Torn Between being "Heartless" and being "Weak": Dilemma of Constitutional Courts about Justiciability of Socioeconomic Rights

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Abstract

Socioeconomic rights have not been given much attention in the case law of the Constitutional Court of Georgia as well as in the Georgian scholarly debate until now. After years of marginalizing these rights from either political or judicial agenda, there are two pending cases before the Constitutional Court, concerning these rights that needs the attention. The aim of this thesis to explore the justiciability of socioeconomic rights which has been a matter of ongoing debate on international level for years now and find possible solutions for the Constitutional Court both, from theoretical and practical perspectives. Current Georgian constitutional reality will be assessed with reference to the examples of South Africa and Germany. The main goal is to find a proper way of balancing political and judicial powers concerning socioeconomic rights, which is the central concern in this debate. The finding of this paper will offer guidance for the Constitutional Court of Georgia to take appropriate steps towards successful adjudication on socioeconomic rights and let them become the decent part of Georgian constitutional order.

List of Abbreviations

CCG – The Constitutional Court of Georgia

CESCR - The Committee on Economic, Social and Cultural Rights

ECHR –European Convention of Human rights

ECtHR –European Court of Human Rights

FCCG – The Federal Constitutional Court of Germany

ICCPR – International Covenant on Civil and Political Rights

ICESCR –International Covenant on Economic, Social and Cultural Rights

SACC – The Constitutional Court of South Africa

UDHR –Universal Declaration of Human Rights

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Introduction

Since their appearance in Universal Declaration of Human Rights (UDHR), the nature of socioeconomic rights as well as questions related to their justiciability have been the matter of ongoing debate either on international or domestic level. First step towards emerging such debate was two following separate UN covenants about civil and political rights, on the one hand, and social, economic and political rights, on the other hand, with two separate institutions with different mechanisms of their enforcement. Even though UDHR does not indicate any such distinction between these two set of rights and after decades there is a widely accepted opinion that this decision had more political than legal backgrounds, socioeconomic rights have still been labeled as "second generation"[1] rights and have been perceived more as "aspirations"[2] for governments, than actual individual rights since then. Typical arguments against granting these rights legally binding status have been relative vagueness of terms they are formulated with and positive obligations of states with financial implications, which presumably makes them more of a matter of legislative and executive policy-making, than the subject of judicial interpretation and enforcement. To put it otherwise, there are serious concerns about the role of the judiciary in traditional understanding of the separation of powers doctrine.

Therefore, it is not surprising that struggle on international level has found its way in domestic jurisdictions of State parties and resulted either in complete rejection of socioeconomic rights or rather cautious and even "hostile" attitude towards them by prescribing such rights as mere

[1] The notion of three human rights "generations" was proposed by French Lawyer Karel Vasak, See Ssenyonjo, Manisuli. Economic, social and cultural rights in international law. *Oxford: Portland, Or.: Hart*, 2016, p. 14

[2] Wiles, Ellen. Aspirational Principles or Enforceable Rights - The Future for Socio-Economic Rights in National Law. *American University International Law Review*, Vol. 22, Issue 1, pp. 35-64, 2006.

"prescriptions for … [governmental] action".[3] Only small minority of countries where brave enough to put socioeconomic rights in their constitutions and make them justiciable.

Eventually, the initial "name-calling phase" about the nature of socioeconomic rights was followed by several steps taken forward in the debate over their justiciability.[4] Progression can clearly be seen in General Comments of the Committee of Economic Social and Cultural Rights (CESCR), which grew more and more adamant during over years. While General Comment No. 3 emphasizes on satisfying "minimum core obligations" from State parties,[5] the General Comment No. 9 speaks about "some significant justiciable dimensions" of socioeconomic rights. As for concerns about financial implications and institutional-competence of courts, CESCR acknowledged that they are already "involved in a considerable range of matters which have important resource implications".[6]

Unsurprisingly, progression on international level also had impact on domestic jurisdictions. "The post-Cold War wave of democratization and constitutionalisation …led to the cataloguing of many justiciable economic, social and cultural rights in many constitutions".[7] It is true that above-mentioned cautious and hostile attitude was still hanging over such progression, in some jurisdictions courts nevertheless found a way to put socioeconomic rights in the constitutional agenda, either by enforcing them as individual rights or by adopting broad interpretations of first generation rights in conjunction with constitutional principles, like Social State. Yet for most jurisdictions this "ancient" struggle is still "premature to assume that social rights have

[3]Langford, Malcolm. Social rights jurisprudence: emerging trends in international and comparative law. *Cambridge University Press*, 2008, p. 9
[4] Langford (n. 3) p. ix
[5] *Ibid*. p. xi
[6] *Ibid*. p. xii
[7] *Ibid*, p. 8

come fully at age in terms of justiciability"[8] as courts still have somewhat ambivalent attitude about this matter.

Georgia represents an interesting example for illustrating the struggle and uncertainty about socioeconomic rights. Even though, the Constitution of Georgia, as supreme laws of many post-soviet countries, prescribes several socioeconomic rights in its human rights chapter, the Constitutional Court of Georgia (CCG) has managed to avoid adjudicating on substantive dimension of these rights until now. Majority of cases concerning socioeconomic rights have been decided on equality claims. However, this reality is going to change soon, since there are two similar pending cases – *Chitaia*[9] and *Tandashvili*[10] - before the Court about social security claims of one of the most vulnerable part of the Georgian society – homeless people. Early signs of the assumption that the CCG is struggling are preliminary decisions on admissibility (Recording Notices). These cases were not only distributed to two different chambers of the Court, but they were adopted with different constitutional human rights provisions to decide on merits. It is apparent that the CCG must define both, the nature and substantive scope of such socioeconomic rights and the appropriate standard of judicial review for them. Therefore, the purpose of this thesis is to examine the addressed issue from theoretical and practical perspectives and conclude, what can be the most suitable solutions for the Constitutional Court of Georgia to handle these pending cases and define comprehensive standards for future ones.

Since the debate about socioeconomic rights has more or less moved from the initial step of name-calling towards justiciability issues, different possible theoretical solutions have emerged

[8] *Ibid* p. xiii
[9] Recording Notice N1/6/854 of the Constitutional Court of Georgia of February 10, 2017 on the case of *"Citizen of Georgia Vladimer Chitaia v. The Parliament of Georgia, the Government of Georgia, Ministry of Labour Health and Social Affairs of Georgia".*
[10] Recording Notice N2/1/663 of the Constitutional Court of Georgia of July 7, 2017 on the case of *"Citizen of Georgia Tamar Tandashvili v. The Government of Georgia"*.

among scholars. Many of them are grouped under the theory of "cooperative constitutionalism",[11] which aims to reexamine the traditional strong role of the courts while adjudicating on human rights issues and tries to provide reasonable solutions on "how [socioeconomic rights] can be consistently adjudicated with measure of integrity, respecting the institutional nature of adjudicatory bodies and the call for justice inherent in human rights"[12] in general. One such example is taxonomy of "strong-form v. weak-form" judicial review, developed by Mark Tushnet.[13] He argues for weakening powers of the courts concerning normative finality of their decisions and aims to avoid inherent tensions between democratic self-governance and judicial supremacy by initiating dialogue between courts and political government on constitutional matters. Another theory of cooperative constitutionalism is the theory of "constitutional dialogue", developed by Rosalind Dixon. She further defines and adjusts Tushnet's concept to positive dimension of socioeconomic rights and argues that "courts have a much greater capacity, even a responsibility" to respond various possible shortcomings of political process and give voice to vulnerable groups who are most in need of state's social assistance. The possible solution can be either strengthening substantive rights or provide strong remedies which ultimately depends on particular jurisdiction and circumstances of each case. Therefore, this following thesis will examine theoretical arguments pro and against active judicial role towards socioeconomic rights and whether suggested theories are suitable for Georgian reality.[14]

As for practical solutions, South Africa and Germany are good examples for comparative analysis this thesis aims to engage in. While both jurisdictions respond to above-mentioned

[11] Dixon, Rosalind, Creating Dialogue about Socioeconomic Rights: Strong-Form versus Weak-Form Judicial Review Revisited. *International Journal of Constitutional Law* 5, no. 3, pp: 391-418, 2007.
[12]Langford (n. 3) p.43
[13] Tushnet, Mark V. Weak courts, strong rights: judicial review and social welfare rights in comparative constitutional law. *Princeton University Press*, 2008.
[14] Dixon (n. 11)

suggested theoretical solutions, the South African Constitutional Court (SACC) and the Federal Constitutional Court of Germany (FCCG) adopted rather different solutions for both issues currently standing in front of the CCG: defining the constitutional scope of socioeconomic rights and adopting appropriate standard of judicial review. While relevant South African experience is remarkable as one of the leading examples of successful adjudication on socioeconomic rights, German example will be equally interesting due to apparent textual and doctrinal similarities with Georgian constitutional order.

The first chapter will define the notion of socioeconomic rights and examine several scholarly arguments against granting these rights full and individual human rights status, which are either historically and politically motivated or slightly exaggerated. It will also briefly cover international standards towards these rights based on the main international document - the International Covenant on Economic, Social and Cultural Rights and General Comments provided by the CESCR. Last, this chapter discuss the importance of granting socioeconomic rights the highest possible protection in domestic legal order by enshrining them in constitutions and provide comparative picture about whether and how these rights are defined by the constitutions of South Africa, Germany and Georgia.

The second chapter will try to address the justiciability concerns of socioeconomic rights. It will critically analyze main pro and against arguments towards the addressed issue to demonstrate that fear of active judicial role on this matter is mainly based on several assumptions, which needs to be reexamined. Consequently, the chapter will further inform the reader about above-mentioned theories of cooperative constitutionalism to assess how the Constitutional Court of Georgia can use these theoretical solutions.

The third and the last chapter will provide the comparative analysis of South African, German and Georgian practical experience. Several landmark cases of the SACC and the FCCG will be

reexamined to provide different but equally interesting answers to the main questions of this thesis. Last, this chapter will expose the weaknesses of the constitutional system and case-law (or lack) of Georgia and suggest possible solutions for them.

In conclusion, I will the suitable standard for judicial review of current pending cases before the Constitutional Court of Georgia, which will hopefully be useful for future challenges also. Last, I will summarize the main arguments that endorses the more active role of the Court concerning socioeconomic troubles of Georgian society.

1. Socioeconomic Rights

Looking at the scholar work about socioeconomic rights it is to identify that there is no unified opinion about nature of these rights. Therefore, before analyzing the problem of justiciability of socioeconomic rights, the first major step obviously is to discuss whether they are individual rights, or just aspirations and goals for the governments, what are the possible grounds behind socioeconomic rights as legally binding notions. The last question is particularly important for justiciability problem because courts will primarily accept legal arguments than just moral ones, which obviously exist and are strong.

Moreover, as it is apparent from the title of this paper, the focus is directed to constitutionally protected socioeconomic rights and their enforceability through constitutional courts. Therefore, in the second section of this chapter I will look at main arguments for constitutionalizing of these rights and argue what difference it makes. I will also look at constitutions of South Africa, Germany and Georgia, as part of this comparative analysis is to define whether and to what extent they contain rights of socioeconomic nature, what are the precise wordings and interpretations given in the relevant case law.

1.1. Defining Socioeconomic Rights

There are different theories and concepts about what human rights are, where they come from, what can be the possible grounds for them as individual rights and how they can/must be realized. Depends on what particular set of human rights we are talking about one can discuss different underlying legal and political philosophies such as Natural Law, Marxism, Legal Positivism, Social Contract, Equality or even Human Dignity. Therefore, it is not surprising that there are no definite answers about above-mentioned questions. Dembour suggests that nature of human rights can be regarded from different perspectives based on different "schools of thoughts". For example, "natural scholars" coming from Lockean liberal philosophy regard

rights as "given", while "deliberative scholars" see them as rights "agreed upon", moreover, people who look at human rights as fruits of French and American revolutions can call them rights as "fought for".[15] But perhaps the most prevailing justification, especially on international level, is that human rights come from the notion of human dignity inherent to an individual by virtue that he/she is a human being.[16] They are considered "as fundamental, inalienable and universal entitlements belonging to individuals and, under certain circumstances, groups of individuals and communities. Human rights are fundamental as they are inherent to the human person".[17]

Interesting fact is that when we are speaking about human rights as fundamental criteria for human dignity, we primarily look at UDHR - first and the most important international treaty about human rights which recognizes and guarantees all rights whether they are called civil and political or social economic and cultural, because human beings are "born free and equal in dignity and rights" and are entitled to all these rights as "the foundation of freedom, justice and peace in the world".[18] If these bold words are not just words and they have to be taken seriously, why is it that we still have apparent division and even some kind of hierarchy between human rights both on international and national level? Why is that some jurisdictions and even scholars still have difficulties to recognize socioeconomic rights as individual rights and not aspirations or future goals for governments?

Besides historical reasons and different timelines of their development, the leading scholar argument about division between civil and political rights, on the one hand, and socioeconomic

[15] Dembour, Marie-Bénédicte. What Are Human Rights? Four Schools of Thought. *Human Rights Quarterly* 32, no. 1 (2010): 1-20.
[16] Preambles of ICESCR and ICCPR
[17] See CESCR, General Comment 17: The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author, par. 1-2
[18] Preamble and Article 1 of UDHR

rights, on the other hand, is broadly accepted negative/positive rights dichotomy. If we accept D'amato's view that legally guaranteed and enforceable human rights must have two main features: entitlement to the particular right for holder and meeting obligation for the state as obligation holder,[19] than we can see what this so-called difference between civil and political rights as "negative" rights and socioeconomic rights as "positive" ones is about. Human rights are traditionally being viewed as enforceable against the state therefore this relationship is deemed as "vertical" as it illustrates "unequal power dynamics" between individual and state[20].But what is the nature of these relationships, what kind of state obligations we are talking about, ultimately determines whether a particular right should be deemed negative or positive one.

