JOURNAL OF CONSTITUTIONAL LAW

VOLUME 1 / 2018

LANDMARK JUDGMENTS OF THE CONSTITUTIONAL JUSTICE ADOPTED BY THE CONSTITUTIONAL COURT OF GEORGIA IN 2017

JOHN KHETSURIANI
CONSTITUTIONAL REFORM IN GEORGIA (2017) AND THE CONSTITUTIONAL COURT

ANNA PHIRTSKHALASHVILI
FROM INTERNATIONALISATION OF THE NATIONAL LAW TO THE CONSTITUTIONALISATION OF THE INTERNATIONAL LAW

STATISTICAL OVERVIEW OF THE COURT'S ACTIVITIES

SPECIAL EDITION

CONSTITUTIONAL COURT OF GEORGIA

GRIGOL ROBAKIDZE UNIVERSITY

UDC (უაკ) 34

ISSN-2587-5329

CONSTITUTIONAL COURT OF GEORGIA

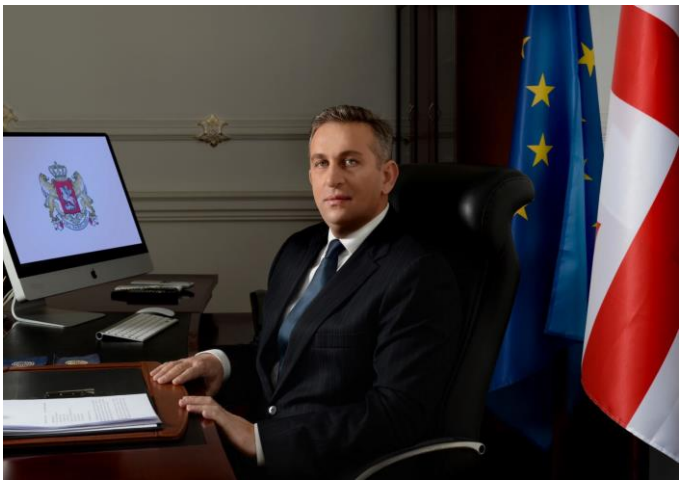
GRIGOL ROBAKIDZE UNIVERSITY

EDITING AND TRANSLATION – **IRINE URUSHADZE**

COVER DESIGN AND PUBLISHING – **MIKHEIL SARISHVILI**

8/10 K. Gamsakhurdia str. | 16/18 M. Abashidze str. Batumi 6010, Georgia
e-mail: jcl@constcourt.ge

FOREWORD



The role of the Constitutional Court of Georgia and its recognition in the society increases year by year, which is evidenced by the amount of constitutional complaints registered during the last year. With this regard it is important for the society to be informed not only on the case-law of the Constitutional Court of Georgia, but also of the constitutional law in general. The periodical issue of the "Journal of Constitutional Law" serves this very purpose of popularisation of constitutional law and supporting the development of academic work in the field.

The development of the case-law of the Constitutional Court of Georgia and the field of constitutional law is significantly depended on various academic activities within the field, as well as on lively legal discussions.

The "Journal of Constitutional Law" has significantly changed compared to its predecessor, namely, the criteria of selecting works has been more precisely set and so were the requirements thereof, the Journal is an international refereed periodical and the works published within will also be available on various international legal scholarly works databases. The access to the Journal on an international level will also increase its popularity and support active academic discussions around the constitutional law.

The foregoing volume of the "Journal of Constitutional Law" is a special issue, dedicated to the information published by the Constitutional Court of Georgia on March 14, 2018 regarding the state of constitutional justice in Georgia. The mentioned document included the summary and analysis of the work conducted by the Constitutional Court in 2017, it reflected the trends observed during the process of constitutional control and various statistical data. For the purpose of bringing this document closer to the academia it was decided to briefly provide the report of the Court within the renewed issue of the Journal.

I believe the "Journal of the Constitutional Law" will have significant role in developing Georgian constitutional law, supporting the identification of legal problems within the field and creating new, substantial forum for academic discussions.

THE PRESIDENT OF THE CONSTITUTIONAL COURT OF GEORGIA

ZAZA TAVADZE

TABLE OF CONTENTS

LANDMARK JUDGMENTS OF THE CONSTITUTIONAL JUSTICE ADOPTED BY THE CONSTITUTIONAL COURT OF GEORGIA IN 2017 7

Introduction 7
Overview of the Jurisprudence of the Constitutional Court of Georgia 9
I. Rulings – Provisions Overruling the Judgments 9
II. Judgments 12
Major Trends of Strengthening Constitutional Justice 22

JOHN KHETSURIANI
CONSTITUTIONAL REFORM IN GEORGIA (2017) AND THE CONSTITUTIONAL COURT 27

Introduction 27
The Place of the Constitutional Court within the System of Separation of Powers 30
The Composition and Formation of the Constitutional Court 32
The Authority of the Constitutional Court and the Subjects Empowered to Petition the Constitutional Court 36
Conclusion 40

ANNA PHIRTSKHALASHVILI
FROM INTERNATIONALISATION OF THE NATIONAL LAW TO THE CONSTITUTIONALISATION OF THE INTERNATIONAL LAW 43

Introduction 43
1. Structural Variation of the Policy of International Law 44
2. From National to Global – Constitutionalisation 45
3. From Global to National – National Identity of the Constitution 49
Conclusion 52

STATISTICAL OVERVIEW OF THE COURT'S ACTIVITIES 55

LANDMARK JUDGMENTS OF THE CONSTITUTIONAL JUSTICE ADOPTED BY THE CONSTITUTIONAL COURT OF GEORGIA IN 2017

This document is based on the Information on Constitutional Justice prepared pursuant to article 12, paragraph 2 of the Organic Law of Georgia "On the Constitutional Court of Georgia"[1]

ABSTRACT

The Organic Law of Georgia "On the Constitutional Court of Georgia" article 12, paragraph 2 prescribes the duty of the President of the Constitutional Court of Georgia to annually present information to the President of Georgia, Parliament of Georgia and the Supreme Court of Georgia regarding the state of constitutional justice in Georgia. The President of the Court has fulfilled this duty for the first time in the past several years in 2018 and delivered the document to the relevant institutions and also published it on the webpage, assessing the state of constitutional justice in Georgia during 2017. The present document is based on this very extensive report and shortly provides the information submitted by the Court.

The Constitutional Court is the guarantor of the supremacy of the Constitution and protection of constitutional rights and freedoms of individual. For assessing the condition of constitutional justice in the country the discussion and analysis over the case-law of the Constitutional Court is significant. The present document aims at summarising the landmark acts adopted by the Court during 2017 and assess their relevance for the development of the constitutional justice. The article focuses on several relevant judgments adopted in 2017 having major impact on legal development in Georgia and which are important to be a subject of wider discussions. At the same time, the Court has adopted several rulings during 2017 for invalidating the provisions overruling its judgments, which stresses the necessity of reflecting Court practice into the law. This article pays particular attention to these rulings, in order to inform interested audience and relevant state institutions of the problems and challenges in implementing the standards established by the Constitutional Court of Georgia.

INTRODUCTION

The Constitutional Court is the guarantor of supremacy of the Constitution and protection of constitutional rights and freedoms of individual. Therefore it has a crucial role in everyday life of a democratic state guided by recognition and protection of fundamental human rights. Interference and restriction of fundamental human rights in the process of governance, is

[1] The present paper was drafted through processing the document created by the Constitutional Court of Georgia and does not reflect the views of the Journal or of the Author. The paper was prepared by the Editor of the Journal, Irine Urushadze. Full copy of the Document submitted by the Court is accessible here: http://www.constcourt.ge/en/ajax/downloadFile/3714 [Last accessed on June 20, 2018].

often an unavoidable, inevitable reality. However, interference in fundamental rights should take place in the manner and according to the due standards set forth in the Constitution. Each branch of the government is obligated to respect and protect the Constitution of Georgia. Due compliance with the Constitution is an important precondition of democratic development of the country with the right values. The Constitutional Court of Georgia is the guarantor of the system of constitutional values; it interprets constitutional principles and provisions, in order the ever changing and developing legal processes to come within the constitutional order and the human rights to be protected.

The dynamic process of interpretation of the Constitution of Georgia by the Constitutional Court poses various legal challenges; the case law of the Constitutional Court is developing year by year; the scopes and the meaning of fundamental rights are reconsidered and important constitutional standards are set, in order the comprehensive and irreversible protection of human rights to be possible. Protection of supremacy of the Constitution requires coordinated operation of all branches of the government.

The present document provides the summary and the analysis of the activities undertaken by the Constitutional Court of Georgia in 2017. It also describes the important directions of strengthening of constitutional justice that were identified in the process of constitutional adjudication. The document is also annexed with the statistical overview of the Court's activities.[2]

The last year of 2017 was significant and productive for the Constitutional Court of Georgia from the perspective of its main activities, which is implementation of constitutional review, as well as, of the activities undertaken at the international level. Firstly, it should be noted, that the number of constitutional complaints filed with the Constitutional Court has significantly increased, which to a certain extent shows the rising of awareness about constitutional review and of the trust of public in it. There were 423 constitutional complaints and referrals registered in the Court throughout the last year, which substantially exceeds the number of complaints registered in the previous years. Trend of increasing number of complaints makes it particularly important, that the Constitutional Court be able to carry out adjudication in timely and effective manner.

In 2017, the Constitutional Court managed to finalise the proceedings with regards to 115 constitutional complaints. In view of the number of completed cases and adopted judgements, 2017 was an unprecedented. However, at the end of the year, there were still 471 constitutional complaints pending before the Constitutional Court and provision of timely and competent adjudication in these cases poses important challenge to the Court. In view of the role and function of constitutional review, the Constitutional Court is oriented at provision of the most effective and rapid adjudication, which will positively influence the degree of human rights protection in the country.

International activities that took place during the last year are worth mentioning, including the XVII Congress of the European Constitutional Courts on "the Role of Constitutional Courts in Upholding and Applying of Constitutional Principles". The Constitutional Court of Georgia, as the chair of the Conference of European Constitutional Courts, hosted the

[2] The overview is given after the works presented in the Journal in the form of an Annex.

Congress. Delegates from the constitutional courts and similar institutions from over 40 countries participated in the Congress together with the invited representatives of the legislative, executive and judicial branches of the government and diplomatic corps. This Congress was an important event for the Constitutional Court of Georgia, as it provided the platform for the fruitful cooperation between the judges of the Constitutional Court of Georgia and representatives of constitutional courts of various European countries. The awareness and role of the Constitutional Court of Georgia has increased further at the international level.

OVERVIEW OF THE JURISPRUDENCE OF THE CONSTITUTIONAL COURT OF GEORGIA

I. Rulings – Provisions Overruling the Judgments

The Constitutional Court is a judicial body implementing constitutional review and its judgements are binding for every branch of government. In certain sense, judgements of the Constitutional Court are self-enforcing, as the provision declared unconstitutional is invalidated without carrying out any additional measures for its implementation. Moreover, full enforcement of judgements of the Constitutional Court also includes actual implementation of legal standards stated in it and their incorporation in the legislation. In this regard, every branch of government is obliged to adhere in practice to the constitutional requirements under a respective constitutional provision, as it was interpreted in the judgement of the Constitutional Court of Georgia. Enforcement of judgements of the Constitutional Court may depend in certain cases on the drafting of legal acts, which should offer a new regulation of the respective relationships. Judgements of the Constitutional Court have crucial role in the law-making process for novel regulation of legal relationships, which would be in compliance with constitutional principles, as the judgements contain authoritative interpretations of the Constitution, as a whole, as well as its individual provisions and principles.

According to the Organic Law of Georgia "On Constitutional Court of Georgia", it is prohibited to adopt legal act, which contains provisions with the same content, as those provisions already declared unconstitutional. Despite this stipulation, it is often the case, that the authority, adopting a legal act, fails to take into account the standards provided in the judgement of the Constitutional Court and the regulation of legal relationships is not compatible with the requirements of constitutional provisions, as the Court interpreted them. It could also be the case that the Court invalidated the disputed provision, but in spite of this, there still remain the rules of behaviour in the legislation with analogous contents and causing analogous legal problems.

