fires, but seems to be confused with large-scale operations resulting in even more deaths. What is most regrettable in this case is the fact that, the Court failed to fulfil its "essential protective purpose" by creating a "vacuum of protection" within the legal space of Convention, the very result it was created to avoid.

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