As Henry Shue argues, state has three sets of duties, namely to "to respect, protect and fulfil" all human rights including socioeconomic ones.[21] While it is considered that first two obligations are the same for both sets of rights, the obligation to "fulfill" creates the ultimate difference for negative/positive rights dichotomy. Civil and political rights are considered both as "first generation" and "negative rights" since they come from 17th -18th centuries period, associated with revolutions and mainly demand life spheres free from state intervention like religion, speech, physical liberty and integrity, association and etc. While socioeconomic rights are called "second generation" and "positive rights" as they were promoted later through struggles and movements for welfare. They are called as "rights to" state contrary to the "rights from" the state and are viewed as demanding active involvement from the state to guarantee health, education and basic social security such as food, water and shelter.[22] This highly

[19] D'Amato, Anthony. The Concept of Human Rights in International Law. *Columbia Law Review* 82, no. 6 (1982): 1110-159.
[20] Manisuli (n. 1) p. 24
[21] *Ibid*. p.31
[22] *Ibid*. p. 15.

problematic hierarchy led to dividing the whole set of rights enshrined in UDHR into two groups either on international level or in domestic jurisdictions. It also defined the belief that "negative" rights are justiciable and immediately enforceable since all the state has to do is not to interfere, while "positive" rights, which require positive actions from the state they are subject to "progressive realization" only, that they are more "programmatic objectives rather than legal obligations that are justiciable".[23]

CCG's Recording Notice on *Tandashvili case* is good example and gives an interesting insight about how the court sees this above-mentioned dichotomy. Stressing on the difference between scopes of the right to life (Art. 15) and the right to minimum standard of living (Art. 32), the court declared that the main difference between these rights concerns the mechanisms and difficulties of their fulfillment. While "the fundamental rights" (by which the court apparently means negative rights) are self-fulfilling and do not necessarily require active state intervention in financial meaning, socioeconomic rights are directly connected to the state resources. Therefore, their effective enforcement can be delayed in time or be so difficult that "it will eventually be pointless". This assumption for the court logically leads the ultimate conclusion that the Constitution must be "less demanding" towards the state when it comes to socioeconomic rights.[24]

It is obvious that, even though CCG did not refer to negative/positive rights dichotomy explicitly, stressing on the "self-fulfilling" nature of civil and political rights as the main source of difference proves where the court's mindset is. If something depends on state's good will, it is arguably more of a privilege than an individual, "fundamental human right", as the court calls it. Furthermore, elaborating on difficulties connected to allocating financial resources, it

[23] *Ibid*.
[24] *Tandashvili case (*n. 10) Par. 16-18

seems like CCG shares more counterarguments about granting socioeconomic rights the status of fundamental human rights, protected on the constitutional level than just negative/positive rights dichotomy. The counterargument about financial difficulties is not less popular among sceptics of socioeconomic rights along with other possible explanations about why these rights should enjoy their firmly granted "second-class status". However, as it is argued in the following paragraphs, these explanations need reexamination, which might lead to different conclusion than the one the CCG came up with.

First, creating two separate covenants in order to turn human rights guaranteed by UNHR into fully legally binding notions is still invoked as one of the major arguments against granting socioeconomic rights full legal status. However, interesting thing is that many scholars consider this decision not as the result of substantial differences between these two sets of rights but as the result of ideological differences and contrasting interests of the Cold War period between the West and the East.[25] Nevertheless, the ultimate outcome of this tension is that it had a spillover effect on domestic jurisdictions. It led to unfortunate practical reality where human rights discourse both on theoretical and practical level has evolved around civil and political rights when "social economic rights very much retain this second-class status"[26] since "[t]hey are [still] regarded with considerable suspicion and as problematic to implement as full legal rights"[27]. Even though the origins of such division bear more political rather that legal characteristics. Therefore, this argument is deemed too weak to justify the amount of suspicion and disregard social and economic rights have been receiving this whole period.

[25] See Manisuli (n.6) p. 16, also Barak-Erez, Daphne, and Aeyal M. Gross. Exploring social rights: between theory and practice. *Oxford; Portland, Or.: Hart*, 2007, p.4

[26] O'Connell, Paul. Vindicating socio-economic rights: international standards and comparative experiences. *Milton Park, Abingdon, Oxon; New York: Routledge,* 2012, p. 2

[27] Barak-Erez (n.25) p.4

Second, if we are considering human dignity and right to personal self-development as underlying philosophy according to which human rights, generally, "are based on and meant to assure the realization of human dignity",[28] it's simply hard to understand how civil and political rights deserve more attention comparing to socioeconomic rights. It is true, that looking at jurisdictions which guarantee human dignity on legal and even constitutional level, such as Germany and Georgia, all human rights are created around dignity as absolute right, even though it is difficult to understand what it requires in a substantive sense.[29] Moreover, some scholars suggest defining dignity as "intrinsic worth" – a value that each individual has simply because he is human,[30] a value that is a basis to personal autonomy and rationality and that requires certain essential guarantees to be fulfilled, whether they are protected by civil and political or socioeconomic rights. Therefore, if we argue that social and economic rights primarily are concerned with the substance of human life, with the very basic necessary for human well-being, it becomes very difficult to deny that socioeconomic rights are as essential part of human dignity as civil and political rights if not more.

Discussing the very essence of concerns that socioeconomic rights serve puts into light another argument for refusing to grant social and economic rights secondary status. Namely, it is argued that they are necessary preconditions of effective realization of other human rights. Of course, socioeconomic rights, just as the whole catalog of fundamental rights, are universal and can be enjoyed by every single member of the society, but as they are mainly focused to ensure the basic necessities for life, they are particularly relevant for the groups who are "marginalized

[28] Minkler, Lanse. The state of economic and social human rights: a global overview. *Cambridge University Press,* 2013, p.3

[29] Sajo even suggests two separate understandings of human dignity: i) "classical liberal dignity"; ii) "welfarist dignity" concerning to social and economic rights (*see* in Ghai, Yash P., Jill Cottrell, and András Sajó. Economic, social & cultural rights in practice: the role of judges in implementing economic, social and cultural rights. *London: Interights,* 2004, p.56)

[30] Gewirth, Alan. The Community of Rights. *University of Chicago Press,* 1996 cited in Minkler (n. 28) p. 6

and disadvantaged".[31] These groups lack capacities to maintain a decent standard of living and, as a result, lack substantive voice to actively participate in democratic and political process that can bring vital changes in their lives when "genuine representative society involves widespread participation as well as tolerance and compromise".[32] Therefore, it is at least doubtful to seriously speak about such "genuine representative society" when part of its members is primarily concerned with physical surviving. Marshall puts this argument perfectly by noting that "the right to freedom of speech has little substance if, due to a lack of education, people have nothing to say that is worth saying and no means of making themselves heard even if they say it". More interestingly, for Marshall, the main reason of this reality is not insufficient guarantees of civil and political rights, but insufficient recognition and lack of legal status of socioeconomic rights.[33]

Finally, as it was summed up in *Tandashvili case* by the CCG, skeptics of socioeconomic rights as individual rights are concerned about the question of financial resources and who should make the decision. This position itself is strongly tied to the negative/positive rights dichotomy and argues that issues concerning basic social security, health and education should be left to government as economic policy issues and not to human rights that could be enforced by the judiciary. To put it otherwise, for social issues with financial implications rights-based solution is not an answer. But if looking into the problem rather deeply, this argument becomes more and more exaggerated simple because implementation of both set of rights, be it negative or positive, involves positive state obligations as well as questions of resource allocation. Sustein gives an example about the right to private property which is "both created and protected by

[31] O'Connell (n. 26) p.5
[32] Schwartz, Herman. Do Social and Economic Rights belong in a Constitution? *The American University Journal of International Law & Policy*, Vol: 10, 1995, p.1233
[33] Discussed in Barak-Erez (n. 25) p. 6

law" and which requires mobilizing different kind of state resources either financial, administrative or human for effective protection.[34] Similarly, Gross goes for effective protection of freedom of speech by arguing that resource allocation is still needed for free expression of people's opinion through public demonstration (allocation of police resources), establishing and maintaining public media or other necessary measures.[35] Furthermore, while speaking about positive obligations for civil and political rights, case law of ECtHR can be used as an example. Article 2 of ECHR entails not only negative obligation of refraining from unlawful act from the state but also puts a positive obligation to take "appropriate steps" to protect lives of individuals. In some cases, taking "appropriate steps" could mean more than insuring public order by police or conducting effective investigation after tragic case, but also providing healthcare as basic minimum for life[36]. Considering these examples, it is justified to say that all rights are more or less "social by nature" in the sense that they exist in social context and in need of both passive and active involvement from the state even in the financial sense – "all rights cost money".[37] Therefore, the argument about resource allocation draws only artificial line between negative and positive rights that further leads to marginalization of the former both on international and national level.

In conclusion, it is apparent that most arguments against socioeconomic rights and their individual entitlements status are either the result of historical and political misunderstandings or are slightly exaggerated. The reality is that socioeconomic rights are as much needed for one's freedom and autonomy as civil and political rights. Their constant denial puts under question the whole idea of modern democratic society which strives for broad participation,

[34] Sunstein, Cass R. Why Does the American Constitution Lack Social and Economic Guarantees? *Syracuse Law Review* 56, no. 1, 2005, p.7
[35] Discussed in Barak-Erez (n. 25) p. 6
[36] LOPES DE SOUSA FERNANDES v. PORTUGAL (Application no. 56080/13), GC, 19 December 2017
[37] Barak-Erez (n.25) p. 8

tolerance and compromise and which not only values personal freedom but also admits individual as valuable for the society and in the society.

1.2. International Standards Concerning Socioeconomic Rights under the ICESCR

Minkler identifies human rights as "the realization of human dignity", "moral entitlements everyone has just because they are human" when speaking about history of recognizing human rights on international level[38]. However, as good as it sounds, calling human rights moral entitlements certainly is not enough when we speak about experiences and struggles of real life. Article 28 of UDHR level deals with the important obligation of states of creating "a social and international order in which the rights and freedoms …. Can be fully realized" which later was turned into system providing legal protection and support, converting these moral entitlements into enforceable legal rights[39].

The most important human rights treaty about socioeconomic rights on the international level is without the question - ICESCR. As it was mentioned above, after adopting UDHR, the next step was turning this set of human rights into legally binding obligations for State parties. However, after the initial decision of UN National Assembly about adopting a single document, the reality became rather complicated because of the tension between the West and the East. Therefore, the result was two separate covenants – ICCPR and ICESCR, adopted at the same time on December 16, 1966. While the former focused on civil and political rights, the latter became the most comprehensive and important document about social, economic and cultural

[38] Minkler (n. 28) p. 3
[39] Universal Declaration of Human Rights, 1948

rights. Nevertheless, unlike ICCPR, ICESCR lacked any enforcing mechanism until 1987, when the CESCR was established.

First, it must be emphasized that ICESCR, despite fierce opposition from the USA and unlike still ongoing debate about true nature of socioeconomic rights, declares these rights as "inalienable … of all members of the human family" which "derive from human dignity".[40] However, trouble comes with nature and wording of general state obligations that are prescribed in Articles 2-5. Since this chapter is mainly concentrated on defining socioeconomic rights from different angles, including theoretical and philosophical foundations, international and domestic level, I will concentrate on Article 2(1) of the ICESCR, which is essential for understanding and defining state obligations with respect to these rights. It is the most general legal obligation the ICESCR contains and it is formulated as follows:

> *"Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures"*[41]

Considering the suspicious and quite vague language of Article 2(1) and comparing it to states' obligations under ICCPR,[42]it is not surprising, that many states as well as scholars initially understood these obligations "merely aspirational".[43] However, the CESCR made considerable efforts through its General Comments and assessment of the state reports to define these

[40] Preamble of ICESCR
[41] Article 2(1) of ICESCR
[42] Article 2(1) of ICCPR provides that State parties should "respect" and "ensure" civil and political rights.
[43]Langford (n. 3) p. 482, *see also* O'Connell (n. 26) p. 31

controversial elements of Article 2(1) "so that rights protected by the ICESCR would become a tangible reality for those whom it was designed to benefit".[44]

The most important work of the CESCR concerning the state obligations under the Article 2(1) is General Comment No.3, which highly considers "Limburg Principles on the Implementation of the ICESCR" - the first comprehensive document about that matter, adopted in 1986. First thing the General Comment No.3 emphasizes is the dual obligation of states – "obligations of conduct and obligations of result".[45] It also affirms that despite notions of progressive realization and the limits of available resources, there are some obligations, which need immediate attention and action from the states, like non-discrimination provision guaranteed by Art. 2(2) of the Covenant.[46]

Another important component of General Comment No.3 that speaks about direct obligation the State parties should give special attention to, is the idea of "minimum core obligations". According to the CESCR, this means "minimum essential levels of each of the rights"[47]. If "a state party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, of the most basic form of education is, prima facie, failing to discharge its obligations under the Covenant.[48] The CESCR also insisted that this definition "shouldn't be misinterpreted as depriving the obligation of all meaningful content" but as "a necessary flexibility" to adjust the difficult reality of the world. Moreover, this part of obligation should be looked in light of the whole Covenant and its

[44] *Ibid*.
[45] See CESCR, General Comment No.3: The Nature of States Parties' obligation, UN doc. E/1991/23 at para. 1
[46] *Ibid*.
[47] *Ibid*. par. 10
[48] *Ibid*.

objective, which is to establish a clear obligation for State parties. Any regressive measures can hardly be justified.[49]

As for obligations "to take steps", which ensures full realization of socioeconomic rights in time, the CESCR requires these steps to be "deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant".[50] At the same time, it appears that adopting only legislative measures does not fulfill states' obligations. It can be first important step and sometimes even essential, they are "by no means exhaustive".[51] It is mainly left to the State parties what kind of steps will be the most "appropriate". Nevertheless, the CESCR especially considers effective judicial remedies as important one and requires from states to report whether there is "any right of action on behalf of individuals or groups who feel that their rights are not being fully realized"[52] guaranteed by legislative measures or even by constitutions.