At the same time, the Constitutional Court has power to invalidate the provision overruling its judgement in a simplified procedure, without consideration on merits. Under article 25 paragraph 4^1 of the Organic Law of Georgia on the Constitutional Court of Georgia, "If the Constitutional Court ascertains at the preliminary session, that the disputed normative legal act or the part thereof contains rules of the same content as those that had already been

declared unconstitutional, [...] it will adopt a ruling on non-admissibility of the case for consideration on merits and on invalidation of a disputed act or part thereof."

The Constitutional Court of Georgia has decided on approximately ten cases, where the complaint requested invalidating the provisions overruling judgments of the Court. In six cases the Court considered the normative acts or the normative substance thereof envisaging the content overruling the judgment of the Constitutional Court.

Such was the case for the constitutional referral N885 of the Bolnisi District Court, where the Grand Chamber of the Constitutional Court of Georgie considered article 260, paragraph 1 of the Criminal Code of Georgia to have the normative content similar to the provisions declared unconstitutional in the Judgment №1/4/592 of the Constitutional Court of Georgia "Beka Tsikarishvili v. the Parliament of Georgia", specifically, the disputed provision allowed the sentence of imprisonment for purchase and storage of narcotic substance – raw marijuana for the purpose of personal consumption.

On July 13, 207 the First Chamber of the Constitutional Court of Georgia upheld the claim of the citizens of Georgia Gocha Gabodze and Levan Berianidze (Constitutional Complaint №878) and invalidated Paragraph 24(a) of the Appendix №1 of the Order №241/ნ of the Minister of Labour, Health and Social Protection of December 5, 2000 "On Determination of Restrictions on Donation of Blood and Its Components", preventing men who have sexual intercourse with men (hereinafter "msm group") from donation of blood and its components, depriving men, who had even one sexual intercourse with men, of the right to donate blood and its components forever, throughout their lifetime, regardless of whether that intercourse entailed the high risk of acquisition of blood-borne viruses. The Constitutional Court declared that the disputed provision had the content similar to the rule declared unconstitutional under the Judgement №2/1/536 of the Constitutional Court of Georgia of 4 February, 2014 and led to analogous legal outcomes.

On 13 October, 2017, the Constitutional Court of Georgia adopted a ruling on the case of "Citizens of Georgia – Emzar Paksadze and Tamar Sadradze v. The Parliament of Georgia" (constitutional complaints №1219 and №1236) and invalidated the part of the disputed provision without consideration on merits, since the disputed provision had the identical content to the rule found unconstitutional under the Judgement №2/2/558 of the Constitutional Court of Georgia of February 27, 2014. Specifically, when the restriction of the right to fair trial is related to imposition of liability for certain disciplinary offence, for transgression, in order to prevent or afterwards remedy arbitrariness or error of a judge, it is necessary, that a person, who was imposed the liability, enjoy the minimal procedural guarantees protected under the right to fair trial, which implies right to appeal against a judgement, *inter alia*.

On October 13, 2017 the Constitutional Court of Georgia adopted a ruling on the case of "Non-Commercial Entity 'Human Rights Education and Monitoring Centre (EMC)' and Non-Commercial Entity 'Ertoba 2013' v. the Government of Georgia" (Constitutional Complaint №1241), where the Court elaborated on the regulations of the Government of Georgia, which prescribed that the reports/conclusions and recommendations prepared as part of the inspection of workplace conditions within the state-implemented programs of 2015,

2016 and 2017 to be non-public information. In this case the Constitutional Court primarily determined, that the documentation prepared as a result of inspection of working conditions presented public information stored in state institutions for the purposes of Article 41 of the Constitution of Georgia. The Constitutional Court explained the standards set forth in the Judgement №1/4/757 of the Constitutional Court of Georgia of March 27, 2017 and stated that in a given case violation of formal criteria of access to the public information led to finding of the disputed provision unconstitutional. Specifically, possibility of access to public information was restricted by a subordinate normative act, instead of law, whereas, no law delegated relevant power to the Government. Therefore, the disputed provisions were declared overruling and the Court invalidated them without hearing on the merits.

On 16 November, 2017 the Second Chamber of the Constitutional Court of Georgia adopted the ruling in the case of "Citizens of Georgia – Ivane Petriashvili and Irakli Ulumbelashvili v. the Parliament of Georgia" (constitutional complaint №1218), where 2nd sentence of Article 37(1) of the Law of Georgia "On Special Penitentiary Service" was declared unconstitutional without hearing on merits, since they provided for the limit of

The disputed rule provided for the entitlement of an official in case of unlawful dismissal to require recognition of their dismissal as unlawful and respective salary. However, the rule contained similar restriction of right to compensation of damages of a person unlawfully dismissed from the Special Penitentiary Service, which is public service, to the provisions declared unconstitutional by the Judgment N2/3/630 of the Constitutional Court of Georgia adopted on July 31, 2015.

On 16 November, 2017, the Constitutional Court of Georgia adopted a ruling on the case of "Non-Commercial Entity Political Union 'United National Movement' v. The Parliament of Georgia" (Constitutional Complaint №1214), where pursuant to the disputed provisions an increased sum for the State Fees was prescribed for the legal entities compared to individuals. The Constitutional Court declared the disputed provisions as overruling the Judgement №2/6/623 of the Constitutional Court of Georgia of December 29, 2016 "LLC 'Unison Insurance Company' v. the Parliament of Georgia" and did not consider the difference in proceedings to be considered as an essential dissimilarity, due to which it would be necessary to undertake additional review of the constitutionality of the disputed rules in the format of consideration on merits.

It is noteworthy, that in several cases the Court did not agree with the complainants that there were overruling provisions in the case and adopted such cases for consideration on merits. For instance, on December 29, 2017 the Constitutional Court of Georgia adopted the recording notice in the case of "The Public Defender of Georgia, Citizens of Georgia – Avtantdil Baramidze, Givi Mitaishvili, Nugzar Solomonidze and Others (Total of 326 Constitutional Complaints) v. the Parliament of Georgia"., where the Court rejected the claim of the complainants with regard to invalidation of the disputed provisions under article 25, paragraph 4^1 of the Organic Law of Georgia "On Constitutional Court of Georgia". The Claimants consider the whole range of provisions regulating the actions of secret surveillance to be unconstitutional. The Grand Chamber of the Constitutional Court of Georgia interpreted the standards set forth in the Judgement N1/1/625,640 in its recording notice of 29 December, 2017 and indicated, that pursuant to the mentioned Judgment, the declaration of the

challenged provisions unconstitutional in the previous judgement was caused by the totality of several factors and through comparing the existing regulations with the invalidated ones, the Court decided that there were no overruling provisions in the case, therefore admitting the case for adjudication in the format of consideration on merits.

II. Judgments

2017 has been unprecedented year in view of the amount and volume of judgements adopted by the Constitutional Court. The judgements of the court of 2017 dealt with many aspects of interpretation and application of Constitution of Georgia. New constitutional legal standards were constructed and established. Below are given summaries of several landmark judgments, which may have special impact on the development of the constitutional law in Georgia.

CITIZEN OF GEORGIA KAKHA KUKAVA V. THE PARLIAMENT OF GEORGIA (CONSTITUTIONAL COMPLAINT N600)

On May 17, 2017 the Grand Chamber of the Constitutional Court of Georgia adopted the judgement on the case of Citizen of Georgia Kakha Kukava v. the Parliament of Georgia, where articles 134(1), 134(2), 143(8) and words of article 167(1) of the Election Code of Georgia were challenged with regard to the first sentence of article 28(1), article 29(1) and article 29(2) of the Constitution of Georgia. Under the disputed provisions, person was not allowed to participate in the elections of members of the municipal assembly, mayor/head of executive body of local government, unless s/he had permanently resided on the territory of Georgia for two years prior to elections.

The Constitutional Court primarily elaborated on the separation of scopes of article 28 and article 29 of the Constitution. According to the Court's reasoning, if elections is required by the Constitution of Georgia as a procedure for taking the office, then the right to hold that position is protected under article 28 of the Constitution, whereas if the Constitution of Georgia does not require elections for taking the office and holding elections is required by the ordinary legislation, the issue of constitutionality of access to such office, should be reviewed with regard to the right of holding public office. Providing this interpretation, the Constitutional Court overruled the approach established by the Judgement of April 14, 2016 in the case of "Citizens of Georgia – Salome Kinkladze, Nino Kvetenadze, Nino Odisharia, Dachi JaneliZe, Tamar Khitarishvili and Salome Sebiskveradze v. the Parliament of Georgia", according to which right of mayor/head of executive body of local government to take the public office, was considered to fall, *inter alia*, under the scope of article 28 of the Constitution.

Reviewing the constitutionality of requirements towards the candidate of member of municipal assembly, the Constitutional Court noted that introducing requirements for taking

the elective office is not incompatible with democratic governance. At the same time, the Court considered it unacceptable to introduce requirements, which are not provided by the Constitution for the elections, which should be held according to the Constitution and the legitimate aim of restriction of this right cannot be ensuring selection of the best candidate and/or the candidate who is objectively the most fit for the elective position. The Constitutional Court explained, that exception can be introduced, when the aim of the requirements prescribed by the law is to prevent risks are entailed by electing a certain person in an office. The elections of the municipal assembly are provided by the Constitution of Georgia. However, the Constitution does not provide for the special requirements for members of the municipal assembly, which were provided in the disputed rules. Moreover, the respondent party did not point out any danger, prevention of which was served by the disputed rules and it could not be discerned from the essence of the disputed regulations either. Therefore the Court considered that the disputed provisions were not compatible with the right of elections enshrined in article 28 of the Constitution.

Reviewing the requirements for the candidate of mayor/head of executive body of local government, the Constitutional Court paid particular attention to the fact, that the disputed rule imposed the obligation on the candidates not to live in a specific self-governing unit, but to live generally on the territory of Georgia. The Court declared that the restriction provided in the challenged provisions cannot serve as guarantee of involvement of a person in a political life of the State, or an unconditional and unparalleled means for achieving this goal. Meeting the requirement set forth in the disputed provisions cannot in itself ensure involvement of that person in the political life of the state. Moreover, the restriction is not tailored in a way to ensure knowledge of necessities of a specific self-governing unit. In view of this, the Constitutional Court decided, that the disputed rules did not comply with the right to hold public office under the Constitution of Georgia.

LLC "Broadcasting Company Rustavi 2" and LLC "Television Company Sakartvelo" v. the Parliament of Georgia

On December 29 2017, the Grand Chamber of the Constitutional Court of Georgia adopted the judgement in the case of "LLC 'Broadcasting Company Rustavi 2' and LLC 'Television Company Sakartvelo' v. the Parliament of Georgia", where the subject of the dispute in this case was constitutionality of articles 54 and 55 of the Civil Code of Georgia with regard to article 16 and paragraphs 1 and 2 of article 21 of the Constitution. The complainant stated, that article 54 of the Civil Code of Georgia, which provides for voidness of contracts contrary to "norms of morals" and "public order", contradicts the right to property and right to free development of personality.

In view of the respondent, the use of broad legal terms like "norms of morals" in civil law is caused by objective reasons. Disproportionality of the price of a deal, under the disputed provision, is not an independent premise for invalidity of a deal and presence of other preconditions is also required

Reviewing this dispute, in the first place, the Constitutional Court identified the claim raised in the complaint and pointed out, that the complainant alleged unconstitutionality of

determination of content and scope of property rights based on the rules of general character and referred to incompatibility of such regulations with the principles of legal security and certainty. Hence, this Judgement is seminal as far as the Court considered and evaluated whether Constitution allows for regulation of contractual relationships on the basis of general rules. Furthermore, the Constitutional Court reviewed the rules regulating civil law relations with regard to the standard of legal certainty.

Elaborating on the issue of certainty of the disputed provisions, the Constitutional Court differentiated between standards of certainty applicable to the rules prescribing liability, rules of public law and rules of civil law. The Court pointed out that setting forth the grounds of invalidity of contracts the State does not impose any type of liability or prohibition, violation of which would be responded with sanction. On the contrary, the rules determining the voidness of contracts apply to those cases, where the State refuses to interfere in the relations between individuals and to coerce one party to carry out certain activities in favour of the other party. Therefore the requirement of the degree of certainty applicable to the rules regulating civil law cannot be as strict, as the criteria that should be met by the rules prescribing legal liability. The Constitutional Court also emphasised the importance of flexibility of the rules of civil law and the risks associated with introducing rigid legislation to regulate this area.

The Constitutional Court interpreted, that the law of contracts applies to wide area of relations, substance and scope of which entirely depend on the acts and will of individuals. In view of ever-developing social and economic relations it is impossible to determine in advance, what type of contract will be concluded by parties; it is also impossible to identify in advance and exhaustively those contracts enforcement of which conflicts with pubic interests. The Court interpreted that the goal of general rules is to regulate civil law relations as comprehensively as possible and to establish fundamental principles of civil circulation, which would provide for legal solution for any type of contractual relations. As in certain cases, solution for contractual relation without its direct, specific regulation is inevitable necessity. The Constitutional Court pointed out that in absence of general rules it would be necessary to either regulate any civil law relation in a maximally detailed manner, that would impede full operation of dynamically developing civil circulation, or to use analogy of statutes and/or law reducing the degree of legal certainty even more. Therefore the Constitutional Court of Georgia did not share the position of the complainant, asserting that general nature and vagueness of the content of disputed provisions constituted self-sufficient ground for finding it unconstitutional.

The Constitutional Court of Georgia did not share the argument of complainants, according to which, the disputed rule grants unreviewable discretion to a judge allowing them to give the rule any content desirable to them. According to the interpretation of the Constitutional Court of Georgia, applying the disputed rule, the measure of evaluation used by a judge cannot be their personal conviction about appropriateness of behaviour and/or how judges themselves would behave in respective cases. Judges should evaluate whether the deal itself, its content, is acceptable in view of the established morals of the public and general requirements of public order. The Court indicated that the disputed rule can be interpreted not according to the subjective views of a judge, but systemically, in the context of other rules and legal

principles, while the appropriateness of each interpretation made by a judge can be objectively checked and reviewed by the courts of upper instances.

The Constitutional Court took into account the established case law of the Supreme Court of Georgia; namely, it referred to the judgement (Case №ას-664-635-2016) of the Grand Chamber of the Supreme Court of Georgia of March 2, 2017, according to which solely the price of a deal cannot serve as ground of voidness of a deal under article 54 of the Civil Code.

According to the Judgement of the Constitutional Court of Georgia, the judgement of the Supreme Court of Georgia is mandatory for the courts of all instances. No court is empowered to interpret article 54 of the Civil Code differently from the interpretation of the Grand Chamber of the Supreme Court and to declare a deal void based solely on the inadequacy of its price. Thus the Constitutional Court of Georgia declared that there is no lawful way of applying article 54 of the Civil Code of Georgia with the normative content challenged by the complainant.

In view of all the above-mentioned, the Constitutional Court did not uphold the constitutional complaint №679.

CITIZEN OF GEORGIA OLEG LATSABIDZE V. THE PARLIAMENT OF GEORGIA (CONSTITUTIONAL COMPLAINT N626)

On October 17, 2017 the Constitutional Court adopted a judgement on the case of "Citizen of Georgia, Oleg Latsabidze v. the Parliament of Georgia", where the subject of dispute was the constitutionality of the words "dismisses from the position" of paragraph 1 and paragraph 4 of the article 60 of the Code of Local Self-Government (the version in force on February 6, 2015) with paragraphs 1 and 2 of article 29 of the Constitution of Georgia. The complainant considered problematic the rule provided in the disputed provisions, which authorised a head of executive body of local government/mayor to dismiss without provision of reasons a head of a structural unit of the municipal Office, on the other hand, and on the other hand, envisaging that the powers of a head of structural unit of a municipal office would automatically terminate from the moment of election (taking of office) of a new head of executive body of local government/mayor.

The Constitutional Court pointed out, that public offices differ from each other in view of their nature. Therefore the constitutional standards should also differ depending on whether a given position has political or professional nature. Based on the relevant legislation, the Court decided, that a head of the structural unit of a municipal office is a career official. Moreover, the main requirement for professional position is official's qualification, experience, personal skills and so forth. Therefore, for efficient functioning of the local self-government it is crucial to employ and maintain professional (career) personnel. Therefore, a rule, which allows for automatic termination of office of a respective official without review or evaluation of their qualifications, experience or other skills from the moment of taking of office by a new head of executive body of local government or mayor, constitutes an unjustified interference in the right to work in a public office enshrined in the Constitution.

The Constitutional Court did not share the argument of the respondent party with regard to the necessity of possibility to substitute the personnel after each election. The Court declared that the presence of democracy implies in the first place government by the people, implementation of public powers by the people directly or through their elected representatives. At the same time, having a democratic state does not imply substitution of all public officials with the new personnel and members of the political group of newly elected public official after each election. Not only this is not required by democracy, but also it is at conflict with democracy as a matter of principle.

In view of the above-mentioned, the Constitutional Court upheld the constitutional complaint №626.

THE CITIZEN OF GEORGIA NODAR DVALI V. THE PARLIAMENT OF GEORGIA (CONSTITUTIONAL COMPLAINT N550)

On October 17, 2017 the Grand Chamber of the Constitutional Court adopted a judgement on the case of "Citizen of Georgia, Nodar Dvali v. the Parliament of Georgia" and partially upheld the claims raised in the complaint, which envisaged declaring article 185 and article 312(2) of the Civil Code of Georgia unconstitutional with regard to paragraphs 1 and 2 of article 21 of the Constitution of Georgia.

The disputed provisions provided the rules protecting the conscientious buyer in case of transfer of a property by a person who is incorrectly registered as owner in the public register. More specifically, according to article 185 of the Civil Code, in view of the interests of acquirer, the transferor is considered to be the owner, if s/he is registered as such in the public register, unless the acquirer knew that the transferor was not the owner. Moreover, article 312(2) of the Civil Code, states that in favour of a person, who acquires property from the person incorrectly registered as owner in the public register, entry of the register is presumed to be correct, except for the cases, when the complaint is pending against the entry, or the acquirer knew that the entry was inaccurate.

The Constitutional Court of Georgia primarily identified the claim raised in the complaint and explained that article 185 of the Civil Code of Georgia deals exclusively with the cases of transfer of property right on the immovable property, while article 312 has a broader scope and applies to the rights registered in the public register in general.

The Constitutional Court reviewed the constitutionality of the disputed provisions based on the principle of proportionality and pointed out that the disputed provisions served achievement of the valuable legitimate aim, which is insurance of stability, ease and low cost of civil circulation. However, in addition to the public interests of stability and ease, in this case there is a conflict between the interests of two private individuals. The right of ownership on the real estate of an original owner is opposed to the interests of a conscientious acquirer. Therefore, both conscientious parties have legal claim on the disputed property. The Court examined whether such a balance between the restricted right and the legal good secured as a result of this restriction was reached.

The Constitutional Court interpreted that obliging the conscientious acquirer to check every circumstance excluding the right of a registered owner in the process of acquisition of immovable property would make the existence of the public registry meaningless and also have significant chilling effect on the process of acquisition of property. In case of presence of such regulation, it would be necessary to collect and examine the whole chain of transactions and related documents, which is related to additional costs and time. Lack of such safeguards for protection of conscientious acquirer, as are provided in the disputed provisions would also increase the costs and complicate to certain extent concluding deals on real estate. At the same time in case of total lack of safeguards for conscientious acquirer, the original owner would have less incentive to demand the correction of entry in case of incorrect registration of his or her property on another person's name and to bring the respective complaint, which would complicate the identification and eradication of incorrect entries present in the public register. Therefore the Court stated that the regulation, which privileges the conscientious acquirer vis-a-vis the owner of a property, does not disturb the fair balance between the private and public interests.

The Constitutional Court also noted, that the regulation should not incentivise reckless attitude of the acquirer towards the correctness of records of the public register. The legislator should not establish such system, in which the acquirer can ignore the information available to him raising questions about the correctness of the entries of the register. In view of the Court, if the acquirer is informed about the ongoing dispute regarding the correctness of an entry in the public registry, they should verify the right of the person, who transfers the property to them, or bear the risk generated by the inaccuracy of the entries of the public register. The Court also interpreted what the complaint brought against the entry in the register should imply and declared that it can be: a) administrative dispute on making incorrect entry in the register; or b) civil dispute about the ownership of a real estate.

The Constitutional Court interpreted that the regulation provided in article 185 of the Civil Code of Georgia is different from that provided in article 312(2). Article 185 of the Civil Code of Georgia sets forth the knowledge by the acquirer that the person, who transfers the property is not an owner, as the only obstruction to transfer of ownership to the acquirer. Hence, the awareness about the pending complaint against the entry of the register does not prevent considering the acquirer as conscientious and transfer of ownership to him. The Constitutional Court decided that article 185 could be applied independently and there was a risk to consider a person as conscientious even if they knew about the pending complaint against the entry of the register.

Article 185 of the Civil Code of Georgia led to loss of ownership by the owner in more cases, than it was objectively necessary to achieve a legitimate goal. Therefore, the Constitutional Court found unconstitutional its normative content, according to which, "person who transfers the property to another is presumed to be the owner, if s/he is registered as such in the public registry" even when, there is a complaint pending against the entry of the register and this fact is known to the acquirer.

CITIZEN OF GEORGIA OMAR JORBENADZE V. THE PARLIAMENT OF GEORGIA (CONSTITUTIONAL COMPLAINT N659)

The Grand Chamber of the Constitutional Court of Georgia upheld the constitutional complaint of the citizen of Georgia, Omar Jorbenadze versus the Parliament of Georgia on February 15, 2017. The disputed rule challenged by the complainant provided for appointment of the judges of the appellate and district/city courts for three years prior to their lifetime appointment as judges. Only upon expiration of this term would the High Council of Justice adopt a decision on lifetime appointment of a judge.

The Constitutional Court stated in its Judgement, that appointment of a judge for the defined period was related to examination of those skills and features of a person, which would be difficult to explore without the analysis of the practical work of a judge. However, there are candidates for judgeship, who already have three-year experience as a judge. Therefore it is possible to evaluate the work they have done as judges and to ascertain in this way if the candidate meets the high standards applicable to the office of a judge. Moreover, the Constitutional Court also indicated that for the purposes of lifetime appointment of candidates of judgeship, who have no less then three-year experience of serving as judges and the candidates, who do not have such experience, are substantially unequal.

The Constitutional Court did not rule out, that in certain cases, if a long period has passed since serving as a judge or if there are other objective circumstances, it may be difficult or impossible to evaluate the past work of a candidate. Moreover, undertaking of evaluation of the past work of a candidate for judgeship requires due legislative regulation. Therefore the Constitutional Court decided, that the legislator should be given a reasonable time, in order to fulfil its constitutional obligation and draft the legislative regulation, which would protect constitutional rights of a person, on the one hand and would avoid damage to the public interest, namely exclude the risk, that unfit candidates would be appointed as judges for their lifetime, on the other hand. In view of this the disputed provision was declared invalid effective from July 1, 2017.