The CESCR further elaborates on importance of effective judicial remedies in its General Comment No.9 by emphasizing on the overarching obligation to "give effects to the rights recognized therein".[53] It's important that even though the CESCR is willing to give a certain degree of flexibility to the states about how these rights become effective, it insists that "whenever a Covenant right cannot be made fully effective without some role for the judiciary judicial remedies are necessary"[54] and therefore must be provided even on the constitutional level if it's possible.[55]

[49] *Ibíd*. par. 9
[50] *Ibíd*. par. 2
[51] *Ibíd*. par. 4
[52] *Ibid*
[53] See CESCR, General Comment No.9: The Domestic Application of the Covenant, UN doc. E/1999/22 at par.1
[54] *Ibid* at par. 9
[55] Concluding Observations of the Committee on Economic, Social and Cultural Rights: Ireland E/C.12/1/Add.35 (15/05/1991) at para. 9

At the end it is clear that on the international level socioeconomic rights are considered as fully legally binding individual rights, coming from the concept of human dignity and equally important as civil and political rights, since these two sets or rights are considered as "interdependent and indivisible". Moreover, the CESCR explicitly refuses the idea that socioeconomic rights are out of the reach of the judiciary as non-justiciable and non-enforceable ones. It is true that among scholars there are different views about this idea as well as about binding force of principles and comments developed by the CESCR. Namely, some of them criticize it for being "too demanding of States",[56] while others stress on their importance noting that the Committee defines "normative standards" about the provisions of the Covenant.[57] Nevertheless, looking at these standards "provides a welcome and helpful tool not only for Governments but also for domestic judges, whether they are interpreting and applying the [standards] itself or other forms of legislation".[58]

1.3. Socioeconomic Rights as Constitutional Rights

In many domestic jurisdictions, socioeconomic rights usually enjoy legal protection as social benefits guaranteed as legal entitlements. Constitutions of these countries are either silent about them or speak about concerns covered by these rights through principles, like Social State Principle for Germany and Georgia. Only few countries such as South Africa were brave enough to give socioeconomic rights constitutional status. Even though as I argued in previous section, that arguments for socioeconomic rights as "second-class-rights" are mostly the result of historical and political unfortunate circumstances or mostly exaggerated, it seems that there is still a need to address fear of their constitutionalization. While presenting arguments against this fear it is essential to answer following questions from theoretical as well as from practical

[56] Langford (n. 3)
[57] O'Connell (n. 26) p. 34
[58] *Ibid* at p.27

perspective: Why do we need socioeconomic rights in constitutions? What are advantages of this scenario? What difference does constitutionalizing socioeconomic rights make? Finally, what were the choices of Germany, Georgia and South Africa about that matter?

As Schwartz suggests, the arguments concerning constitutional protection of socioeconomic rights can roughly be divided in two groups: practical and philosophical.[59] The former is about judicial enforceability since constitutionalizing these rights presumably grants to courts the status of "the main player on the field", makes them "super-legislatures".[60] For the philosophical group of arguments, it concerns the question of whether constitutionalizing these rights is consistent with a free, democratic society with the limited sense of government.

In many legal cultures, what counts as constitutional rights is mainly shaped by courts, so it is not surprising that one of the main legal arguments against constitutionalizing socioeconomic rights is connected to fear of judicial participation in solving difficulties associated with social problems and distributive justice. It is particularly true for those jurisdictions which give the final word about the scope of each and every fundamental constitutional right to court with power of constitutional adjudication – be it either supreme or constitutional court. Since, looking at the thesis of this paper, main discussion evolves around constitutional adjudication of socioeconomic rights, this argument deserves its own place and more in-depth analysis in the next chapter. Nevertheless, there are arguments in scholar works against active judicial intervention that, surprisingly, may speak for guarantying these rights constitutional protection.

While trying to rethink the idea of constitutional "welfare rights"[61] Liu argues for limited role of judiciary concerning social justice, but for different reasons than fear of turning it into super-

[59] Schwartz (n. 32) p.2
[60] Shapiro v. Thompson, 394 U.S. 618,661 (1969) (Harlan, J., dissenting)
[61] In American scholar work, social and economic rights are usually called as "welfare" rights.

legislature. According to his argument, success of social justice mainly depends on public perception about values envisioned by this concept not on how the courts interpret it. Judiciary should not initiate "creating" socioeconomic rights, not because their enforcement creates difficulties in practice, but because these kinds of changes should be recognized by the people first, in democratic manner. Judicial interpretation must reflect not "transcendent moral principles" but the values and principles that the society is ready to accept and declare on its own[62]. It seems the typical counter majoritarian argument, which does not recognize the judiciary as equally capable and responsible part of the state and simply does not trust it to initiate important changes in the current perceptions of the majority. Nevertheless, if this argument can be shared, it can be used for pushing towards constitutionalization of socioeconomic rights, for fighting against "political apathy or indifference". [63] Giving these rights protection and recognition on constitutional level can mean that social justice should be recognized as the value itself that the society strives to enhance and cherish. I believe, this would be the best possible option to solve this argument.

The second argument against constitutionalization of socioeconomic rights considers already existing legislative framework adopted through democratic political debates as enough for accomplishing same goals these rights aim to pursue. Scholars who endorse this argument suggest that in developed countries core social issues are already handled by ordinary legislation and governmental social programs, therefore, it is simply unnecessary to push for constitutionalization of socioeconomic rights.[64] My intention is not to argue against the assumption that legislative framework for socioeconomic rights can be necessary, because again considering the nature of these rights their full and proper implementation and protection

[62] Goodwin L. Rethinking Constitutional Welfare Rights. *Stanford Law Review,* 61(2):203 -269,2008, p. 211
[63] *Ibid*.
[64] Wiles (n. 2) p. 40

may require special governmental programs, services, organizations. My argument is that without constitutional back up, the whole framework is subject of legislative discretion. It can be easily repealed or transformed because statutory rights are placed in a lower rank in domestic legal order compared to the supreme law and they can greatly depend on current fiscal and economic policy of the political government. Comprehensive and in-depth analysis is not necessary for concluding that short-sight view of the government due to political reasons can emerge as a troublesome barrier. Therefore, only statutory guarantees can seriously undermine the importance of socioeconomic rights. As Schwartz correctly points out, a constitution removes such rights from "the vicissitudes" of the majority, gives them more stability and, more importantly, gives them the place among fundamentally important values which are normally considered as inseparable elements of supreme law, helps society focus on them and make commitment to these values "indispensable to a decent life" as equally worthy.[65]

Taking this argument further, O'Connell argues that this legislative level of regulation "carries with it the notion of a discretionary sop to the ragged masses and the implicit morality of the old concepts of charity to the deserving poor".[66] Therefore, enshrining socioeconomic rights in the constitution spares them from such prejudice and admits them as individual entitlements, deserving the equal and higher protection in the legislative hierarchy.[67] This argument is strongly connected to above-mentioned ideas of Liu about the values and principles that the society is ready to accept and is perfectly summed up by Scott and Macklem:

> *"A constitutional vision that includes only traditional civil liberties within its interpretive horizon fails to recognize the realities of life for certain members of society*

[65] Schwartz Herman. In Defense of Aiming High. *East European Constitutional Review,* Vol. 1, Issue 3, pp. 25-28, 1992, p.3
[66] *Ibid*. p. 6
[67] *Ibid*. p. 6

who cannot see themselves in the constitutional mirror. Instead, they will see the constitutional construction and legitimation of a legal self for whom social rights are either unimportant or taken for granted"[68]

In conclusion, constitutionalizing socioeconomic rights can be argued and justified from different angles and points of view, whether the arguments are of philosophical, moral or legal nature. Furthermore, this option can be acceptable even for sceptics and for their fear of enforceability of these rights through courts. It can give further legitimation to judiciary to push for more, for being "critics" and not only "mirrors" of their own society that "uselessly reflect a community's consensus and division back upon itself".[69]

Out of three main jurisdictions discussed in this paper, South Africa represents the strongest example concerning constitutionalizing and adjudicating on socioeconomic rights. Similarly, to Georgia, South Africa has undergone major constitutional reforms over the past years which included, among other things, the constitutionalization of rights and substantive judicial empowerment through establishing institutional framework for effective judicial review.

The South African Constitution creates quite extensive system for guarantying as well as enforcing socioeconomic rights. List of these rights as well as wording used for enshrining them in the Constitution strongly reflects ICESCR: Articles 25 – 29 guarantee the right of citizens to access to land, the right to everyone to housing, to health care, food, water and social security, children's rights to shelter, basic nutrition, social services and health and the right to basic and further education[70]. Article 7(2) adopts Henry Shue's list of the state duties to

[68] Scott Craig & Macklem Patrick. Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution, *University of Pennsylvania Law Review*. 141(1):1-148, 1992. Cited in Wiles (n. 2) p. 50

[69] Dworkin Ronald 'Spheres of Justice': An Exchange, *N.Y. Rev. Books*, 1983, p. 46 cited in Goodwin (n. 62) p. 249

[70] Constitution of South Africa, 1996

"respect, protect, promote and fulfil" these rights and similar to ICESCR requires from the state "to take reasonable legislative and other measures, within its available resources, to achieve… [their] progressive realization"[71]. Furthermore, the Constitution made further institutional arrangements by creating Human Rights Commission to monitor and report how the state implements human rights including socioeconomic ones and gave the courts power, to adjudicate on these rights, make them justiciable while the state itself took further steps through further legislative, executive and administrative actions and programs, implementing specific statutory entitlements and made them enforceable by the courts and through state institutions and social programs.[72]

Possibly one of the brightest examples of societies, which are not morally neutral to social needs of their own, is Germany. German Basic Law contains no set of social rights besides Article 6 which concerns the protection of marriage, family and children. However, Social State principle (Sozialstaatsprinzip), articulated in article 20, which has been developed and defined by FCCG for many years, has significantly influenced readings of the human rights provisions under the Basic Law. Declaration that Germany is a "social federal republic" is made several times in the Basic law[73] but Article 20 is especially important since it is protected by the "eternity clause"[74] and can be deemed as a "foundational constitutional decision for the social state, in the sense of an obligation to shape the social order more deeply and more widely"[75]. According to King, commitment to the social state becomes more apparent and beyond social state principle declaration if we look at allocation of powers between federal

[71] *Ibid*.
[72] Brand, Danie. Socioeconomic Rights and the Courts in South Africa: Justiciability on a Sliding Scale" in Coomans (n. 93) pp. 208-209
[73] Article 20, Article 23(1), Article 28(1) of German Basic Law
[74] Article 79 (3) of German Basic Law
[75] King Jeff, Social rights, Constitutionalism and the German Social State Principle, *E-Pública: Revista Electronica de Direito Public*, 2014, p. 9

government and Lander in the Basic Law. It explicitly mentions competencies about labour law (Art. 74(2)), public welfare (Art. 74(7)) or social security (Art. 74(12)) and institutionalization of federal social and labour courts on the constitutional level[76]. However, the most important part of the Basic Law where the Social State principle is reflected is the basic rights provisions found in the very first part of it. Concept of human dignity as inviolable value and basic right (Art. 1) is frequently invoked to argue for more active, positive state actions together with the very Social State principle. Furthermore, the right to property (Art. 14), which is considered as one of the main natural rights in Lokean sense, "entails obligations [and] its use shall also serve the public good" under German Constitutional order.[77] This particular formulation has been extensively used and interpreted for successfully arguing about rights under Social State, including social insurances and defending the interests of tenants in cases about rental accommodations.

In the end, from all these provisions about institutional arrangements, jurisdictional allocation or basic human rights, it is apparent that German legal culture, reflected in the Basic law, sees individuals as inherently social beings. The whole constitutional order is obviously more socially oriented. As for individual human rights, even if the Basic Law doesn't explicitly guarantee a wide arrange of social rights, the Social State principle combined with certain basic human rights provisions represent "a participatory, duty-based element to the idea of human rights and reflect a concern for the welfare of the community".[78]

The 1995 Constitution of Georgia has strong similarities with German Basic Law, especially when it comes to the social State principle and the concept of human dignity. Though Georgia

[76] *Ibid*.
[77] Article 14(2) of German Basic Law
[78] Wiles (n. 2) p.49

represents typical example of post-soviet countries, which was torn between vital necessity of stability after gaining the independence by still enshrining certain socioeconomic rights and the strong will to move towards free and market-oriented society, with liberal values by including all fundamental civil and political rights in its newly-adopted constitution. The outcome is perfectly resembled in the case law of the CCG where it adopted strong-form of judicial review concerning so-called negative rights but is still avoiding stepping into the territory of socioeconomic rights, even though the Constitution explicitly speaks about the right of education (Art. 35), healthcare, social security (Art. 32), labour rights (Art.30) and protection of family (Art.36).[79]

Even if there were no socioeconomic rights in fundamental rights' part of the Georgian Constitution, as I mentioned above, there are certain similarities with the Basic Law that could be used for this matter. Social state is only mentioned in Preamble of the Constitution, which generally does not have a binding force, but the CCG always stresses on assessing the disputed provisions in the light of the whole constitutional order, including principles enshrined in preamble and in the main text.[80] Therefore, it was not surprising that Social State principle as "one of the fundamental principles of the Constitution"[81] was invoked by the court while defining labour rights. Moreover, similarly to the German Basic Law, Article 17(1) of the Georgian Constitution declares human dignity as inviolable value, "a fundamental constitutional principle". It puts an individual in the center of the whole constitutional order, admits and cherishes inherent worth of him just because he is a human being and requires an unconditional respect of this value from the state.[82]

[79] Constitution of Georgia, 1995
[80] *See* Judgment N2/2/389 of the Constitutional Court of Georgia of October 26, 2007 on the case of *"The citizen of Georgia Maia Natadze and others V. the Parliament and the President of Georgia"*.
[81] *Ibid.*
[82] *Ibid.*

Nevertheless, despite having quite solid ground for adjudicating on socioeconomic rights and developing comprehensive case law while sorting out its possible role on that matter, the CGG still has not been given a chance to tackle this topic. Most attempts about pushing for successful litigation have been based on equality claims, which represents not only individual right but one more fundamental constitutional principle in Georgian constitutional culture. The CGG had to deal with problems about education, healthcare system or social security, meaning social compensations and benefits[83] granted by the state, but as the results can be satisfying in certain situations, it can hardly be considered as a serious step taken towards initiating any serious academic or practical debate on socioeconomic rights as substantive constitutional entitlements.