JUDGEMENTS ADOPTED WITH REGARD TO THE DRUG OFFENCES

The Judgement №1/4/592 of the Constitutional Court of Georgia of October 24, 2015 was the first case, where the Court had to adjudicate the issue of constitutionality of punishment applicable for a drug crime. In this case, the Court upheld the complaint of a citizen of Georgia, Beka Tsikarishvili and declared the normative content of the disputed provision, which allowed sentencing to imprisonment for purchase and storage of up to 70 grams of the narcotic drug - dry marijuana for personal consumption purposes unconstitutional. It is noteworthy, that from adoption of this Judgement till present, the Constitutional Court has reviewed five more constitutional complaints and has upheld all the five of them with final decisions, characterised by a similar structure and reasoning, as well as distinct features. In this respect, particular attention should be given to the Judgement №1/13/732 of the Constitutional Court of Georgia of November 30, 2017, where in contrast to other cases, the Court did not consider the constitutionality of statutory sentence for a certain crime, but considered the constitutionality of imposition of criminal liability for a specific action –

consumption of marijuana. The Judgement adopted with regard to the constitutional complaint №725 is also worth noting separately, as the Court considered that manifestly disproportional punishment for the crime provided in the disputed provision was not imprisonment, as the type of punishment, but the degree of punishment – imprisonment from 6 to 12 years.

In addition to the named judgements, the Constitutional Court adopted number of rulings, which declared unconstitutional those sentences for drug offences, which constituted the overruling provisions of the judgements of the Constitutional Court of Georgia. Some of the important standards, which the Constitutional Court set forth in these judgements, will be discussed below.

According to the interpretation of the Court, "the Constitutional Court is obliged to review the sentencing policy in that extreme case, when it causes a violation of a human right".[3]The Constitutional Court ruled, that manifestly disproportional sentences contradict the clause of article 17(2) of the Constitution of Georgia, according to which inhuman, cruel or degrading punishment is prohibited.[4]

According to the established practice of the Constitutional Court, the constitutional review of punishments is based on the following criteria: 1) manifest disproportionality between gravity of offence and the sentence provided for it is reviewed – the sentence set forth in the legislation for a given act should be reasonable and proportional to the damages that were caused or may be caused by the crime to individuals/society. The sentence will be considered as manifestly disproportional, inhuman and cruel punishment if its duration is sharply, grossly disproportional to the degree of wrongfulness and dangers that might be entailed by an action; 2) the law should allow a judge to take into account specific circumstances of a case, the damages caused by an action, degree of culpability, etc. in sentencing, in order to exclude imposition of disproportional sentences without consideration of all the relevant factors/circumstances in practice.[5]

Reviewing the nature of drug offences, the Constitutional Court declared that "it is meaningless and thus unjustified to sentence a person to criminal punishment of imprisonment for an action, which can only cause damage to his or her health".[6] "Punishment of a person for merely harming their own health is the form of paternalism demonstrated by the state, which is not compatible with free society".[7]

In the case of "Citizens of Georgia, Jambul Gvianidze, Davit Khomeriki and Lasha Gagishvili v. the Parliament of Georgia" (constitutional complaints: №701, №722, №725) the normative content of a provision of the Criminal Code envisaging the possibility of using a sentence of imprisonment for illegal sowing, growing or cultivation of cannabis (plant) in large amounts was disputed. Pursuant to the constitutional complaints №701, №722 and

[3] See *Citizen of Georgia Beka Tsikarishvili v. the Parliament of Georgia* Judgement №1/4/592, the Constitutional Court of Georgia, October 24, 2015. II-34.
[4] ibid. II-25.
[5] ibid. II-38.
[6] ibid. II-84.
[7] *Citizen of Georgia, Givi Shanidze v. the Parliament of Georgia* Judgement №1/13/732, the Constitutional Court of Georgia, November 30, 2017. II-50.

№725, the claimants were found to have respectively 150.73 grams, 63.73 grams and 265.49 grams of cannabis. In view of this, in the abovementioned case the Court reviewed the sentencing to imprisonment, as type and degree of punishment for sowing, growing and cultivation of the above-mentioned amounts of cannabis for personal consumption purposes.

The Constitutional Court drew a distinction between the danger entailed by sowing, growing and cultivation of certain amount of cannabis (plant) to the owner of the plant, on the one hand and the danger, which these actions may cause for other people, on the other hand. Based on the testimonies of witnesses and specialists, the Court decided that the use of products of cannabis could involve potential risks for human health. Moreover, it was ascertained, that the danger, which the consumption of products of cannabis may cause for its consumer is lighter compared with the harm caused by consumption of other, so-called hard narcotic drugs. The Court reiterated the standard already established by it and declared that it is purposeless and therefore, unjustified to sentence a person to imprisonment, as criminal punishment for an act, which can only cause danger for their health.

The Constitutional Court evaluated separately the inherent dangers of distribution associated with the disputed amounts of cannabis. It ruled that 63.73 grams (the constitutional complaint №722) and 150.72 grams (constitutional complaint №701) of cannabis cannot be considered to be the amount, which involves the inherent risk of its distribution. In view of all the above-mentioned, the Court considered that sentencing to imprisonment, as a punishment for the acts of sowing and growing of these amounts of cannabis constituted manifestly disproportional punishment and therefore contradicted article 17(2) of the Constitution of Georgia.

The Court indicated that sowing and growing of 265.49 grams of cannabis lead to high risks of its distribution. As the sentence prescribed for growing of the mentioned amount of cannabis served the protection of health of others, the Court found it constitutional to sentence a person to imprisonment as type of punishment for the mentioned act. However, based on the comparison with sanctions prescribed for other more serious crimes, stated in the Criminal Code of Georgia, the Court arrived at the conclusion, that the given length of the prescribed punishment for growing of 265.59 grams of cannabis – imprisonment from 6 to 12 years was manifestly disproportional punishment and was incompatible with article 17(2) of the Constitution of Georgia.

In the case of "Citizen of Georgia, Givi Shanidze v. the Parliament of Georgia" (Constitutional Complaint №732) the subject matter of the dispute was the constitutionality of the normative content of article 273 of the Criminal Code of Georgia, which provided for liability for consumption of narcotic drug, marijuana with regard to article 16 of the Constitution of Georgia. The Constitutional Court had to evaluate in this case constitutionality of criminalization of the act of consumption of narcotic drug – marijuana

The Constitutional Court noted that taken separately, the fact of consumption of marijuana, in view of the nature of this act, is involving little danger to public interest, as there is not even theoretical chance of distribution of narcotic drug.

The Constitutional Court decided that the disputed provision prescribed criminal liability for repeated consumption of marijuana in a blanket manner and without any exceptions,

regardless of place and situation of consumption, the person, committing an act and realism of danger for public order. In view of all the above-mentioned, the Constitutional Court considered that the disputed provision was incompatible with the right to free development of personality enshrined in article 16 of the Constitution of Georgia.

CITIZENS OF GEORGIA, NADIA KHURTSIDZE, DIMITRI LOMIDZE AND TARIEL CHOCHISHVILI V. THE PARLIAMENT OF GEORGIA (CONSTITUTIONAL COMPLAINTS N650, N699)

On January 27, 2016 the First Chamber of the Constitutional Court of Georgia adopted a judgement on the case of "Citizens of Georgia, Nadia Khurtsidze, Dimitri Lomidze and Tariel Chochishvili v. the Parliament of Georgia" The subject of dispute in the above-mentioned case was the constitutionality of paragraphs 1 and 4 of article 136 of the Criminal Procedure Code of Georgia with regard to article 40(3) and paragraphs 1 and 3 of article 42 of the Constitution of Georgia.

The complainants asserted, that the disputed provision restricted the possibility of defense party at the criminal trial, to apply to the court with the motion to subpoena the information stored in the computer system or on the device of storage of computer data or documents, whereas this right is granted to the prosecution, which violates the enforcement of principles of equality of arms and adversarial procedure.

The Constitutional Court primarily emphasised the necessity to provide the defense party with real and adequate opportunity to rebut the arguments of prosecution within the adversarial trial, which includes examination of the evidence submitted by the prosecution and right to argue about them, as well as the right to obtain the evidence. The legislation should not put the other party at the disadvantageous position and should allow them to effectively realise their right of defense.

The Court referred to the rapid technological progress nowadays and to the growing trend of storage of any information (written documents, video and audio records, public or confidential information) in electronic archives in state institutions, by natural and legal persons. The Court determined that the disputed rule restricted access of the defense party to the wide range of information that was important to the criminal proceedings, without consideration of dangers for third parties and for constitutionally protected interests.

The Constitutional Court upheld constitutional complaints N650 and N699 and declared the normative content of the disputed provisions, which excluded the opportunity of the defense party to apply to the court with the motion to issue a ruling of subpoena of a document or information stored in the computer system or on the device for storage of computer data unconstitutional with regard to article 40(3) and paragraphs 1 and 3 of article 42 of the Constitution of Georgia.

CITIZEN OF GEORGIA, OMAR JORBENADZE V. THE PARLIAMENT OF GEORGIA (CONSTITUTIONAL COMPLAINT N658)

On November 16, 2017 the Constitutional Court of Georgia adopted a judgement in the case of "Citizen of Georgia, Omar Jorbenadze v. the Parliament of Georgia", which challenged the constitutionality of the Law of Georgia "On Disciplinary Liability of Judges of the Common Courts of Georgia and Disciplinary Proceedings" with regard to article 29 of the Constitution of Georgia.

The Constitutional Court interpreted, that the conditions of taking and holding of the office of judge should be in compliance with the requirements of article 29 of the Constitution. This entails obligation of the State to not only adhere to the principle of proportionality in restriction of the right to hold a public office, but also to adhere to all the formal requirements as they are stipulated in the Constitution.

Based on the analysis of relevant rules of the disputed legal act, the Court ascertained, that the disciplinary proceedings might end up in any outcome, including the dismissal of a judge from the occupied position. Therefore, any procedure set forth in the disputed Law, which is related to disciplinary proceedings, presents a procedure stipulated for dismissal of a judge from the occupied position and their regulation in the form of an ordinary law contradicts the formal requirement established by the Constitution of Georgia.

In view of all the above-mentioned, the Constitutional Court declared unconstitutional the Chapters II, III and V of the disputed Law, which prescribed procedures of disciplinary proceedings. The Court decided that these rules did not comply with article 29 of the Constitution from the formal perspective.

The Constitutional Court took into account that in case of invalidation of the disputed provisions upon publication of the Judgement of the Constitutional Court it would be impossible to carry out disciplinary proceedings against judges, which the complainant did not apply for and was not the goal of declaration of the disputed provisions unconstitutional by the Constitutional Court either. Therefore, the Constitutional Court decided that the legislator should be given a reasonable time, so that it could regulate the procedure for dismissal of a judge according to the requirements of the Constitution. In view of this, the disputed provisions were invalidated effective from May 1, 2018.

MAJOR TRENDS OF STRENGTHENING CONSTITUTIONAL JUSTICE

The Constitutional Court deems it important to identify in this document the significant accomplishments and challenges related to the work of the Court, which influence the protection of constitutional justice to a certain extent. Their identification and analysis are important preconditions of improvement of the quality of protection of constitutional supremacy.

COOPERATION BETWEEN THE CONSTITUTIONAL COURT AND COMMON COURTS

The productive cooperation between the Constitutional Court and common courts is of vital importance for due protection and realisation of constitutional values and fundamental human rights. The common courts administer justice and ensure implementation of constitutional legal standards established by the Constitutional Court in specific cases, whereas the Constitutional Court invalidates the unconstitutional laws, ensuring thereby the legislative realm in compliance with the Constitution and thus the ability for the common courts to administer justice in line with the Constitution.

Mechanism of constitutional referral presents a crucial guarantee for administration of justice in line with the Constitution by the common courts. The mechanism of constitutional referral allows a judge of the common court to avoid application of presumably unconstitutional normative legal act. In recent years, the frequency of submission of constitutional referrals from common courts to the Constitutional Court has clearly increased and 2017 was no exception to this trend.