Looking at this impressive picture of the whole system concerning socioeconomic rights, it is obvious that South Africa ended the debate about granting these rights the full status and place in the society and in their own legal culture long time ago while this debate is still ongoing and sometimes emerges as scary for other jurisdictions like Georgia. Moreover, it is apparent that Germany has also fully embraced its social-oriented values through the Social State principle, even though the Basic Law lacks as impressive socioeconomic rights list as South Africa and has more similar constitutional legal system with Georgia than the former. Therefore, it will be interesting whether these systems are working and how successful they can be, what lessons can be taken from South Africa's and Germany's experience. And the case law discussed in it shows the ultimate questions is not about the problem of constitutionalizing socioeconomic

[83] *See* for example: Judgement N1/11/629, 652 of the Constitutional Court of Georgia of October 25, 2017 on the case of *"Citizens of Georgia – Roin Gavashelishvili and Valeriane Migineishvili v. The Government of Georgia"* – on health care system; Also, Judgement 2/3/540 of the Constitutional Court "of Georgia of September 12, 2014 on the case of *„Citizens of Russia -Oganes Darbinian, Rudolf Darbinian, Sussana Jamkotsian and Citizens of Armenia -Milena Barseghian and Lena Barseghian v. The Parliament of Georgia"* on the right to education.

rights or making them justiciable for the courts but what can be a reasonable degree of their justiciability.[84]

[84] Brand (n. 72) p. 207

2. Judicial Enforcement of Socioeconomic Rights

Talking about socioeconomic rights as fundamental rights and arguments in favor of entrenching them in constitutions naturally leads to the final step of the debate- probably the most fearful scenario for sceptics about these rights – their effective judicial enforcement.

There are usually several arguments on a theoretical as well and practical level against such scenario. While theoretical objections mainly concern the nature of socioeconomic rights, their political, philosophical and moral grounds and their place in the hierarchy of domestic legal order, the practical controversies speak about competence (or lack of) of the courts while handling financial policy issues connected to these rights, fears of "messing with" traditional understanding of separation of powers and issues of possible remedies. Nevertheless, it is obvious that socioeconomic rights are becoming more and more popular and increasingly entrenched in international and regional human rights documents as well as national constitutions. Scheppele suggests that the results are somewhat paradoxical, while in the debate on theoretical level skepticism still has an upper hand about that matter, "on the real battlefield" people as well as courts are more willing to take steps towards effective justiciability of social and economic rights.[85] Unlike Georgia South Africa and Germany are good examples for this suggestion. Therefore, there must be a reasonable explanation of this paradox as well as possible solutions either on theoretical or practical level.

Before testing the main objections towards justiciability of socioeconomic rights, it must be clarified that, in my own understanding, they are guided by assumptions about the role and competence of the courts as well as forms of review they must/can adopt. It is assumed that courts should concentrate on particular cases/controversies without further interfering with

[85] Scheppele Lane Kim. A Realpolitik Defense of Social Rights. *Texas Law Review* 82, no. 7, 2004: 1921-1962

broader picture about different state policies (economic or fiscal) as this is a job of political branches of the government. It is also assumed, that courts should always adopt strong-form review with legal finality and immediate strong remedies because of "the conception of the state-as-Leviathan". [86] Therefore, at the end, the answer of the authors of these objections is to limit or fully abandon the role of courts in dealing with socioeconomic rights, leave them in the realm of the political government with no directly enforceable nature.

So, first it must be clarified why do we need courts to enforce socioeconomic rights in the first place. Before dealing with above mentioned objections and assumptions, it is necessary to provide arguments for participation of the judiciary, other than pure "originalist response" that if the framers of the constitution decide to give courts that authority the latter should carry the burden.[87] As for counterarguments and assumptions, they will be challenged in the second section while in the last section I will provide possible theoretical solutions that are already well-discussed in the scholar work and aim to rethink these assumptions by using tools of "cooperative constitutionalism" – weak-form of judicial review suggested by Mark Tushnet[88] together with the more specified version of this weak-form/strong form taxonomy – "the constitutional dialogue" developed by Rosalind Dixon[89]. The possible practical lessons from South Africa and Germany which leads to ultimate solution for the Constitutional Court of Georgia are the matter of discussion in the third chapter of this paper.

[86] Hirschl, Ran. Negative" Rights vs. "Positive" Entitlements: A Comparative Study of Judicial Interpretations of Rights in an Emerging Neo-Liberal Economic Order. *Human Rights Quarterly* 22, no. 4 (2000): 1060-098 p. 1083
[87] Dixon (n.11) p.398
[88] Tushnet (n. 13)
[89] Dixon (n. 11)

2.1. Why Do We Need Courts to Enforce Socioeconomic Rights?

When Hans Kelsen first introduced a concept of the constitutional review by a separate judicial organ – a constitutional court in Europe, which would be the main guarantor of the supremacy of the constitution without "stealing" the law-making power from the parliament,[90] his main concern was more about power struggle than about human rights protection.[91] Moreover, he was against the idea of giving the court a power of enforcing basic human rights, because as he argued, incorporating this kind of law in the constitution and subsequently leaving their enforcement in the hands of the constitutional court would inevitably blur the fine line existing between the court and the legislature. The main concern was extremely broad concepts and vague language about human rights that would untie the courts hands to define content and scope of natural law and would indirectly create responsive obligations for the state and become "super-legislators".[92] Ironically, after more one hundred years, the main task and function of "the guardians"[93] of the constitution became exactly the effective protection of human rights. However, one must bear in mind that when Kelsen was speaking about human rights in this concept, he meant only civil and political rights as classic liberty catalogue and it is easy to assume that socioeconomic rights if being actively discussed at that time would have been more problematic for the Kelsenian concept of constitutional review.

Luckily, time and practice change many things, including views about legal concepts and doctrines. Vagueness of socioeconomic rights is still an argument often invoked against justiciability of these rights. However, it is also used by those who support courts' active role

[90] For concept of "negative" and "positive legislator" *see* Sweet, Alec Stone. Constitutional Courts and Parliamentary Democracy. *West European Politics* 25, no. 1 2002
[91] Sajó, András, Uitz, Renata. The Constitution of Freedom: An introduction to Legal Constitutionalism. *Oxford University Press*, 2017, p 333
[92] Sweet (n. 90) p. 81-82
[93] This terminology is used in Sajó, Uitz (n.91) p. 326

in tackling this issue. Not to mention the obvious thing that all human rights are usually written down in an abstract form (examples can be easily given by mentioning human dignity and freedom of development of one's personality as individual human rights prescribed by Georgian and German constitutions), the vagueness is itself an argument for courts to develop and clarify understanding of what these rights actually mean. They have done it since adjudicating on civil and political rights has become the leading task of constitutional review. Indeed, more than 90% of CCG's case law has been about defining scope of these equally "vague" rights and developing different standards of review since the very beginning. Therefore, as O'Connell suggests, the problem is not about unique nature of socioeconomic rights per se but more about judiciary itself that "which refused to engage … and generate jurisprudence clarifying the contours of specific [these] rights".[94] Similarly, Coomans calls it "the failure of national courts" that these rights "have remained largely meaningless in practice".[95] Therefore, the first argument about vagueness speaks more for the active role of the judiciary and not the *vice versa.*

When it comes to giving arguments for courts' necessary participation on that matter, Dixon suggests more arguments when speaking about socioeconomic rights in South African Constitution, which are extremely relevant for Georgian reality too. Namely, she argues that, since Articles 26 (2) and 27(2) of the Constitution that concerns housing rights, are not so precise, South Africans are likely to disagree on content as well as on priority that can be given to claims under these sections. They can see connection between these sections and first generation rights, like right to life or dignity as well as argue what can be the philosophical or moral implications behind these rights: minimum core obligations due to obvious textual

[94] O'Connell (n.26) p. 8
[95] Coomans, Fons, *"Justiciability of economic and social rights: experiences from domestic systems."* Antwerpen: Intersentia, c2006, at p. 3

similarities with ICSECR and the very same standard adopted by the CESCR. Also dignity as a guarantee for "a certain physical or material baseline, necessary for a person's life to count as fully human" or "human subjectivity" based on dignity in the Kantian sense.[96] Situation for the CCG is exactly the same. Since both pending cases – *Chitaia* and *Tandashvili* - are about legal provisions concerning homeless people and basic social security, the court admitted them with different constitutional provisions to deliberate on merits, including the right to life, dignity and equality. Therefore, Dixon correctly suggests that means of resolving these questions are not purely democratic process which can define "collective understandings "and incorporate it "in the broader constitutional culture".[97] But the problem cannot be solved by purely "countermajoritarian judicial enforcement" with strong coercive measures either. Though doesn't necessarily mean complete absence of the judiciary but, on the contrary, an active role in countering shortcomings of political process with rather modified understanding of toolkits on its hands. [98]

After vagueness, the second argument about the active role of constitutional courts towards socioeconomic rights sees courts as means to counterbalance "serious blockages" in democratic deliberation process that are usually caused by either political disagreements between parties in the parliament or by various procedural or substantial constraints on legislative process, including time pressures or limits on legislative foresight. Dixon calls them "blind spots" and "burdens of inertia" as inherent parts of lawmaking process and that can and should be balanced by the judiciary.[99] However, it can happen when and only if we escape from the assumptions that courts exist only to deliberate on particular cases and admit that they can adopt more active

[96] Dixon (n. 11) at p. 398-401
[97] *Ibid.* at p. 401
[98] *Ibid.*
[99] *Ibid*. p. 405

role participating in ongoing processes as the equally important branch of the government. Moreover, *ex post* constitutional control which is normally the case for constitutional courts can be the additional characteristic for pushing for proper place of the judiciary in this "constitutional battle" for socioeconomic rights.[100]

One more detail from this second argument, which can make these blind spots and burdens of inertia in political process more visible and troublesome again concerns part of the society that are usually the socioeconomic rights claimants - vulnerable groups mainly underrepresented in the democratic deliberation process. This important detail echoes the argument about why these rights should be admitted as human rights and be entrenched in constitutions – because majority or political government should not afford to lose them from their view, from active discussion and make considerable effort to let their voice be heard and be taken into account while deliberating on matters important for them. Visibility and transparency of judicial proceedings about socioeconomic rights not only can give these individuals or groups voice among the society but return them in active political process, indirectly influence the government to return their problems and necessities into their current agenda.[101] As Makinen argues based on her studies, constitutionalizing socioeconomic rights and making them justiciable "raises the priority of [social] programs in the eyes of legislators and may encourage groups to lobby for increased benefits. [it] provides an additional veto point on law that might cut social programs".[102]

In conclusion, adjudicating on socioeconomic rights can be regarded not only as possible reality but even necessity and responsibility of courts. Their role is very important in giving

[100] *Ibid.*
[101] *Ibid.*
[102] Mäkinen, Amy K. Rights, review, and spending: Policy outcomes with judicially enforceable rights. *European Journal of Political Research*, vol. 39, no.1 2001, p. 43

these rights the actual, meaningful substance as well as in help the primal addressees of socioeconomic rights to find and use their voice for pushing political governments for changes and complying with domestic and international obligations.

2.2. Several Objections about Judicial Enforcement of Socioeconomic Rights

When we speak about the problem of justiciability of socioeconomic rights, there are two main questions that must be answered before discussing the possible solutions: what exactly the justiciability means and what are possible issues, arguments against it.

According to Coomans, the concept of justiciability implies two cumulative options: a) an alleged violation of an economic or social subjective right invoked in a particular case [must be] suitable for judicial or quasi-judicial review at the domestic level"; b) if the courts find a violation, they should be able to provide remedy.[103] Both options are perceived as problematic when it comes to socioeconomic rights and different arguments are suggested both for and against it, which, as O'Connell suggests, come down to the ultimate objection - separation of powers. To put it otherwise, justiciability of these "will result in undermining the separation of powers by transferring too much authority to the courts, at the expense of elected branches of government".[104]

Concerning the suitability problem, it is suggested that since enforcing socioeconomic rights are in its nature "resource intensive", the courts are "institutionally ill- suited to adjudicate on matter with potentially significant economic and social policy implications".[105] Based on Lon Fuller's concept of "polycentric disputes" distribution of state funds means controlling state

[103] Coomans (n. 95) , p. 4
[104] O'Connell (n. 26) p. 2
[105] *Ibid.* p. 9

fiscal and economic policy and this reality "present[s] too strong a polycentric aspect to be suitable for adjudication".[106] Moreover, some critics worry more about the judiciary and how this "unprecedented responsibilities" will be reflected on their role now merging with the legislature and the government policy-making authorities.[107] After all, traditional understanding about the role of constitutional adjudication inherently implies complete and utter non-compatibility with law- and policy-making powers. While others are more worried about possible practical outcome of this process as short-term and radical solution compared to political debates where different ideas are crystalized into most reasonable and necessary social policies[108]

As it was demonstrated in previous chapter, the argument about socioeconomic rights as exclusively "resource intensive" is highly suspicious and does not make sense for the system where the courts adopt strong-form review for civil and political rights because the latter needs the state financial, administrative resources as well. But the argument itself that socioeconomic rights' realization mostly needs resources is not far from the truth, especially when it comes to their positive dimension. Therefore, the question is whether courts are suitable to adjudicate on this matter in a sense that whether they have an institutional competence for it.