Application of the standards and interpretations provided in the judgements of the Constitutional Court by common courts in the process of adjudication over specific cases is also worth of noting. The common courts directly interpret provisions of laws in the process of adjudication; therefore it is important that interpretation and application of a provision is in compliance with the order established by the Constitution of Georgia. In this respect whole range of decisions of the Supreme Court of Georgia are noteworthy, where reasoning and legal conclusion are based on the interpretations made by the Constitutional Court. The Supreme Court of Georgia based its reasoning on the standards established by the Constitutional Court of Georgia in its judgement №3/1/531 and interpreted accordingly the time-related limits of realisation of the right of access to court in its ruling Nას-475-443-2017 of June 23, 2017.[8] An example of the same trend is the ruling №ას-871-838-2016 of the Supreme Court of Georgia of April 28, 2017, where the Supreme Court used the concept of social function of right to property interpreted in the judgement N2/1/370,382,390,402,405 of the Constitutional Court for determining the scope of the enjoyment of the right to property and based the final decision on the standard provided in the afore-mentioned judgement.[9] The above examples demonstrate that the common courts actively use the interpretations of the Constitutional Court and try to interpret the applicable provisions in line with the constitutional standards.

RELATION OF THE CONSTITUTIONAL COURT WITH THE PARLIAMENT OF GEORGIA

In the majority of cases reviewed and decided last year, the respondent was the legislative body of Georgia – the Parliament. Despite the fact, that the Constitution binds each branch of government to adhere to the requirements of the Constitution in their actions, in view of the

[8] *Citizens of Israel – Tamaz Janashvili, Nana Janashvili and Irma Janashvili v. the Parliamet of Georgia* Judgement №3/1/531, the Constitutional Court of Georgia, November 5, 2013.

[9] *Citizens of Georgia, Zaur Elashvili, Suliko Mashia, Rusudan Gogia and others and the Public Defender of Georgia v. the Parliament of Georgia* Judgement №2/1/370,382,390,402,405, the Constitutional Court of Georgia, May 18, 2007.

nature and scale of legislative process it is impossible to rule out the risk of violation of fundamental rights. The effective mechanism to respond to this risk is implementation of constitutional review by the Constitutional Court.

Regulation of any sphere by the legislator should fully comply with the strictures of the Constitution of Georgia. It is the case law of the Constitutional Court through which the Constitution is interpreted and constitutional standards are determined. Therefore, taking into account legal acts adopted by the Constitutional Court significantly determines the protection of constitutional supremacy in the law-making process.

There were cases identified in the practice of the Constitutional Court, when the legislator failed to consider the standards established by the Constitutional Court in the process of elaboration of legislation to regulate certain relations. The number of cases decided with simplified procedure due to provisions overruling the judgments of the Constitutional Court of Georgia was significant in 2017, when the Court adopted rulings on six such cases. In the instances, where the established constitutional standards clearly demonstrate the unconstitutionality of a provision, the legislator should itself correct such provision instead of awaiting the Constitutional Court to invalidate the provision without hearing on merits.

None of these cases, where the Court invalidated provisions without hearing on merits, were related to adoption of a regulation with the contents similar to the rule declared unconstitutional in the period following the pronouncement of judgement. Instead the regulations with the similar content to the rules declared unconstitutional by the Constitutional Court still remained in the legislation and the responsible authority did not take any measures to eliminate the shortcomings.

It is also noteworthy, that from the perspective of incorporation of standards of the judgements of the Constitutional Court into the legislation, the situation is significantly different with regard to those judgements, enforcement of which was postponed by the Constitutional Court. The Constitutional Court postpones the enforcement of judgement, when immediate invalidation of a disputed rule may lead to the material damage of private or public interests. The goal of postponement of its judgement by the Constitutional Court is not to leave a legal relationship which, in view of their nature, constantly needs legal regulation, without such regulation and the Court gives certain time to the respondent party, so that it is able within this period to regulate legal relationships in line with the Constitution of Georgia.

In this respect, the judgement adopted on the constitutional complaint N659 by the Constitutional Court of Georgia is noteworthy as it postponed the invalidation of the disputed rules and within the transitional period the Parliament of Georgia prepared new regulations. In the constitutional complaint N659 the complainant challenged those provisions of the Organic Law of Georgia on Common Courts, according to which the judges of appellate and district (city) courts should be appointed for three years and after passing of this period, the High Council of Justice would consider the issue of their lifetime appointment. The Constitutional Court pointed out, that in case of those persons, who already had three-year experience of serving as a judge and it was objectively possible to study his/her work, additional requirement to serve for the time defined by the disputed rule constituted a redundant and unjustified barrier. Despite the fact, that the disputed rule was declared

unconstitutional, the Constitutional Court considered that appraisal of the past work of the candidate for judgeship required legislative regulation of the respective procedure, for which the legislator should be given a reasonable time to elaborate the solution in line with the Constitution. In view of this, the Constitutional Court postponed the enforcement of its judgement until July 1, 2017. It is noteworthy that on June 16, 2017, the Parliament of Georgia made whole range of amendments to the Organic Law of Georgia "on Common Courts". The goal of amendments, among others, was regulation of the procedure of appointment of judges in appellate and district (city) courts in view of the standard established in the judgement of Constitutional Court.

After postponement of enforcement of judgement, the Parliament of Georgia adopted legislative amendments on numerous occasions in the past. Among others, the legislation regulating the institution of incapacity has qualitatively changed. In the process of elaboration of legislation, taking into account the standards established in the legal acts of the Constitutional Court will clearly have a positive effect on protection of constitutional justice; it will create a fertile ground for effective realisation of fundamental human rights. The legislator is obliged to regulate any single legal relationship in line with the Constitution, to regard the standards established by the Constitutional Court and to enforce its judgements.

John Khetsuriani

Corresponding Member of Georgian
National Academy of Sciences, Academician

CONSTITUTIONAL REFORM IN GEORGIA (2017) AND THE CONSTITUTIONAL COURT

ABSTRACT

Constitutional reform undertaken in 2017, which ended the transformation of the country into the parliamentary republic, also affected the Constitutional Court. The norms providing the constitutional basis for the Court were amended. The article discusses the content of amendments, their appropriateness and relevance; it demonstrates the experience of relevant regulations from other countries. The constitutional amendments regarding the formation of the Constitutional Court and appointment of judges, as well as specifying the scope of authorities the Court holds are assessed positively in this paper. However, considering the substantial reduction of competences of the Court, specifically, removal of four competences altogether, including the formal control of the provisions, further limitation of the competence of overseeing the constitutionality of elections, etc., the constitutional reform in these regards cannot be declared as a step forward.

.

INTRODUCTION

Georgia saw yet another constitutional reform in 2017. Although the constitution has been partially amended permanently since 1999, constitutional reform causing general revision of the Basic Law took place only twice prior to 2017 – in 2004 and in 2010.

All three constitutional reforms (2004, 2010 and 2017) aimed at establishing new system of governance or substantial improvement of the existing model. It seems the political elite of the country saw the incorrect choice of state governance model as a main reason of failure. In fact, the idea of establishing a democratic and rule of law state is certainly not linked with any particular type of state governance. The idea of a democratic and rule of law state can be successfully executed in a constitutional monarchy, just like in a presidential, semi-presidential and parliamentary republic. Such examples are vivid and multiple in the modern world. It is essential that the power is separated pursuant to the famous triad and simultaneously, there must be efficient mechanisms for checks and balances in place, while fundamental human rights and freedoms are sufficiently protected and guaranteed.

While searching for new type of state governance, the presidential republic set as its first in 1995 was formally replaced by the semi-presidential system by the constitutional reform of

2004. A new executive body – the Government, - was introduced, however the mechanisms for checks and balances were selected in a way, that in reality offered the so called super-presidential governance,[1] the eradication of negative socio-political and socio-economic results of which are still ongoing.

The constitutional reform of 2010 was also dictated by the political goals. The desire of the ruling force to remain in power was well met by the parliamentary republic, which, in case of success in parliamentary elections, would allow maintaining power infinitely in the executive branch. Thus the choice was made in favour for it, more precisely, for the rationalised parliamentarism, the main goal of which is ensuring the stability of the Government.[2] However, the main tool of this system of governance – constructive vote of no confidence, providing for the balance between the parliament and the government, was construed within the Constitution in such a complicated manner, that it was practically impossible to be used. The status and the authorities of the President were not completely understood either, which became apparent right after the amendments of 2010 went into force and served as the basis for conflict between the constitutional bodies.

Since the acting Constitution provided "faulty parliamentary system", the main task of the constitutional reform in 2017 was ensuring the Constitution fully conformed with the fundamental constitutional law principles characteristic to the parliamentary republic.[3] How well this task was fulfilled by the State Constitutional Commission and the Parliament of Georgia is well demonstrated by the final assessment of the Venice Commission, provided in its final report regarding the 2017 constitutional reform. Specifically, it states: "the constitutional reform process completes the evolution of Georgia's political system towards a parliamentary system and constitutes a positive step towards the consolidation and improvement of the country's constitutional order, based on the principles of democracy, the rule of law and the protection of fundamental rights".[4]

The Venice Commission, together with this general positive assessment, has provided for specific comments and recommendations in its report, including in relation to the authority of the Constitutional Court with regards to the elections. The Parliament of Georgia decided these comments and recommendations were appropriate to be carried out, even though the amendments were already adopted on the second reading of the Parliament, which excluded making substantial changes in the amendments. Accepting the recommendations caused the

[1] I Arakeliani et al, *The Process of Constitutional-Political Reform in Georgia: Political Elite and the Voices of the People* (IDEA, CIPDD 2005). 21.

[2] On rationalised parliamentarism see E Tanchiev, 'Rationalised Parliamentarism' in O Melkadze (ed), *Republic: Parliamentary or Presidential* (Upleba 1996). 38-44.

[3] "It is necessary to transform current inaccurate parliamentary system of governance into meticulous parliamentary governance system. This was […] fundamental task set before the Commission and the State Constitutional Commission worked according to this very […] fundamental task". <http://www.parliament.ge/ge/parlamentarebi/chairman/chairmannews/irakli-kobaxidze-sakonstitucio-cvlilebebis-mizania-demokratiuli-ganvitarebis-konstituciuri-garantiebis-sheqmna.page accessed 1 June 2018.

[4] European Commission for Democracy through Law (Venice Commission), 'Opinion on the Draft revised Constitution as adopted by the Parliament of Georgia at the second reading on 23 June 2017'. CDL – AD (2017)023, 51.

initiation of a new wave of constitutional amendments within the recently adopted constitutional law, which allowed the reform process to continue in 2018 as well.

This was not the first time, when the constitutional reform concerned the Constitutional Court. This body of constitutional review, established by the Constitution of 1995 has been substantially revised both through the process of constitutional reforms and legal amendments. For instance, in 2002 the law regulating the Constitutional Court was significantly changed.[5] The scope of competences of the Court widened. The formal and concrete control of provisions was added to its powers, the circle of persons authorised to address the Court widened and the constitutional proceedings became more flexible and efficient. However, in 2004, the government established after the revolutionary wave first attempted to abolish the Constitutional Court through merging it with the Supreme Court, and then, on December 17, 2004 it published for public discussions the draft constitutional law initiated by the President, which established the Constitutional Court outside the judicial branch, the early termination of all justices of the Constitutional Court and the Supreme Court (with the exception of newly elected President of the Supreme Court), the removal of a member of the Constitutional Court was allowed through the procedures of impeachment, the age census for the appointment to the Court was to be decreased, the rules on the formation of the Constitutional Court were to be amended – all members were to be elected by the Parliament through the proposal of the President, the Court would not be allowed to rule on the constitutionality of the elections any more, the circle of normative acts the appeal of which could be made by the citizens to the Constitutional Court was to be narrowed etc.[6]

These possible amendments to the Constitution of Georgia were met with severe negativity both within and outside the country, as a result of which the government refrained from adopting the draft. However, some provisions, which, for instance, limited the authority of the Constitutional Court, reduced the age census for the appointment of judges and others, were still adopted later on.[7]

Imposing limitations on the authorities of the Constitutional Court was attempted in 2016 as well, however, as a result of veto by the President of Georgia, large part of suspicious amendments planned to be included in the laws governing the Constitutional Court was avoided.[8]

The constitutional reform of 2017 caused several significant changes in the provisions establishing constitutional foundations of the Constitutional Court. The foregoing article discusses the content of these amendments, their appropriateness and conformity with the general principles of the constitutional law.

---

[5] Article 14, 12 February 2001, სსმ 4, Organic Law of Georgia on Constitutional Court of Georgia (*საქართველოს საკონსტიტუციო სასამართლოს შესახებ*); See also J Khetsuriani, 'Novelties in the Legislation of the Constitutional Court of Georgia' (2002) Human and Constitution, 9-18.

[6] 9 December 2004, სსმ 148, Ordinance of the Parliament of Georgia on Publishing Draft Constitutional Law 'On Amendments to the Constitution of Georgia' and Creation of Organising Commission of its General Public Discussions.

[7] J Khetsuriani, *From Independence to Rule of Law State* (Cezanne 2006). 67-69.

[8] On this topic see J Khetsuriani, *The Authority of the Constitutional Court of Georgia* (Favorite Style 2016). 278-282.

THE PLACE OF THE CONSTITUTIONAL COURT WITHIN THE SYSTEM OF SEPARATION OF POWERS

As a result of constitutional reform the place of the Constitutional Court within the system of separation of powers has not changed. The main law still recognises the Court as an institution of the judicial branch. The chapter six of the new version of the Constitution of Georgia – "Judicial Authority and Prosecutor's Office", - states, that the judicial authority is exercised by the Constitutional Court of Georgia and the general courts of Georgia (paragraph one of article 59). As for the Prosecutor's Office, although in certain states it is an institution of the judiciary (Belgium, Spain, Romania, Latvia and Croatia),[9] however in Georgian reality, merging this Office with the Judiciary in one chapter is extremely conditional. When deciding on a place of the Prosecutor's Office in the new Constitution the legislator, as it seems, took into account the significant role the Prosecutor holds in adjudication, however, the same logic dictates that the Bar of defence lawyers should have been in the chapter of the Judiciary as well.[10] Despite the Prosecutor's Office of Georgia being one of the constitutional bodies of the state, the main law of the country does not define its competences, which, in our opinion, is a significant flaw and allows for wide margin of defining authorities by the legislator. If we take into consideration the rule of formation of the Prosecutor's Office of Georgia and its accountability towards the Parliament (article 65 of the new version of the Constitution of Georgia), it is more associated with the legislature, rather than the judiciary or even the executive branch, as it was in the original version of the Constitution in 1995 and is in the current Constitution as a result of 2004 reform.[11]

Unlike the new version, the acting Constitution does not only state the institutions of the judiciary in its chapter regarding the judicial branch, but also the forms of executing judicial authorities. Specifically, it states: "Judicial authority shall be exercised through constitutional control, justice, and other forms determined by law" (paragraph 1, article 82). The possibility to exercise judicial authority through "other forms determined by law" is removed in the new version of the Constitution.

The judicial branch and adjudication (including, of course, constitutional adjudication) are not identical notions. Exercising judicial authority is wider notion, including adjudication, constitutional control (constitutional adjudication) and, at the same time, the activities, which cannot be considered either adjudication or constitutional control. For instance, when the Constitutional Court decides on early termination of office of its member, it cannot be considered as exercising its power of constitutional control, or the work of the High Council of Justice, another institution set by the Constitution within the judicial branch; it certainly

[9] O Melkadze, B Dvali, *Judiciary in the Foreign States* (Merani-3 2000). 209-225.

[10] The indication to the advocacy in the new version of the Constitution of Georgia is given in the chapter on Human Rights (article 31, paragraph 3). In this regard it is noteworthy, that advocacy together with the Prosecutor's Office is included in the chapter on Judiciary in the Constitution of Bulgaria, while the Constitutional Court is separated from the Judiciary and has its own dedicated chapter (see V Gonashvili (ed) *Constitutions of Foreign States* Part IV (2007). 222, 224).

[11] In the original 1995 version of the Constitution of Georgia the Prosecutor's Office was considered an institution of the Judiciary and its powers were envisaged within the same chapter (article 91, while as a results of constitutional reform of 2004 the indication on the Prosecutor's Office was completely removed from the Basic Law and it became an institution of the Executive Branch.

does not represent adjudication. However, both instances are forms of exercising judicial powers set by the Constitution or law. Therefore, amending the mentioned provision in the Constitution was not appropriate.

Exercising justice and constitutional control (constitutional justice) are main functions, major directions of the work for the two institutions within the judiciary – general courts and the Constitutional Court – demonstrating their internal specific nature and distinguishing them from other bodies of the state. No other state institution may exercise justice or constitutional control. Although, these institutions also undertake other, non-major functions, such functions do not have independent meaning and serve the efficiency of the main functions. Legal scholarship rightfully states regarding this issue: "Adjudication, as a main, major function of the judiciary is the one defining its specificity and its place within the state functioning system".[12] We could also add that this major function ensures the belonging of these two institutions to the judiciary.

It is expressed in the legal scholarship, that the Constitutional Court is both judicial body of exercising politics and a political body exercising judicial powers. It includes significant elements characteristic to both and exercises the so called "mixed" – political adjudication.[13] Derived from this specific political-legal nature, the Constitutional Court is viewed as an independent one of the highest state institution, separate from judicial system. In their view, this is why in the constitutions of some countries, the Constitutional Court rightfully has dedicated separate chapter (Austria, Spain and Bulgaria) and it is not necessary to include the relevant provisions in the chapter of the judiciary.[14]

In our opinion, the Constitutional Court cannot be a political institution, since such bodies decide on issues based on their initiative and appropriateness. While the Constitutional Court, when addressed (and not with its own initiative) decides only on legal issues – whether a particular provision of the law or an act is in conformity with the Constitution.[15] These issues, at the same time, may carry significant political relevance, just as the criminal, civil or administrative cases within the general courts, but in both instances the court decides only on legal and not political issue. Since the court judgments may have political relevance and, therefore, affect the political life of the country, the illusion that the Court is also a political institution is created, which surely is not accurate.

The Constitutional Court is one of the highest constitutional institutions of the state exercising its judicial powers through adjudication and other means set by the law. Thus its place is within the judicial branch and, therefore, this issue is properly decided in the Constitution of Georgia.

[12] O Melkadze, B Dvali, *Judiciary in the Foreign States* (n.9). 16.
[13] D Gegenava, 'The Nature of the Constitutional Court and its Place in the Concept of Separation of Powers' in G Kverenchkhiladze, D Gegenava (eds), *Modern Constitutional Law* Book I (2012). 99.
[14] НВ Витрук, *Конституционное правосудие. Судебно-конституционное право и процесс* (Юрист М., 2005). 161.
[15] G Khubua, J Ch Traut, *Constitutional Justice in Germany* (2001). 18.

THE COMPOSITION AND FORMATION OF THE CONSTITUTIONAL COURT

Main aspects of the composition and formation of the Constitutional Court has been subject to constitutional regulations both before and after the reform, envisaging the issues of personal composition, method and procedures of appointment of judges, requirements set for candidates of judges and the bodies involved in formation of the court.

It should be primarily stated, that before the constitutional reform of 2017, the Basic Law of Georgia used two notions interchangeably regarding the personal composition of the Court: "Judge of the Constitutional Court" and "Member of the Constitutional Court" (paragraph 2 of article 88). The new version of the Constitution of Georgia utilises only one notion in this regard: "Judge of the Constitutional Court", which, in our opinion, expresses the legal status of this position more precisely.

The number of judges in the Constitutional Court varies in different countries. This number is mainly defined based on the authorities and possible cases the Court should deal, also by other factors.[16] The Constitutional Court of Georgia comprises of nine judges. Since the adoption of the Constitution of Georgia, this amount has not changed. Although, there has been a proposal of increasing the number of judges, however, only in case the Constitutional Court would be granted the authority to conduct real constitutional control, which, obviously, would cause the severe increase of number of cases.[17] However, since this proposal was not adopted, the number of personal composition of the Court has remained unchanged. On the other hand, the requirements set for the candidate of the judge of the Constitutional Court have somewhat changed. In the original version of the Constitution three mandatory conditions were set. The candidate of the judge should have been the citizen of Georgia aged at least 35 and holding higher legal education (paragraph 4 of article 88). With amendments of 2005,[18] the age requirement has decreased from 35 to 30, which, in our opinion, was unjustified. It is relevant, that compared to other countries, Georgia had set minimal age requirements already and decreasing them further negatively affected the qualification of the judges, especially, when the Constitution did not prescribe the requirement of having work experience with the specialty.[19] The professionality and high experience of the personal composition of the Constitutional Court is achieved in other countries through setting high age requirement and the condition of extensive work experience with the specialty. For instance, in Germany and Slovakia, minimal age for appointment of the judge of the Constitutional Court is 40, in Hungary – 45, while the requirement of minimal work experience in professional field is 10 years in Austria, 15 years in Spain, etc. Even in those countries, where the minimal age is not set for appointment of judges (Lithuania, Latvia,

[16] The fewest number of judges is in the Constitutional Court of Andorra (four judges), while the largest number is in the Constitutional Court of Russia (19 judges).
[17] Khetsuriani, *The Authority of the Constitutional Court of Georgia* (n.8), 148-154.
[18] Article 2 of the Constitutional Law no.2496 - ᲡᲐᲥ I, no.1, 27 December 2005.
[19] It is noteworthy that unlike the candidates of the Constitutional Court, the Basic Law set the same criterion for the candidate of judgeship of the general court. Namely, the candidate of judgeship in the general courts was required among others, to have at least 5 years of work experience within the specialty (article 86, paragraph 1).

etc.), the candidate of the judge has the duty to hold such work experience, that a person can become a judge only above the age of 35.[20]

In legal literature the system of criteria set for the appointment of judges of the Constitutional Court, which does not conform to the high status of the judge of the Constitutional Court, is quite justifiably criticised.[21] As a result of constitutional reform, the requirements set for the candidate of a judge of the Constitutional Court have significantly increased and are set in the following manner: a candidate shall be a citizen of Georgia, who has attained the age of 35 years, has higher legal education, no fewer than ten years of experience in the practice of law and distinguished professional qualifications (article 60, paragraph 2). It is obvious, that minimal age requirement has returned to the original condition and, simultaneously, which is of course welcomed, new criteria are added, specifically the condition of having no less than 10 years of work experience with the specialty and distinguished professional qualification. These criteria collectively, in our opinion, ensure that the Constitutional Court will be composed of experienced and highly qualified lawyers.

The rules of selecting and appointing judges in the Constitutional Court are no less relevant, which are not unequivocally decided abroad. However, in all instances the desire of the lawmaker to set rules of formation of the Court ensures the independence of this utmost relevant institution of constitutional control from other branches and party influences. This trend is well demonstrated in the rule of composition of the Constitutional Court, which envisages the involvement of all three branches of power equally in the process (Bulgaria, Spain, Italy, Ukraine, etc.).[22] This very system of formation of the Constitutional Court was set by the original version of the Constitution. The Basic Law of the country (article 88, paragraph 2) prescribed the following: three members of the Court were appointed by the President of Georgia (the President was the head of State and executive branch then), three members were elected by the Parliament (legislative branch) and three members were appointed by the Supreme Court (judicial branch).