Looking at the objections mentioned above, the main problem can be summarized under the umbrella of one word – "assumption". First assumption is certainly about competence of the judiciary. Wiles correctly notes that this distrustful attitude towards judiciary shouldn't be welcomed,[109] especially in the reality where adjudication on human rights issues has become one of core authorities of the courts within constitutional review. Courts often discuss and

[106] *Ibid.* p. 13
[107] Wiles (n. 2) p. 43
[108] *Ibid.* at p. 43
[109] *Ibid.*

deliberate on cases that have serious financial implications, for example, taxes or property rights (expropriation example). Adjudicating on socioeconomic rights may depend on several factors and may even require developing different standards of litigation as well as argumentation from the courts, but this is not a valid argument to completely ignore their possible and desirable participation and activism on this matter. Suggested solution for this problem, if there is one, would be trying to find a proper balance and adjudicative model for courts to deal with socioeconomic rights and certainly not excluding them from the game completely.

Moreover, even if we assume that the courts may have difficulties while enforcing socioeconomic rights, questions can be asked about why it is such impossible task to get necessary information from the state in the process as well as producing and presenting expertise opinions and impact assessment studies about policy considerations. On the contrary, it can be highly beneficial for political government to encourage taking these cases to courts in order to identify and correctly diagnose possible problems and shortcomings of particular programs since "Focusing on the effects of policies on individuals is an efficient mode of policy evaluation and would lead to greater streamlining and rationality".[110]

Second assumption concerns the role that courts have to perform while dealing with socioeconomic rights. Judicial enforcement of these rights does not necessarily mean that courts have to determine a particular level of resources that the government must spend or decide what this amount should be spent on. Neither it is true that the courts have to make ordering rules in their decisions, meaning issuing demanding mandatory orders for the government to comply with. They can become in action when they identify place and reasons

[110] Wiles (n. 2) p. 44

of violation and possible remedies. From this point, it is the primal authority and responsibility of political government to adopt the most appropriate means to correct them.

The final assumption discussed here is about traditional understanding of separation of powers. According to this assumption, judicial participation in defining and practically guaranteeing socioeconomic rights is considered to be "a serious derogation of the principle of separation of powers. Investing judges with the authority to tell the elected branches of the government what services and benefits they have under a constitutional duty to provide allows them to take over final responsibility for the budget and the financial affairs of the state".[111]

Over the past decades the debate has been raised whether trouble about the separation of powers, namely the relationship between the courts and democratically elected branches of government, are that decisive and moreover, real, when it comes to penultimate interpretations and solutions about the constitutional provisions, especially about human rights. Several scholars argue that "the concept of the separation of powers is not a static one".[112] The main rationale behind it for Montesquieu and, later, for the Founding Fathers was avoiding concentration of power and tyranny, especially in the hands of executive than strict separation of functions.[113] But, Paul O'connell notes that "the separation of powers' allocation of discrete areas of operation is purely a functional choice, to serve particular substantive ends".[114] The aim of defending the state and ultimately the society against tyranny certainly is not the exclusive problem of history, which is not relevant anymore. The danger is always present from either one-man ruling or tyranny of the majority and "constitutionalism is all about limiting contemporary majorities".[115] It requires setting limits on the choices of the society and

[111] Beatty, David M. The ultimate rule of law. *Oxford University Press*, 2004, p. 125
[112] O'Connell (n. 26) p. 169
[113] *Ibid*. p. 170
[114] *Ibid*. p. 171
[115] Tushnet (n. 13) p. x

through creating an independent branch of the government – the judiciary it aims ensuring that these choices remain within constitutional bounds and limits. Therefore, when it comes to certain constitutional issues and majority clearly oversteps its limits, it should be the judiciary who stops it, and, in that situation, the normative finality of its decisions should be highly welcomed.

Nevertheless, the separation of powers doctrine, at least its contemporary understanding does not necessarily exclude the possibility of dialogue between the judiciary and political government when it comes to socioeconomic rights. These rights deal with issues, which definitely needs attention, compassion and involvement from the society as well as from the state as a whole. Therefore, it will be such possibilities of dialogue that will be discussed and endorsed in the final section of this chapter.

2.3. Strong-Form v. Weak-Form of Constitutional Review: Possibility of Constitutional Dialogue?

It was discussed in the first two sections of this chapter that critical analyzing of arguments pro and against justiciability of socioeconomic rights hint towards rethinking the traditional ideas about the role constitutional courts play while adjudicating on socioeconomic rights as well as necessity to discuss alternative understanding of standards of constitutional review. The ultimate aim of this paper is to search for theoretical and practical solutions for familiarizing socioeconomic rights with the judiciary in a way that ensures the proper place of these rights in the constitutional order as well as ensures legitimation of decisions adopted by constitutional courts.

There are different theories of cooperative constitutionalism, which suggest equally interesting ideas about how the traditional constitutional system and thinking can be transformed for full and effective protection of human rights, especially socioeconomic ones. Among them, the

most interesting concepts for this paper are Tushnet's taxonomy of strong-form/weak-form judicial review and Dixon's understanding of the theory of constitutional dialogue, which at some point further defines the former. The main line for these ideas is a claim that constitutional judicial review should be weakened either while defining the scope of rights and the state's obligations or while dealing remedies. Furthermore, while Tushnet goes further and suggests the possibility of weak-form review for all human rights, Dixon stays in the realm of socioeconomic rights and ultimately concludes that the most suitable version of weak-form review should be defined by each domestic jurisdiction considering historical, political and legal culture as well as particular circumstances of each case.

As it was discussed in the previous section, reformulating separation of powers as one of the basic principles of classic constitutionalism unsurprisingly leads another debate over whether "this either/or choice between two homogenous and mutually exclusive systems" – democratic self-governance and judicial supremacy must be replaced by more flexible institutional options, "encompassing more or less parliamentary or judicial control, depending on the wants and needs of the political community".[116] Elaborating on this debate Mark Tushnet introduced strong-form/weak-form judicial review where he tied "the strength" of the constitutional review to "normative finality [these systems] give to judicial interpretations".[117] Tushnet regards USA system as a model for strong-form judicial review, where "the courts' reasonable constitutional interpretations prevail over the legislature's reasonable ones" and "their interpretive judgments are final and unrevisable"[118] which usually creates constant tension between above-mentioned democratic self-governance and judicial review.[119] Additionally, it

[116] O'Connell (n. 26) p. 173
[117] Tushnet (n. 13) p.34
[118] *Ibid.* at p. 21
[119] *Ibid.* at 22

must be emphasized that most jurisdictions that have constitutional review guaranteed in the constitution, it is usually the judiciary who has the final word about the meaning of the constitution.

As for weak-form judicial review, which is also called the "new Commonwealth model",[120] the courts assess the constitutionality of legislation without having the upper hand, a final word about it.[121] For Tushnet, this model solves the problem of difficulty about making "necessary choice" between democratic self-governance and judicial supremacy and ultimately the decisive argument about the separation of powers in its classic sense. Weak-form review opens door for the legislative authority to participate in defining reasonable interpretations of the constitutional provisions and, more importantly, to do it "in dialogue with the courts".[122] As Goldsworthy puts it, this form of review "offers the possibility of a compromise that combines the best features of both the traditional models, by conferring on courts constitutional responsibility to review the consistency of legislation with protected rights, while preserving the authority of legislatures to have the last word".[123]

While critically assessing case-law of South African Constitutional Court, Dixon further develops Tushnet's idea and introduces constitutional dialogue as "the most desirable model of cooperation between courts and legislatures in the enforcement of socioeconomic rights".[124] She argues for limited judicial competence in socioeconomic rights adjudication, but for greater aptitude and responsiveness from courts towards legislative and executive shortcomings to enhance the constitutional democracy in its broad sense. But unlike traditional strong-form

[120] *This terminology is used* by Gardbaum, Stephen. The new Commonwealth model of constitutionalism: theory and practice. *Cambridge University Press,* 2013
[121] Tushnet (n. 13) p. ix
[122] *Ibid.* p. xii
[123] Goldsworthy, Jeffrey, Homogenizing Constitutions. *Oxford Journal of Legal Studies* no. 3, 2003
[124] Dixon (n. 11) p. 393

judicial review with its normative finality and strong injunctive reliefs and unlike Tushnet's opposite suggestion for weak-form judicial review, Dixon concludes that necessary "trade-off" must always be made between communicative and coercive role of courts as Sadurski suggests.[125] It means that either courts should focus on deliberating on important constitutional issues rather than deciding and therefore adopt form of review with strong rights but weak remedies or, on the opposite, resolve concrete cases without deep judicial reasoning about scope of the particular rights and therefore provide strong remedies with usually strict time constraints.

Nevertheless, it is not that easy to make the necessary choice between these options. Making a "trade-off" does not particularly depend on either courts or legislature. The choice should be made after thoroughly examining a particular constitutional system, domestic institutional features like strong human rights committees or public defender, strength of the local civil society, place and importance of international human rights standards in domestic legal order and strength and willingness of constitutional courts and political responsiveness for their decisions. For example, if strong public or international pressure or strong domestic institutional mechanisms are in place, it can be reasonable for courts to engage in deeper forms of reasoning, adopt explicit and strict standards while defining a particular socioeconomic right because at the end "external players" will handle political responsiveness. In contrast, if serious legislative or executive shortcomings are in the place due to strongly politically divided atmosphere and lack of mobilization from the society, it is more likely to encourage meaningful social changes and stronger coercive measures with time constraints can be more reasonable steps from the courts.

[125] Sadurski, Wojciech. Judicial Review and the Protection of Constitutional Rights. *Oxford Journal of Legal Studies* 22, no. 2 pp: 275-99, 2002, discussed in Dixon (n. 11) p. 413

Since the serious academic or legal debate on that matter still has not been initiated in Georgia and recent pending cases can be the defining point for the CCG, it will be interesting to analyze the possible solutions based on Dixon's comprehensive theory of constitutional dialogue. But it is obvious that before diving into Georgian constitutional reality which has definitely become much more complicated in recent years for the building tension between the CCG and political government due to recent politically-sensitive cases, it is equally important to take a look at other domestic jurisdictions with rather broader experience on that matter. While South Africa has been leading example for this matter and important lessons will be taken from looking at its case law and practical reality, Germany has notable similarities with Georgia when it comes to constitutional culture either on textual, theoretical or practical level. Therefore, the next chapter will be dedicated to practical issues and possible solutions from these jurisdictions as well as to analyzing Georgian recent constitutional reality. Conclusions made in the first two sections of the next chapter will hopefully lead to the valuable and most suitable lessons for the CCG articulated in the last section of this chapter.

3. Towards Practical Reality: Experiences and Lessons

After discussing some of the most important theoretical and conceptual aspects about the justiciability of socioeconomic rights and critically analyzing pro and counterarguments for the active role of the judiciary in dealing with society's social concerns, the next step is looking at the practical reality. It is interesting how the domestic jurisdictions with rather strong constitutional socioeconomic rights and extensive practical experience handle the justiciability issue, what are the shortcomings and strengths of "risking" and adjudicating on this matter, what are the possible standards of judicial review that manages to find the proper balance between the traditional functions of different branches of the government.

First section of this chapter looks at South African experience, which developed gradually and gives some interesting answers about the proper role of courts concerning socioeconomic rights. The main standard of judicial review adopted by the SACC is called a "reasonableness standard".

The second section describes German understanding of the right to subsistence minimum, which is not prescribed in the Basic Law but was read through the right to dignity (Art. 1) and the Social State principle (Art. 20). The FCCG created so-called "two-step" standard of review concerning socioeconomic rights which was more welcomed by scholars and critics the South African experience, mainly because of finding more proper solution for this justiciability issue.

The third and the final section of this chapter concerns the Georgian reality concerning socioeconomic rights and their enforceability (or lack of) by the CCG. Based on comparative analysis of two above-mentioned jurisdictions, possible solutions and most suitable standard of judicial review concerning socioeconomic rights will be provided.

3.1. Reasonableness Standard - South African Experience

In South Africa, socioeconomic rights are not only recognized as justiciable rights but are regularly dealt by the courts. Case law of the SACC has been in the center of scholar debate about justiciability issue over the past decade. Nevertheless, as history shows this reality was not created without a battle. During drafting process of 1996 constitution serious debates where held about whether to entrench socioeconomic rights in the constitution and whether to make them justiciable.[126] The SACC intervened in the earlier stages with its *First Certification* judgment. The Court explicitly rejected the separation of powers argument by noticing that civil and political rights sometimes could raise the same issue and that the role of the court is not "so different" from what the constitution required them concerning these rights and that "results in a breach of the separation of powers".[127] As for the justiciability issue, the court clearly stated that despite arguments about separation of powers and budgetary issues, socioeconomic rights "are at least some extent, justiciable", though it also recognized possible future problems about the scope of its power towards positive dimension of these rights.[128]

Since then SACC's case-law concerning socioeconomic rights has evolved significantly with the court "gain[ing] increasing confidence in its ability to manage the justiciability concerns" and defining its famous reasonableness standard of review. This gradual development is apparent in so-called "first-wave cases"[129]: *Soobramoney*[130], *Groothboom*[131], *and Treatment Action Campaign (TAC)*[132] that concerned to the right to access health care (Art.27), the right to Access to adequate housing (Art. 26) and the right to every child "to basic shelter" (Art. 28).