Legal scholarship has highlighted that this rule of formation of the Constitutional Court, considering the entities engaged in the process, although has remained the same, as a result of the constitutional reform of 2004, the status of one entity, the President of Georgia, was amended. The President was not seen as a leader of executive branch, which, in the opinion of legal scholars, excluded the executive branch from the formation of the Constitutional Court. Therefore, the idea of ensuring the full parity principle was expressed, which envisioned the Government of Georgia proposing a candidate for a member of the Court to the President.[23] We consider such approach appropriate, however, this necessity arose not after the reform of 2004, but after the constitutional reform of 2010, when the Government of

[20] В В Маклаков (Ред), *Конституционный контроль в зарубежных странах* (Норма, М., 2007). 42-43; Н В Витрук, *Конституционное правосудие. Судебно-конституционное право и процесс* (Юрист, М., 2005). 180-181.
[21] See G Kakhiani, *Constitutional Control in Georgia. Theory and Legal Analysis* (Meridiani 2011). 149-150.
[22] Article 147, Constitution of Bulgaria. 12 July 1991 (Държавен Вестник, No.56, 13.07.1991);
Article 159, Constitution of Spain. 13 October 1978 (Boletín Oficial del Estado 29.12.1978);
Article 135, Constitution of Italy. 22 December 1947 (Gazzetta Ufficiale No. 298, 27.12.1947);
Article 148, Constitution of Ukraine, 28 June 1996 (Відомості Верховної Ради України (ВВР), 1996, № 30)
[23] See Kakhiani, *Constitutional Control in Georgia* (n.21). 135-136.

Georgia become the highest body of executive branch, while the main executive functions were removed from the President of Georgia. Before that, since the reform of 2004 until 2013, the President of Georgia was although no longer the leader of the executive branch, the Government of Georgia was not seen as the highest body of the executive either. The President of Georgia shared the executive powers with the Government, specifically, the Government of Georgia was accountable to the Parliament and the President, the President was authorised to remove the Government at his own discretion, remove certain Ministers from their posts, cease or annul the acts of the Government and the bodies of the executive branch, etc. Considering these, the appointment of a judge of the Constitutional Court by the President of Georgia could still be seen as a participation of the executive branch in the formation process of the Court.

Although the constitutional reform of 2017 has almost completely removed the President of Georgia from the executive branch and only left the status of a head of state for the President characteristic to the parliamentary republic, the authority to single-handedly appoint one third of the Constitutional Court was maintained. If the lawmaker were loyal to the principle, that all three branches of power are equally engaged in the process of forming the Constitutional Court of Georgia, then it is unclear how the executive branch participates in the process within the new constitutional reality. After the constitutional reform the President of Georgia does not represent any of the well-known triad of power. Based on all these, this issue should in future be solved in a way proposed above or by introducing the endorsement (countersigning) of the Prime-Minister on the appointment of the judge of the Constitutional Court by the President.[24]

In the new version of the Constitution of Georgia the procedure of electing judges of the Constitutional Court by the Parliament is amended. Under the current Basic Law, three members of the Constitutional Court is elected through majority of the full list of the Parliament, while according to the new version of the Constitution it has to be no less than three fifth of the total number of the Members of the Parliament (article 60, paragraph 2). It is noteworthy that pursuant to the original Constitution of Georgia, three fifth of the full list of the Parliament was necessary for the election of a judge of the Constitutional Court (article 88, paragraph 2). The new version replaced “full list” with the “total number”, while “three fifth” replaced the word “majority”. When appointing a judge of the Constitutional Court increasing the quorum significantly, in our opinion, will support the participation of the parliamentary minority and protect members from the influence of the parliamentary majority.

As for the term of the judge of the Constitutional Court, in our opinion, the judge should be appointed either for a life or for a fixed term, however without the ability of re-appointment (re-electing). The Constitution of Georgia has originally set 10-year term for the judge of the Constitutional Court and the prohibition of the re-appointment. None of the constitutional reforms has amended these provisions and will be in force in the new version of the Constitution, indicating the right approach of the lawmaker.

[24] For instance, the President of Italy appoints one third (five judges) of the Constitutional Court without the Government proposing the candidates to the President, however, the Decree of the President on appointing a judge needs countersigning from the Chairman of the Government (see В В Маклаков (Ред), *Конституционный контроль в зарубежных странах* (Норма М., 2007). 315-316).

The election of the President of the Constitutional Court can be viewed within the same context as well. The President of the Court exercises representative, organisational and certain procedural authorities, which distinguishes him/her from other judges. Two methods of appointing (electing) the President of the Constitutional Court is known: the President is elected by the Court (e.g. Belgium, Italy, Latvia, etc.) or the President is appointed (elected) by another state institution (e.g. Germany, Austria, Spain, etc.).[25] Legal scholarship considers election by the Court members more appropriate, as it significantly decreases the possibility of politicising the election (appointment) procedure and creates certain guarantees for equality of the judges and independence of the Court.[26]

In the original version of the Constitution of Georgia the President of the Constitutional Court was elected by the Constitutional Court from its members for a 5-year term. Additionally, the same person could not be elected twice (paragraph 2, article 88). This model of electing the President of the Constitutional Court has survived all constitutional reforms and remained unchanged; however, the provision of prohibiting re-election has been amended. Specifically, since 2010 re-electing same person as a President of the Court became possible, this took place in practice in 2011.[27] The reform of 2017 has reinstated the original condition and in the new version of the Constitution of Georgia, re-electing same person for the Presidency of the Court is again prohibited (article 60, paragraph 3).

With regards to this issue it is not insignificant to state one fact, although it is not related to the Basic Law of the State, but to the subject regulated by the organic law on the Constitutional Court. Specifically, the issue concerns the proposal of the candidacy for the President of the Constitutional Court. Prior to 2016 the candidate of the Presidency of the Court was nominated through the agreed proposition of the President of Georgia, Chairman of the Parliament of Georgia and the President of the Supreme Court of Georgia (article 10, paragraph 3 of the Organic Law). As a result of the amendments to the Organic Law of Georgia "On the Constitutional Court of Georgia" the candidate for the Presidency of the Court can only be nominated by three judges of the Constitutional Court.[28] Thus the candidate of the President of the Constitutional Court is nominated by the judges themselves

[25] Article 32, Organic Law of Belgium Special Act of January 6, 1989 On Constitutional Court, Official English translation available here: <http://www.const-court.be/en/basic_text/Organic_legislation_SACC.pdf> accessed 1 June 2018;
Article 135, Constitution of Italy 22 December 1947 (Gazzetta Ufficiale No. 298, 27.12.1947);
Article 12, Law of Latvia on Constitutional Court 14 June 1996, official English translation available here: <http://www.satv.tiesa.gov.lv/en/2016/02/04/constitutional-court-law/> accessed 1 June 2018;
Article 9, Law of Germany on Federal Constitutional Court 12 March 1951, official English translation available here <http://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/Gesetze/BVerfGG.pdf?__blob=publicationFile&v=10> accessed 1 June 2018;
Article 147, Constitution of Austria 1 October 1920 (Federal Law Gazette No. 1/1930 (StF: BGBl. Nr. 1/1930 (WV));
Article 160, Constitution of Spain 31 October 1978 (Boletín Oficial del Estado 29.12.1978).
[26] Н В Витрук, *Конституционное правосудие. Судебно-конституционное право и процесс*. (Юрист, М., 2005). 195.
[27] Article 379 Constitutional Law of Georgia 15 October 2010 no.3710-ს\ბმ I, no.62, 05.11.2010.
[28] Organic Law of Georgia 3 June 2016 (webpage 04.06.2016).

and they are the ones electing the President at the same time. In our view, this will further strengthen the autonomy of this institution of the constitutional control.

THE AUTHORITY OF THE CONSTITUTIONAL COURT AND THE SUBJECTS EMPOWERED TO PETITION THE CONSTITUTIONAL COURT

Major changes were brought to the foundational constitutional provisions of the authorities of the Constitutional Court of Georgia. If pursuant to the current Basic Law the authorities of the Constitutional Court is defined by the Constitution and the Organic law, after the amendments to the Constitution the only source of authorities of the Constitutional Court is the Constitution. The provision of the new version of the Constitution, which provides the authorities of the Constitutional Court, also establishes that the Constitutional Court "exercises other authorities envisaged by the Constitution" (article 60, paragraph 4, subparagraph "j"). Therefore, the authorities of the Constitutional Court are comprehensively defined only by the Constitution and it is prohibited to increase the amount of these authorities by, for instance, the Organic Law.

The above mentioned provision of the new version of the Constitution of Georgia provides for nine authorities of the Constitutional Court: protection of human rights, abstract norm control, real norm control, deciding upon disputes of competence, constitutional review of the international agreements, constitutional control of the political parties, constitutional control of elections and referenda, protection of the rights of the local self-government. This list does not include the authority of exercising impeachment procedure. It is indicated in the article 48 of the new version of the Constitution, which is already named "Impeachment". Thus the Constitutional Court is represented with ten types of authorities in new version of the Constitution. Constitution currently in force and the Organic Law of Georgia "On Constitutional Court of Georgia" provides for fourteen authorities, thus, more by four compared to the new version. The authors of the constitutional reform rejected the authorities such as: formal norm control, deciding the disputes on violation of the status of the Autonomous Republic, control over normative acts of the Autonomous Republic and protection of the constitutional foundations of the judiciary. As we see, the competence of the Constitutional Court, which is established by the unity of its authorities, is significantly reduced. This is so based on the quantitative approach. Below we will provide in-depth discussion on the authorities of the Constitutional Court that are either removed or have been amended to a certain extent.

One of the authorities removed from the Constitutional Court is formal norm control. The Constitutional Court adjudicated and decided on the adoption/issuance, signature, publication and entry into force of legal acts of Georgia and parliamentary regulations with regards to the Constitution of Georgia within this authority. Therefore, the subject to the constitutional review was not the content of the mentioned normative acts, not the material part thereof, but the formal aspects in the view of the Constitution. Formal constitutional control covered only parliamentary normative acts and aimed at ensuring the legislative process established by the Constitution for the legislative branch was followed. Formal constitutional control had such a high significance, that, although it was independent type of authority of the Constitutional

Court, simultaneously, the Organic Law of Georgia "On Constitutional Court of Georgia" also prescribed it as an authority that could have been used by the Court on its own initiative (article 26, paragraph 2) and was mandatory in case the Constitutional Court was exercising norm control within other authorities (which is exceptional for Georgian constitutional justice). The lawmaker, obviously, was considering the general rule of validity of normative acts, according to which, the normative act has no force not only when it contradicts the Constitution, but also when the procedures established by the Constitution for its adoption and entry into force is violated. Based on this, after the new version of the Constitution comes into force, a situation could emerge, when a legal act or normative regulation adopted by the Parliament does not contradict the Constitution, however, the rules of its adoption or entry into force provided by the Constitution may be heavily violated. Unfortunately the control mechanism of the Constitutional Court will not exist for such instances and restraining the Parliament from violating the Constitution will be impossible. Thus removing this authority from the Constitutional Court was not appropriate.

The following two authorities of the Constitutional Court covered the Autonomous Republic of Ajara and aimed at deciding the cases of constitutional claims between the bodies of central state government and of the regional one. The Constitutional Court was authorised to adjudicate and decide on claims of violation of the Constitutional Law "On the Status of the Autonomous Republic of Ajara", as well as the issues of conformity of the normative acts of the Supreme Council of Ajara Autonomous Republic with the normative acts of Georgia. After such authority is removed, the constitutional review over the normative acts of the Supreme Council of Ajara Autonomous Republic will be placed on other authorities of the Constitutional Court (for instance, abstract norm control, protection of human rights, etc.), however the norm control will not be as efficient as it was within the special authority. The issue here is that within the currently abolished authority of the Constitutional Court, the acceptance of the constitutional referral of the Parliament of Georgia for consideration by the Constitutional Court caused suspension of the operation of the respective normative act of the Supreme Council of the Autonomous Republic of Ajara until the final judgement was delivered on the case. Additionally, the disputed normative act could be reviewed with regards to both, their constitutionality and their legality.[29] These possibilities of constitutional control shall not exist after the constitutional reform.