[126] Ray, Brian. Engaging with social rights: procedure, participation, and democracy in South Africa's second wave. *Cambridge University Press*, 2016 p. 47
[127] *Certification of the Constitution of the Republic of South Africa 1996 (10) BCLR 1253 (CC)*, Sec. 77
[128] *Ibid*. par. 78
[129] Ray (n. 126) p. 45
[130] *Soobramoney vs. Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC)
[131] *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC)
[132] *Minister of Health v Treatment Action Campaign (TAC)* 2002 (5) SA 721 (CC)

Interestingly all these articles speak about positive dimensions of above-mentioned socioeconomic rights and similar to ICESCR contain limitation clauses about their "progressive realization" "within the maximum of [the state's] available resources".[133]

Soobramoney. It was the first case where the SACC engaged with socioeconomic rights and it is widely criticized among scholars for its overly deferential nature to political decision-making, for its concerns about separation of powers and lack of serious engagement with legal reasoning about substantive part of the right to access to health care. Remedial issues were not discussed since, the court did not find a violation of Article 27. The case involved a man suffering from irreversible kidney failure who was denied access to dialysis services at a public hospital. Rationale behind such medical policy was based on following criteria: either individual could be cured after treating with dialysis or they could benefit from this program as becoming eligible for a kidney transplant. The applicant could not qualify for either of these conditions.

As it was mentioned above, there are several aspects of this case which is important for this paper and which was highly criticized: (1) the court refused to invoke first-generation right – the right to life (Art. 11) since the constitution was clear that health care issues should be dealt under Article 27 (2). Nevertheless, the court did not adopt conversational model of adjudication by refusing to define the nature and scope of an invoked right. Moreover, it read substantive right (Art. 27 (1)) together with the internal limitation clause (Art. 27 (2)). So, the main reasoning went to resource constraint issue, even extended to apparently unqualified right not to be refused emergency medical treatment (Art. 27(3)) and echoed arguments against more active role of the judiciary that were discussed in the previous chapter. Therefore, it is not

[133] Article 26 (2), Article 27 (2) and Article 29 (2) of the Constitution of South Africa

surprising, that the second controversial aspect of this decision concerns deferential reasonableness standard; (2) The court justified its limited reading of the right to have access to health care with competence and separation of powers arguments[134] by declaring that cases like this "involve difficult decisions to be taken at the political level … and at the functional level in deciding upon the priorities to be met".[135] As for separation of powers concerns, SACC noted that it would be "slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters".[136]

Invoking the theory of constitutional dialogue, it is apparent that in this decision SACC adopted extremely weak-form of review and was heavily criticized as being "a retreat from the challenge of justiciable social rights".[137] Referring to resource limitations, presumed institutional incompetence and deference to political government, the court gave the latter almost full freedom and it did so without giving any coherent standard of constitutional understanding towards positive dimension of socioeconomic rights in general and towards access to health care system in particular. Justice Albie Sach had similar concerns in his concurring opinion, where he spoke about "the need to provide a broad framework of constitutional principles governing the right of access to scarce resources and to adjudicate between competing rights bearers".[138] The only thing that the court clarified was its rejection for bringing first-generation rights in the discussion about second-generation ones. As for possible remedies it was obviously out of the discussion due to outcome of the case.

[134]Ray (n. 126) p. 50
[135] *Soobramoney* (n. 130), par. 11
[136] *Ibid*. par. 19
[137] Woods, Jeanne M. Justiciable Social Rights as a Critique of the Liberal Paradigm. *Texas International Law Journal*, Vol. 38, Issue 4, pp. 763-794, 2003, p. 329 cited in O'Connell (n. 26) p. 57
[138] *Soobramoney* (n. 130), par. 54

Needless to say, *Soobramoney* did a little to change *status quo* in South African constitutional system concerning socioeconomic rights considering it was a pioneer case with an individual not a group or NGO as an applicant and lack of other external actors. Therefore, after several years, the next - *Grootboom* case, was met with great enthusiasm and with hope for stronger, more confident court.[139]

Groothboom. There is a general observation[140] among scholars that in the subsequent *Groothboom* case the SACC "largely abandoned" "simple rationality" standard developed in *Soobramoney* and provided more refined reasonableness standard of judicial review[141] with positive outcome for the applicants of this case. The case was about up to 900 individuals – adults and children – who moved to an area of private land after living in informal settlements with unbearable living conditions. After eviction and unsuccessful demand for temporary accommodation from the local authorities, applicants went to court and relied on both the right to access to adequate housing (Art. 26) and the right of children "to basic… shelter" (Art. 28 (1c).

Apart from defining reasonableness standard of review for the first time, there are several important nuances in this decision that needs to be mentioned: (1) The court again stressed on the difficult nature of the issue of enforceability of socioeconomic rights and noted that it "must be carefully explored on a case-by-case basic";[142] (2) The court rejected minimum core approach, adopted under ICESCR referring to the difference of this concept. The Court basically referred it as soft law developed by the CESCR over years by gathering state reports and difficulty of domestic reality about whether this kind of obligation "should be defined

[139] Ray (n. 126), p. 51
[140] *See* Ray (n. 126), Dixon (n. 11), O'Connell (n. 26)
[141] *See* Brand (n.72) p.227
[142] *Grootboom* (n. 131*),* par. 20

generally or with regard to specific groups of people".[143] Therefore, the court chose to focus on case-by-case assessment of measures (or lack of) adopted by the legislature or the executive rather than adopting abstract standard;[144] (3) The court engaged in substantive interpretation of invoked socioeconomic rights without putting concerns about financial constraints in the center of the discussion.

As for reasonableness standard, Ray suggests that wording of the Article 26 (2), which requires taking "reasonable legislative and other measures"[145] from the state to fulfill its constitutional obligations, is "the core"[146] element of this standard. Namely, in order the state housing plan to be considered as reasonable, it must be "a comprehensive one determined by all three spheres of government in consultation with each other"[147] which strongly reflects the constitutional dialogue theory and its conversationalist aspect. Moreover, according to the court, the Constitution requires not only proper legislative measures but also "appropriate, well-directed policies and programs implemented by the executive"[148] which will be ultimately assessed by the court itself whether they are reasonable "both in their conception and their implementation". Though, the clear deferential aspect of this standard appears in the part of reasoning where the court leaves "the precise contours and content of the measures"[149] adopted by the political government and refuses to check whether there might be "more desirable or favourable measures" the latter could adopt. To put it otherwise, the court didn't go so far to engage in strict proportionality analysis typically familiar to the strong-form review model. Finally, the court looked at whether adopted social program/plan addressed "[t]hose whose

[143] *Ibid*. par. 34
[144] Ray (n. 126) p. 53
[145] Constitution of South Africa, 1996
[146] Ray (n. 126) p. 54
[147] *Groothboom* (n. 131) par. 40
[148] *Ibid*. par. 42
[149] *Ibid.* par. 41

needs are the most urgent and whose ability to enjoy all rights is most in peril". It was indeed the element where the SACC found a violation of the state's constitutional obligation. It also hinted that the state doesn't have unlimited time to fulfill invoked socioeconomic rights, but it must move forward "as expeditiously and effectively as possible", be flexible towards time and changing circumstances and any "deliberately retrogressive measures" in already existing programs will have to be assessed by heightened scrutiny.[150]

In conclusion, looking at the results of *Groothboom,* departure from a strongly deferential approach with competence, resource and separation of powers concerns articulated in *Soobramoney* case is clear. By engaging in relatively more substantial reasoning about the scope of invoked socioeconomic rights, limiting the state's options for satisfying its constitutional obligations and adopting more clearly-tailored standard of review, the court took important steps towards adopting strong-form review in the sense of substantial rights. Extensive number of applicants, including children that put the housing problem out, in daylight, also heightened scrutiny coming from the society as well as scholars and other external actors must also have played a role in shaping the court's mind.

Nevertheless, several parts of the decision still remain problematic and are at the center of academic debate. As Dixon and Ray point out, the most controversial part is its weak remedy that shapes the whole decision still into weak rights/weak remedies form of review according to the constitutional dialogue theory suggested and discussed in the previous chapter of this paper. Namely, it is true that the SACC identified and referred to obvious "blind spot" of the government for not including people with desperate needs in its housing policy and encouraged the legislature to overcome its "burdens of inertia" by taking more active steps and engage in

[150] *Ibid.* par. 45

more active conversation with other branches of the government, including the judiciary. Nevertheless, at the end it stopped with only declaratory relief without identifying further specifics of this particular case – housing policy. Needless to say, the Court refused to provide direct relief for any applicant or any particular time constraint to comply with its decision. Therefore, despite important steps forward, *Groothboom* case is still considered as weak in both substantive and a remedial sense.[151]

TAC. This case further advanced SACC's reasonableness approach and "cemented its international reputation in the social rights field"[152] by handling one of the most important issues of South Africa – IHV/AIDS disease. The applicants challenged the government's policy which aimed to prevent transmission of this virus from mother to child by special drug – Nevirapine. According to applicants, the main issue of this program was the limited access to this "potentially life-saving drug"[153] which covered only several sites of the whole country and, therefore, violated the right to access to health care services under the Article 27. The court found the violation and granted the direct relieve by ordering to the government to annul the restrictions and make Nevirapine available in all hospitals.

What makes *TAC* case important is not only further defined reasonableness approach, but also rather strong remedial solution compared to *Grootboom* and several special circumstances of the case that allegedly influenced the SACC's final decision. Namely, (1) The court granted a very little deference to the government's arguments about its lack of competence towards assessing the scientific specifics of the disputed program as well as its possible remedial options due to the separation of powers and budgetary concerns arguments. SACC stated that

[151] Dixon (n. 11)
[152] Ray (n. 126) p.58
[153] O'Connell (n. 26) p. 60

if it holds that the state policy or its implementation does not satisfy requirements of the Constitution and "that constitutes an intrusion in the domain of the executive that is an intrusion mandated by the Constitution itself".[154] (2) The court also engaged in critical analysis of scientific evidences and safety arguments introduced by the government and drew its independent counterarguments instead of invoking institutional-competence argument against doing so. This method implies adopting higher scrutiny of procedural constitutional requirements than in previous cases. (3) The court used direct remedy for the first time by making changes in the disputed government policy and program though it still left some space to the latter for " adapting its policy in a manner consistent with the constitution if equally appropriate or better methods become available for the prevention of mother-to-child transmission of HIV";[155] (4) There were several circumstances of the case which allegedly influence SACC's reasoning and the outcome of the case: (a) serious legislative shortcomings due to political reasons which led to marginalization of this particular health issue in South Africa; (b) Strategic litigation and increased attention from external actors; (c) Nevirapine was freely suggested by its providers therefore the financial concerns was out of picture for the court.

It is without the question that TAC case was very important step-forward for the SACC's jurisdiction as it showed the court's increasing confidence towards defining procedural requirements in broader terms and adopting stronger remedies than both in *Soobramoney* and *Grootboom*. Even though, criticism about lack of substantive analysis of the right to access to health care system still remains for some scholars,[156] the overall assessment is still positive. Klaaren goes further by arguing that *TAC* "demonstrated not only real scrutiny but also real

[154] *TAC* (n. 132) par. 98-99
[155] *Ibid.* par. 135
[156] Ray (n. 126) p. 63

judicial remedial action".[157] In contrast, O'Connell chooses more careful path and states that despite tremendous importance of positive changes after this decision, one should not "overstate it from the perspective of the evolution of the Court's jurisprudence" because the special circumstances of the cases played equally important role in the outcome.[158] This particular assessment seems reasonable. Nevertheless, there is nothing new with the conclusion that social, political or other circumstances always play important part in judicial proceedings. Moreover, such scenario once more proves their importance in Dixon's suggested theory of the constitutional dialogue and emphasizes on need of gradual, case-by-case evolution of courts' jurisprudence and standards of review concerning socioeconomic rights.

3.2. Human Dignity and Social State Principle - Solving Dilemma in Germany

Case law of the FCCG represents interesting and rather unique example when it comes to socioeconomic rights. The term "unique" referrers to the reality where the Court unlike SACC managed to escape the major criticisms towards admitting certain socioeconomic rights as individual constitutional rights and their justiciability in a manner, which gives enough strength and "teeth"[159] to those rights and manages to neutralize arguments about institutional-competence and separation powers. Before discussing two landmark cases about this matter, it is important to define six points in advance, which makes German example so valuable for this paper and for possible lessons defined in the last section of this chapter for Georgia.

[157] Klaaren, Jonathan. A Remedial Interpretation of the Treatment Action Campaign Decision. *South African Journal on Human Rights* vol. 19, no. 3, pp. 455-468, 2003, p. 561 *cited in* O'Connell (n. 12) p. 61
[158] O'Connell (n. 26) p. 62
[159]Leijten, Ingrid. German Right to an Existenzminimum, Human Dignity, and the Possibility of Minimum Core Socioeconomic Rights Protection. *German Law Journal* no. 1, pp. 24-48, 2015, p. 40

First, as it was briefly discussed in previous chapters, unlike South African Constitution, German Basic Law is silent about socioeconomic rights. The only example can be found is Article 6, which concerns protection of children and family. Nevertheless, "the court explicitly read … well-defined guarantees in the field of socioeconomic policy"[160] by invoking the right to dignity (Art. 1.1) in conjunction with the Social State principle enshrined in the Article 20 of the Basic Law.

Second, again, unlike SACC's negative attitude about minimum core approach, FCCG managed to transform this concept into "subsistence minimum". It basically means essential needs to live a dignified life, but the Court defined it in such way that it avoids the same criticism about its absoluteness and incompatibility with judicial assessment because of its vagueness and its political and financial implications as it is towards such obligations on the international level, defined by CESCR.[161]

Third, FCCG made clear that the right to "subsistence minimum" is indeed an individual right and individual claims about this right can be brought before the court. Fourth, the most interesting part is the two-step assessment standard, adopted by the Court. While the first step serves to define the right to "subsistence minimum" in rather broad terms and, just like SACC, leaves its ultimate definition to the legislature, the second step covers procedural requirements for the state policy and plans and manages to articulate certainly more detailed and not so deferential standard towards the legislature.

[160] Leijten (n. 1159) p. 23
[161] *Ibid*. p. 38

Fifth, FCCG obviously does not shy away from adopting strong remedies, with individual relief for applicants as well as clear time constraints for the government to comply with. This is the part where German and South African systems part the ways in the most significant manner.

Sixth, the FCCG's understanding of Basic law as non-value neutral legal document has been in its case-law for many decades. The court "has repeatedly declared that basic rights in their capacity as objective norms also establish a value order that represents a fundamental constitutional decision in all areas of the law".[162] Moreover, when it comes to certain socioeconomic areas such as education for example, FCCG speaks about not only the requirement of non-state intervention as it is traditionally essential for fulfillment of "the basic liberty rights" but also about the need for active governmental action by noting that "basic rights are not merely defensive rights of the citizen against the state. The more involved a modern state becomes in assuring the social security and cultural advancement of its citizens, the more the complementary demand that participation in governmental services assume the character of a basic right will augment the initial postulate of safeguarding liberty from state intervention".[163]

Therefore, it is not surprising that apart from South Africa, Germany is an interesting jurisdiction to look at while discussing the nature of socioeconomic rights, their place in the supreme law and possible solutions about the issues of their justiciability. There are many interesting cases in FCCG's case law concerning socioeconomic issues. Many of them were handled under the constitutional restrictions of property right or tax exemptions for insuring certain necessities for children and family,[164] but for reasons mentioned above, two recent

[162] *Numerus Clausus I* case (33 BVerfGE 303, 1972)
[163] *Ibid*.
[164] *See* for example: *Family Burden Compensation Case* (99 BVerfGE 216, 1998)

landmark cases about "subsistence minimum"– *Hartz IV*[165] and *Asylum Seekers Benefits*[166] - should be discussed in this paper.

Hartz IV. The case was about social assistance under the Second Book of the German Code of Social law, which, through amendments taken in 2003, merged the unemployment and the social assistance benefits. Apart from standard benefits, recipients received benefits to accommodation and heating.

As it was highlighted earlier, Basic law does not say anything about state obligation to provide any kind of social assistance. Nevertheless, FCCG read the right to a "dignified minimum existence" under the Article 1 (dignity) in conjunction with the Article 20 (the Social State principle) and did so by declaring it as judicially enforceable individual right that "covers those means which are vital to maintain an existence that is in line with human dignity". Moreover, as the court stressed, "subsistence minimum" covers both, pure physical needs, such as "food… housing… health…" and minimum necessities for social and cultural life.[167]

It is true that the Court showed clear deference about further defining what this right means exactly by noticing that "Basic Law itself does not permit any precise figure to be put on the claim",[168] which means that concept of human dignity does not provide "any quantifiable requirements".[169] Rather "it depends on society's views of what is necessary" therefore it is primarily a job for the legislature to define the scope of the right as well as necessary means for its realization, because the court's role in this is limited "to a restricted degree by the

[165] *Hartz IV case* - BVerfG, Judgment of the First Senate of 09 February 2010 - 1 BvL 1/09 - paras. (1-220)
[166] *Asylum Seekers Benefits case* - BVerfG, Judgment of the First Senate of 18 July 2012 - 1 BvL 10/10 - paras. (1-113)
[167] *Hartz IV* (n. 165) par. 135
[168] *Ibid*. par. 141
[169] *Ibid*. par. 142

standard of this fundamental right".[170] Nevertheless, unlike SACC, which committed itself to only assessing whether an already existing social programs and governmental plans comply with the constitutional requirements, FCCG spoke about state's positive obligation to provide "subsistence minimum" in the first place and, therefore, suggested stronger guarantees for the right of pure socioeconomic nature. When it comes to first step – substantive constitutional requirements, the state will be held responsible for violation if "benefits are evidently insufficient".[171]

Nevertheless, when it comes to the second step of defining procedural requirements for the state, the Court engaged in detailed analysis and articulated four main criteria the legislature needs to satisfy in order to fulfill its constitutional obligation. This is the part where the Court held the legislature to much stronger form of review than it was observed in the case of South Africa. Namely, the Court examined whether the legislature: (1) "has covered and described the goal to ensure an existence that is in line with human dignity… in conjunction with Article 20.1". (2) "has selected a calculation procedure of calculation fundamentally suited to an assessment of subsistence minimum"; (3) "has completely and correctly ascertained the necessary facts"; (4) "kept within the bounds of what is justifiable in all calculation steps with a comprehensible set of figures within this selected procedure and its structural principles". Leijten calls these criteria "rationale", "transparency" and "consistency requirement" respectively.[172] Additionally, the legislature has an obligation to disclose all necessary information and adopted methods of calculation to the Court in order to "facilitate … constitutional review".

[170] *Ibid*. par. 142
[171] *Ibid*. par. 141
[172] Lejten (n. 159) p. 31

Looking at the outcome of *Hartz IV* case, it is apparent that the legislature does not have much discretion when it comes to procedural constitutional requirements, unlike material ones. Moreover, procedural requirements seem to be cumulative since the only part where the Court found the violation was the fourth criterion, which means that it did not found the assessment method used by the legislature "realistic" enough, which reflected to significant number of people in desperate need for the state's social assistance.[173]

Final and the most significant difference between South African and German standard of constitutional review concerns the remedies. Contrary to SACC which, even in its strongest cases like *Groothboom*, refrained from adopting any kind of strong remedy and issued only declaratory relief without any time constraint of individual entitlements even for applicants only, the FCCG took the opposite direction. It gave the legislature fixed time to make necessary corrections in its program without nullifying the disputed provisions and granted individual relief to applicants, even in this period gap to require and receive necessary benefits.[174]

Asylum Seekers Benefits. The second landmark case was about minimum social benefits for foreign nationals guaranteed by the Asylum Seekers Benefits Act of 1993 and set significantly lower benefits than for Germans and for those legally defined to be similarly treated. So, the disputed act set different conditions and amount of benefits than the Second Book of the German Code of Social law which was discussed in *Hartz IV* case. More importantly, the law remained unchanged since the introduction of the Act in 1993, even though the number and preconditions for applicants changed.

First, the FCCG mainly based its reasoning on *Hartz IV* case while defining "the guarantee of a dignified minimum existence" as "the fundamental right... of every individual human being"

[173] *Hartz IV* (n. 165) par. 216
[174] *Ibid*.

which when there is such need may "only be ensured by the material support" of the state.[175] In addition, because such entitlement was qualified as individual constitutional right, it applies to all, regardless of one's official status in Germany. The reasoning was also similar concerning the state's positive obligations and the Court's restricted form of review. However, as for applying these standards to the present case the FCCG found the violation of substantive as well as procedural requirements. First, it declared that benefits guaranteed by the disputed act were "evidently sufficient to guarantee a dignified minimum existence", because the amount has not changed since its adoption, even though the legislature itself provided the mechanism for adjustment for changing reality.[176]

Second, according to the Court, the assessment conducted pursuant to the disputed act was not realistic, since the assumption that the amount of time spent in Germany influences the amount of benefits "ha[d] no adequately reliable basis".[177] Moreover, "migration-policy considerations" argument presented by the state, which aimed to discourage asylum seekers by providing a significantly lower amount of benefits to them, was not a convincing argument for the Court.

Third, concerning the remedies of the final decision, similarly to *Hartz IV*, the Court did not annul the disputed provisions, but arranged the transitional rules and gave the legislature fixed time to adjust its assessment to constitutional obligations articulated by the Court.

In conclusion, as it was identified at the beginning of this section, FCCG's case law about "subsistence minimum" creates different and equally interesting example for socioeconomic rights' justiciability debate. Additional to the previous remarks, some further aspects can be

[175] *Asylum Seekers Benefits* (n. 166) par. 64
[176] *Ibid*. par. 81-89
[177] *Ibid*. par 92

identified for this matter. First, the Court's understanding of "subsistence minimum" strongly reflects on the minimum core approach defined by the CESCR, as "it is minimal…. [and] only applies to those things necessary for leading a life consistent with dignity".[178] However, the Court manages to define this concept and, moreover, to enforce it in such way that is consistent to German reality where the Social State principle is one of the fundamental constitutional principles, frequently and elegantly used in its case-law. Second, as Leijten correctly argues, FCCG gave the strong and reasonable answer to critics, which are skeptical about relying on "classic rights" for covering "minimum social protection".[179] It can certainly be an option for the Constitutional Court of Georgia, because of strong textual similarities with the Basic Law about the human dignity concept and Social State principle in Georgian Constitution. Third, the Constitution of South Africa obviously gives SACC the broader and direct mandate to adjudicate on socioeconomic rights and entrenches these rights directly in the Constitution. Nevertheless, the SACC still rejected minimum core approach and adopted the reasonableness standard, which is mainly about procedural requirements, even these requirements seem less strong, and coherent and more problematic compared to the standard of review adopted by FCCG. Moreover, by adopting just enough constitutional "guidelines" for the legislature to define the scope and substance of this socioeconomic right but giving itself sufficient means to limit the legislature's discretion through articulating strong procedural requirements, FCCG mostly managed to escape widely-shared counterarguments for active role of judiciary concerning these kinds of rights. Finally, by pushing for strong remedies, the German example fits to Dixon's suggestion about the constitutional dialogue more that South African one.

[178] Leijten (n. 159) p. 36
[179] *Ibid*. p. 37

3.3. Facing the Reality – Lessons for Georgia

Currently there are two pending cases before the Constitutional Court of Georgia (CCG) that concern particularly vulnerable group of the society-homeless people. Both, *Chitaia* and *Tandashvili* cases question constitutionality of the legislation and executive policy about social security, namely the social plan which aims to combat poverty and ensure social protection of families whose income is below the minimum level ("poor families"), prescribed by the same plan. Disputed provisions define preconditions required to become a part of the universal database for poor families as well as to have access to material social assistance, which is formulated as "minimum allowance". Moreover, registration in this universal database is the necessary prerequisite for getting such minimum allowance. Family which considers itself as poor and therefore to satisfy the necessary conditions to register to this universal database must apply to governmental social agency and require official assessment of its living conditions from the authorities first. However, one of the main requirements for even considering the application is that a family should have a permanent place to live and it should not occupy the state property for this purpose. Therefore, disputed provisions completely deny access to the universal database and ultimately to the material social assistance to homeless people. Both plaintiffs are arguing that such system violates their following fundamental constitutional rights: equality before the law (Art. 14), the right to life (Art. 15), the right to human dignity (Art. 17). Additionally, they invoke Article 39, which guarantees "*universally recognized rights, freedoms, and guarantees of an individual and a citizen that are not expressly referred to herein but stem inherently from the principles of the Constitution."*[180]

[180] Constitution of Georgia, 1995

It was mentioned above that CCG has dealt with equality problems in different social programs many times, but it still has not have a change to adjudicate on the substantive socioeconomic rights apart from state-provided pensions which are not considered as property entitlements. Both, *Chitaia* and *Tandashvili* cases are unique in this sense. They cover both, substantive and procedural parts of minimum allowance and they deal with probably the most vulnerable social group, people with no shelter and in need of very basic necessities for life. And the simple proof for uniqueness of these cases and for CCG's lack of experience about providing fixed standard of review for this matter is that, these cases has been distributed to different chambers of the court and according to Recording Notices (preliminary decisions on admissibility) they admitted them for main hearings with different set of constitutional rights. While Recording Notice on *Chitaia* does not reveal the First Chamber's argumentation because the case was fully admitted, for *Tandashvili* case the Second Chamber engaged in interesting reasoning. It refused to admit the constitutional claim with the right to life and Article 39 by defining that entitlement to minimum allowance, as the substantive constitutional right, is protected by the Article 32 of the Constitution which declares that "Conditions for ensuring some minimum standard of living… shall be determined by law".[181] As for dignity claim, the Chamber elaborated on its classic liberal understanding, not social one[182] and declared that it will decide on merits whether disputed provisions, which restrict social program accessibility to those homeless people who occupy the state property, use them as means to an end to discourage committing such unlawful act.

Even though, the CCG still has not made its final decision about *Tandashvili* case, the careful reading of the Recording Notice still allows to assess: (1) What is the Court's understanding

[181] *Ibid.*
[182] Ghai (n. 29) p. 56

about minimum standard of living concept. What are the similarities and differences of Georgian case compared to German and South African jurisdictions and case law that was discussed in two previous sections of this chapter. (2) What are the particular facts and circumstances that can contribute to the final recommendations for CCG and finally, (3) what is the most suitable standard of review the court can possibly adopt regarding the positive dimension of socioeconomic rights (in general and minimum standard of living in particular) based on Dixon's suggested variations of the constitutional dialogue theory.

First, it is important to clarify that the CCG openly declared that Article 32 of the Constitution guarantees substantive individual right to minimum standard of living.[183] Even though it can be a matter of debate whether a clear textual understanding of this article prescribes an individual right or just the state's minimum positive obligation about adopting proper legislative measures for its regulation. Unlike the FCCG which reads the right to subsistence minimum from the right to dignity in conjunction of the Social State principle CCG refused to refer to any classic liberty rights suggested by the applicants, including human dignity. Nevertheless, the similarities between German and Georgian constitutional order are obvious. Whether an individual right on minimum standard of living is explicitly and separately enshrined in constitution or is read through human dignity, it is the Social State principle, which gives this right meaning both in both jurisdictions. Like the FCCG, the Court defined this principle as the essential constitutional source to not only the right to minimum standard living but to all social rights included in the second – human rights – chapter in the Constitution.[184]

One would think that invoking such broad definition and importance of Social State principle, together with the Article 32, creates perfect possibility to adopt German understanding of

[183] *Tandashvili case* (n. 10) par. 13
[184] *Ibid*. Par. 12

subsistence minimum as strong individual socioeconomic right, which was welcomed by critics. Nevertheless, the CCG's actual understanding of the nature and scope of the right to minimum standard of living is way more similar to SACC's definition of healthcare rights adopted in *Soobramoney,* which is its one of the most heavily criticized decisions for shaping this right as extremely "weak". Namely, the CCG invoked resource constraints argument – typical one against the active judicial role in enforcing socioeconomic rights- as an indispensable part and an important "shortcoming" of these rights and clearly noted that "the constitution will be less demanding towards the state when it comes to social state principle and rights connected to it".[185] By declaring so, the CCG certainly gave the deference to the political government, though it is entirely up to future cases to define whether such deference is reasonable or gives almost unlimited freedom to the government.

Another element of the CCG's understanding of the right to minimum standard of leaving concerns possible procedural requirements which is more important source of power of the judiciary both in South Africa and Germany. Article 32 speaks about state obligation to adopt legislation and prescribe necessary conditions for enjoying the right to minimum standard of living but stops here. The Court further elaborated on this topic by noting that "the ultimate aim of the social program disputed in this case is to provide social protection of those families which need it most and the state must enact and enforce this program in an effective manner and with clear aims in mind".[186] Nevertheless, it ended up the reasoning again with reference to budgetary means and necessity to distribute it in fair manner. Maybe in similar future cases, which will be decided on merits by the CCG, the Court will be brave enough to adopt more

[185] *Ibíd*. Par. 18
[186] *Ibíd*. Par. 11

detailed procedural requirements for this matter. Both, German and South African case-law provide interesting standards of review for it.

Second, several circumstances and facts must be mentioned that can possible influence on CCG's decisions for these two pending cases as well as future challenges concerning adjudication on socioeconomic rights. Since its establishment, the CCG has gradually developed its image in compliance with the Kelsenian understanding of constitutional review concept. There were several cases at the beginning when the Court gave some direct instructions to the legislature after declaring disputed provisions as constitutionally problematic, but this practice was abandoned soon. Since then, through its reasoning, it became clear that the CCG sees itself strictly as a negative legislator, which checks the constitutionality of already existing legislation without further elaborating on possible future solutions and suggestions for the political government.[187] Moreover, the CCG is another example of Tushnet's strong-form judicial review model that almost always uses strict proportionality standard for constitutional review concerning human rights. The only exception is reasonableness standard for equality cases where different treatment is based on other grounds than those prescribed by the Constitution or the differentiation itself is less intensive.[188] Therefore, dealing with socioeconomic rights with more budgetary and financial implications and coming closer to the already thin line between the judiciary and the political government, as negative and positive legislator respectfully, seems problematic and rather scary for the Court. Moreover, recent tensions between the Court and the government over politically

[187] Judgement N3/6/642 of the Constitutional Court of Georgia of November 10, 2017 on the case of *"Citizen of Georgia – Lali Lazarashvili v. the Parliament of Georgia*", par. 20

[188] *See* for example: Judgement N1/11/629, 652 of the Constitutional Court of Georgia of October 25, 2017 on the case of *"Citizens of Georgia – Roin Gavashelishvili and Valeriane Migineishvili v. The Government of Georgia"* for reasonableness standard, also Judgement N1/1/477 of the Constitutional Court of Georgia of December 22, 2011 on the case of *"Public Defender of Georgia v. the Parliament of Georgia"* for strict proportionality standard.

sensitive cases[189] and subsequent legislative amendments aiming to restrict the court's authorities, which was later declared mostly unconstitutional,[190] it is understandable that engaging in the constitutional dialogue with the political government can be problematic.

Nevertheless, there are apparent blind spots and burdens of inertia in Georgian political reality when it comes to socioeconomic rights. Even though, state-provided pensions and concerns of state social policy are always popular themes for election campaigns, promises are rarely turned into reality after elections. It is even more obvious when it comes to vulnerable groups like homeless people. The current legislation speaks about joint responsibilities for the government and local authorities to work on proper social programs to provide shelter and minimum necessities for life for this group, but as applicants' arguments showed in *Chitaia* case, such responsibilities remain on paper so far. Moreover, considering lack of strong public mobilization culture, this concern is even more troublesome when it comes to socioeconomic issues. People who are in need of material help are vulnerable and marginalized group of society, who lack the voice to put enough pressure on political government. Even among civil society, NGOs who work on socioeconomic issues are in minority and unable to steer public attention towards these issues and push for changes. Therefore, it is obvious that the CCG's active role has vital importance for dealing public's socioeconomic concerns. One more promising detail is the Court's increasing popularity and trust among the society due to recent cases about classic liberty rights which were widely approved.

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[189] See for example the following Article: *Preserving Democracy: the On-Going Fight between the Court and the Government,* http://georgiatoday.ge/news/3424/Preserving-Democracy%3A-the-On-Going-Fight-between-the-Court-and-the-Government (last accessed on 19:48, April 11, 2018).

[190] Judgement N3/5/768, 769, 790, 792 of the Constitutional Court of Georgia of December 29, 2016 on the case of *"Members of the Parliament of Georgia – David Bakradze, Sergo Ratiani and others v. The Parliament of Georgia"*

Third, despite above-mentioned political tensions and conceptual uneasiness that the CCG has dealt recently, it still can play an important part in advancing socioeconomic rights' role in Georgian constitutional order. Besides, it is a matter of time before these rights become important source of debate either on academic or practical level. Therefore, it will be useful to suggest solutions and possible standard of judicial review considering all theoretical and conceptual understandings, discussed in the first two chapters of this paper as well as lessons taken from practical experiences of South Africa and Germany analyzed in previous sections of current chapter.

It was discussed in the third section of the previous chapter that, for adjudicating on positive dimension of socioeconomic rights, Dixon suggests the concept of constitutional dialogue developed under Tushnet's strong-/weak-form of judicial review taxonomy. She argues that courts should weaken their traditionally accepted strong-form review and should prefer either strong conversationalist model with relatively weak coercive solutions (strong rights-weak remedies model) or vice versa (weak rights-strong remedies model). The final solution is up to domestic jurisdictions after considering all important characteristics of these jurisdictions and circumstances of each case.

According to Dixon's suggestion, South African experience is an example of weak form judicial review where SACC adopted both weak rights and weak remedies approach, refused to give strong judicial reasoning about the scope of certain socioeconomic rights or invoked resource constraints argument and did not suggest stronger remedial solutions by issuing mainly declaratory reliefs. It is true, that the CCG did not engage in extensive judicial reasoning about the right to minimum standard of living (Art. 32) considering the format of preliminary decision and invoked resource constraint argument. Nevertheless, at least giving such entitlement the status of a constitutional rights still gives hope that the Court will reconsider its uneasiness about budgetary implications and will adopt more of FCGG's understanding on the

right to subsistence minimum discussed in *Hartz IV* case, where the latter set strong constitutional ground for this right through human dignity and Social State principle. At least the Court has good example by *Hartz IV*. German example is also more useful from democratic perspective and neutralizes the CCG's possible concerns about separation of power and Kelsenian negative legislator concept, since FCCG defined the right to subsistence minimum in relatively abstract manner and left enough space for the legislature to provide more precise shape of the right itself.

The further unique element of German standard of judicial review that is not considered in Dixon's dialogic understanding is separation of substantive and procedural requirements towards the state. It is true that SACC developed and refined such procedural requirements through reasonableness standard also, but two-step standard of review looks more promising for Georgian type of constitutional review for 4 reasons: (1) As the CCG defined, Article 32 of the Constitution provides obvious procedural element of the right to minimum standard of living by prescribing legislature's obligation to adopt subsequent legislation for its realization. (2) Assumed difficulties about providing necessary information to courts[191] can be easily handled since it will not be the first case where the CCG has to require and analyze information with technical or statistical characteristics. The FCCG directly ordered the government to represent all necessary information about disputed social program in *Hartz IV;* (3) Both *Chitaia and Tandashvili* cases mainly deal with apparent procedural shortcomings of the already existing social program, which fails to address the necessities of the most vulnerable social group – homeless people. This particular shortcoming is so obvious and unreasonable that it can be easily assessed even by reasonableness standard adopted by the SACC in *Grootboom* case. Though, German procedural standard with four criteria seems more comprehensive,

[191] Dixon (n. 50) p. 410

detailed and promising for future cases and for active, stronger court this paper tries to endorse; (4) Even if for *Chitaia* case, the First Chamber chooses another direction and uses invoked classic liberty rights, such as right to life or right to human dignity to read such socioeconomic right in the Constitution, German experience can be the only helpful example to overcome subsequent legal challenges of not crossing the already thin line with the political government.

As for strong remedies, which is preferable suggestion Dixon's dialogic understanding, the SACC mostly fails to suggest useful example. It is obvious from its case law the South African Constitutional Court repeatedly refuses to grant either individual relief or fixed time constraints, which is not a strong instrument for catching political governments attention and make it rethink the existing status-quo. In contrast, German case law provides better solution of granting both – individual relief and setting time limit for the government to comply with its decision. This suggestion can definitely be useful for the CCG as setting fixed time to change disputed legislation according to standards articulated in its decisions is not something new for the Court but a well-adopted tool in its case law.[192]

In conclusion, Dixon's model of the constitutional dialogue, which suggests adopting weak rights – strong remedies standard of judicial review, is certainly a promising and possible theoretical solution for Georgian constitutional reality and for the CCG to play active role in "encouraging the legislature and the broader constitutional culture to reconsider its allegiance to the previous status quo".[193] As for practical guidance, both South African and German experiences are interesting and suggest more detailed answers to many problematic questions about justiciability of socioeconomic rights, including their positive dimension. Nevertheless,

[192] Judgement N2/4/532, 533 of the Constitutional Court of Georgia of October 8, 2014 on the case of "*Citizens of Georgia – Irakli Kemoklidze and David Kharadze versus the Parliament of Georgia*"
[193] Dixon (n. 50) p. 407

the FCCG's case law with its two-step standard of review, which manages to provide stronger constitutional ground for substantive socioeconomic rights, more detailed procedural requirements and stronger remedies, is the example Georgia needs to follow.

Conclusion

It is without a doubt that debate over controversies about the nature and justiciability of socioeconomic rights is yet far from being over. Concept of comparative constitutionalism is becoming more and more popular, which means that, looking at different theoretical and practical perspectives of this matter will gain more importance for domestic jurisdictions in order to draw their own standards and adopt the most suitable solutions for their own constitutional order.

Similarly, the aim of this thesis was to reexamine central theoretical arguments and important practical experiences concerning justiciability of socioeconomic rights, based on comparative analysis, and provide suitable solutions for the Constitutional Court of Georgia, which has come across to such challenge only recently.

This paper discussed popular arguments for and against granting socioeconomic rights full, legally binding constitutional status and making them justiciable before constitutional courts. As it was shown, most counterarguments are either dictated by historical political circumstances, slightly exaggerated or based on certain assumptions about the traditional understandings of separation of powers doctrine and strong-form review that courts usually adopt when they adjudicate on human rights. After reexamining such arguments, this paper discussed two main theoretical suggestions the role of constitutional courts concerning socioeconomic rights - Tushnet's strong-form/weak form judicial review taxonomy and Dixon's theory of constitutional dialogue. The ultimate suggested model of constitutional review concerning these rights is the one where the courts adopt rather weakened standard of review either by defining substantive socioeconomic right with narrow terms but suggesting strong remedies or vice versa, depending on particular jurisdiction and case. This is the new reality where courts engage in dialogue with political government in order to insure maximum protection of socioeconomic rights.

As for practical perspectives, both, German and South African experience, discussed in this paper, showed that successful adjudication on socioeconomic rights as individual constitutional human rights guarantees is not only theoretical possibility but can be a normal reality too. Discussing case law of these jurisdictions through the prism of comparative analysis, they both suggest more detailed answers to many problematic questions discussed in first two chapters of this paper. Nevertheless, the two-step standard of review, adopted by the Federal Constitutional Court of Germany is more interesting for Georgia due to doctrinal as well as textual similarities between these two jurisdictions. It manages to provide stronger constitutional ground for substantive socioeconomic rights, more detailed procedural requirements and stronger remedies, which is the example Georgia needs to follow.

The Constitutional Court of Georgia has been one of the strongest state institutions in recent years. Successfully adjudicating on important human rights issues and setting high legal standards played an important role in sealing the Court's "public image" as strong and independent part of Georgian judicial system. This reality is both, its unique chance and huge responsibility to play an important role in defining Georgian society as "truly representative, based on compassion and participation". By taking a step towards initiating active debate over socioeconomic rights, the Court will voice to people in need and encourage the government to move finally beyond social status que, which is still chained by irrational fear of country's soviet past.

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