As for the second authority related to the Autonomous Republic, since the violation of the Constitutional Law "On the Status of Autonomous Republic of Ajara" was possible by both central and Autonomous Republic Government bodies, the right to submit claims on this issue was given to the institutions of both level of government: the President of Georgia, the Government of Georgia, no less than one fifth of the Members of Parliament and the Supreme Council of Autonomous Republic of Ajara.[30] Currently, pursuant to the new version of the Constitution of Georgia (article 60, paragraph 4, subparagraph "d") the highest representative or executive body of the Autonomous Republic of Ajara is entitle to address the Constitutional Court only if it considers that its competence established by the

[29] See Khetsuriani, *The Authority of the Constitutional Court of Georgia* (n.8). 253-263.

[30] Article 41[1] Organic Law of Georgia on Constitutional Court of Georgia (საქართველოს საკონსტიტუციო სასამართლოს შესახებ), (პარლამენტის უწყებანი, # 45, 21.11.1997, p. 54).

Constitution of Georgia is violated, which, obviously includes the issues of much narrower circle that the topics regulated by the Constitutional Law of Georgia.

The next authority removed from the Constitutional Court, which aimed at protection of the constitutional foundations of the judiciary, could, in our opinion be replaced by the authority of deciding competence disputes, since the function of ensuring the independence and efficiency of the general courts, pursuant to the Basic Law of the State, is the competence of the High Council of Justice (article 64, paragraph 1). Therefore the normative act contradicting the constitutional provisions regarding the general courts is linked with the competences of the High Council of Justice and, thus, this institution, hopefully will have the right to file a referral to the Constitutional Court requesting constitutional revision of such normative act.

The amendment was made to the authority of abstract norm control of the Constitutional Court. Prior to the reform it had quite limited character, specifically the Constitution (article 89, paragraph 1, subparagraph "a") and the Organic Law of Georgia "On Constitutional Court of Georgia" (article 19, paragraph 1, subparagraph "a") precisely defined the normative acts, which could be subject to constitutional control through this authority. After the constitutional reform the abstract norm control adopted universal quality and any normative act falls within its scope. The expansion of the area of constitutional control should of course be assessed positively, if this does not cause overload of the Constitutional Court. In our opinion this authority of the Court is one of the most important tools for checks and balances between the branches of power and thus, it would be more appropriate, if it covered only the normative acts adopted by the supreme state authorities.

The legal definition of the authority of the Constitutional Court regarding the adjudication of the disputes on competences between the state bodies is amended. Pursuant to the new version of the Constitution of Georgia new subjects are allowed to participate in such disputes, specifically: the Council of the National Bank, Auditor General, Prosecutor General and the executive bodies of the Ajara Autonomous Republic (article 60, paragraph 1, subparagraph "d"). Additionally the courts are removed from the entities entitled to address the Court. We should assume that in case the competences of the judiciary are violated, the right to address the Constitutional Court will be granted to the High Council of Justice by the Organic Law, as it was mentioned above. Generally it should be noted that the Organic Law on the Constitutional Court shall specify not just this issue, but also the right of certain state entities (e.g. the President of Georgia, The Parliament of Georgia, the High Council of Justice) to address the Constitutional Court regarding the violation of their competences and of other state entities as well.[31] In any case the provision of the new version of the Constitution establishes that the Constitutional Court is authorised to "consider disputes on the authority of an appropriate body" does not give precise guidelines for establishing the scope of referrals to the Court by specific entities and requires further specification in the Organic Law.

[31] Pursuant to the Organic Law of Georgia on Constitutional Court of Georgia (საქართველოს საკონსტიტუციო სასამართლოს შესახებ) article 34, paragraph 1, the President of Georgia and the Parliament of Georgia are entitled to refer to the Constitutional Court not only when they consider their own competence violated, but also when the scope of competences of other state institutions are violated as well.

In the new version of the Constitution of Georgia the authority of the Constitutional Court regarding the constitutional control over the political parties is established differently. Prior to the constitutional reform both the issues of constitutionality of the formation and activities of political entities of citizens fell within the scope of authorities of the Court. After the reform the competence of the Constitutional Court only covers the constitutionality of the activities of the political parties. As for the constitutionality of their formation, it is beyond the jurisdiction of the Constitutional Court. The issue here is that the Basic Law of the State establishes the list of prohibitions regarding both the activities and the formation of the political parties. For instance, the new version of the Constitution states that "the formation of a political party according to territorial affiliation shall be impermissible" (article 23, paragraph 3). If we consider the instance, when a political party was established based on territorial affiliation, but at the same time its activities do not contradict other requirements of the Constitution, such Party cannot be prohibited by the Constitutional Court. Its prohibition is not permitted by any other entity either, since the Constitution provides that the political party can be prohibited exclusively by the Constitutional Court (article 23, paragraph 4).

Another amendment was made to the following authority of the Constitutional Court, however with regards to its expansion. Specifically, the Constitutional Court, when prohibiting a political party, shall now be authorised to decide the termination of the member of a representative body elected through this party. It should be noted that Georgian legal scholarship had already proposed reasoned suggestions on this issue, similar legal experience is seen in other countries and it is welcomed, that as a result of the constitutional reform this topic was positively decided.[32]

New provision was added to the authority of the Constitutional Court regarding the constitutional control of the elections. Specifically, pursuant to the new version of the Constitution of Georgia, it is prohibited to declare regulations governing elections as unconstitutional during the respective election year, unless these regulations were adopted during 15 months before the month of respective elections (article 60, paragraph 6). As for the constitutional definition of the current authority of constitutional control of the elections, it has remained the same and despite the critical comments, the disputes on the constitutionality of regulations governing elections (referenda), and disputes on the constitutionality of elections (referenda) shall be decided in unity by the Constitutional Court. The shortcoming of such legislation, in our opinion, is following – if constitutionality of the regulations governing elections or referenda is not under doubt, but the elections or referenda were held in violation of these regulations and the Constitution, the constitutionality of such elections (referenda) does not fall within the jurisdiction of the Constitutional Court.[33] The above mentioned new provision of the Constitution of Georgia has further limited the authority of the Constitutional Court in deciding the constitutionality of the elections. In case the election law faces no amendment within the last 15 months prior to elections, i.e. no new law regulating elections is adopted, the Constitutional Court cannot adjudicate over the constitutionality of elections held or to be held within that election year. In other words, one of the most relevant authorities of the Constitutional Court will be paralysed. In our opinion in order to ensure the legitimacy of the state government and to legally resolve the political

[32] Khetsuriani, *The Authority of the Constitutional Court of Georgia* (n.8). 94-97.
[33] Khetsuriani, *The Authority of the Constitutional Court of Georgia* (n.8). 102-103.

crises, the role of the judiciary in forming the state government through elections should be further strengthened, not diminished. Unfortunately, since 2005, the constitutional reforms, including that of 2017 the law of Georgia sees development in the latter direction.

We have partially addressed the issue of the subjects entitled to address the Constitutional Court when discussing the amendments of the authorities of the Court. Hereby we will only state, that as a result of the constitutional reform the circle of such subjects has significantly widened. Eleven subjects were entitled to address the Constitutional Court prior to the reform, while as a result of it this number has increased to 16. Additionally, new subjects, as mentioned above, can address the Constitutional Court for deciding on the disputes of competences.

The constitutional provision regulating the legal outcome of the judgment of the Constitutional Court has been partially amended. Pursuant to the current Constitution "a normative act or part of it recognised as unconstitutional shall cease to have legal effect as soon as the respective judgement of the Constitutional Court is published" (article 89, paragraph 2). In the new version of the Constitution following sentence was added to this provision: "unless a different, later period of **invalidation** of the act or part of it is established by the respective judgment [emphasis added]" (article 60, paragraph 5). It should be noted that the Organic Law of Georgia "On Constitutional Court of Georgia" establishes the same legal outcomes of the judgment of the Constitutional Court (article 25, paragraph 2), however it was not used in practice, since it did not conform with the Basic Law, establishing imperatively the invalidation of the unconstitutional act at the moment of the publication of the judgment and did not allow for the discretion of the Constitutional Court to define other date for invalidation. However such need was obvious for exercising certain authorities, particularly when exercising the authority of constitutional control of the acting international agreements.[34]

Currently this issue is decided and as a result of the constitutional reform, the mentioned provision of the Organic Law has gained the constitutional status. Using this provision in the practice of the Constitutional Court, in our opinion, will avoid possible conflict between the principles of the national and international law and will be a relevant tool for ensuring the legal security.

CONCLUSION

The constitutional reform that took place in Georgia in 2017 has completed the transformation of Georgian political system to the Parliamentary system and removed the errors made during the previous constitutional reform (in 2010).

The constitutional reform, which partially continued in 2018, has touched upon the provisions defining the foundations of the Constitutional Court, however, did not change the place of the Constitutional Court within the system of separation of powers. Pursuant to the new version

[34] On this issue see Khetsuriani, *The Authority of the Constitutional Court of Georgia* (n.8). 186-188.

of the Constitution, it is still be institute of the judicial branch and is a judicial entity of the constitutional control.

As a result of the constitutional reform the requirements set for the candidate of the judge of the Constitutional Court have significantly increased, as well as the quorum for electing a judge by the Parliament; additionally the possibility of electing the President of the Constitutional Court for a second term was also removed, the circle of persons entitled to address to the Constitutional Court has widened, just as the scope of abstract norm control and constitutional control of the political parties; the Constitutional Court has been granted the power to decide the period, when an unconstitutional normative act will be invalidated.

Together with these positive changes, as a result of the reform the authorities of the Constitutional Court have significantly decreased. Four authorities, including formal norm control, were removed. The authority of deciding constitutionality of the elections has further diminished. Additionally, increasing or specifying the authorities of the Constitutional Court in the future is only possible through constitutional amendments, which is an extremely difficult process.

Derived from the above mentioned, if we are guided by the idea that the role and relevance of the Constitutional Court, as well as of any other state authority, is primarily decided based on its scope of competences, whereby the new version of the Constitution has significantly diminished the authorities of the Constitutional Court, the constitutional reform of 2017 cannot be considered as a step forward in this regard.

Anna Phirtskhalashvili

PhD of Law,
Professor at the Grigol Robakidze
University School of Law

FROM INTERNATIONALISATION OF THE NATIONAL LAW TO THE CONSTITUTIONALISATION OF THE INTERNATIONAL LAW

Abstract

The development of the states in the modern world happens in steps with the global processes and taking the national identity into consideration. Often times, it is difficult for the states to follow this process of development maintaining the balance. The law should be the tool ensuring the optimal correlation of both– international and national – values. The observation on the cold war, its following period and the ongoing processes demonstrates that the states within the current globalisation cannot develop independently from other states and peoples. The problems facing the world, such as, for instance, environmental protection, the fight against terrorism and other threats can only be defeated with unity. The supranational union of states serves primarily the goal of resolving these global problems. The states unite in such international communities through giving up portion of their sovereignty. Giving up this "portion" of sovereignty sometimes means limiting constitutional, national identity. The control of national identity is the barrier between the national and international. Nowadays the main challenge of the modern state is to be a dignified member of the international community and maintain national identity of its constitution.

INTRODUCTION

The law should develop in steps with the processes the society goes through. Like a living organism it should not be detached from the reality and the community, it should timely and reasonably react to all processes appearing in the society. The function of the law is, on the one hand, to fit the development of the society and, on the other hand, to carry the restraining function towards the negative trends of evolution.

Much like the evolution of international community, two trends are observed in the development of modern law: globalisation of the national law and constitutionalisation of the international law. These two processes unfold in parallel, frequently in harmony, however, sometimes in conflict. This article is a modest attempt to observe, analyse and evaluate these processes of interaction and development.

1. STRUCTURAL VARIATION OF THE POLICY OF INTERNATIONAL LAW

International law is one of the relevant elements of the global order. When the foundational values and order changes in the world, international law should be revised and new, different focuses should emerge of its policy priorities.[1] If this is not the case, the law will not be capable to respond to the challenges and demands of the society, which has historically accompanied the evolution of humanity. According to some part of the scholars in this field, the "acceleration" of the ongoing processes in the world is the one inducing the constitutionalisation of international law.[2] With this regard it is remarkable that in 2004 seventh Secretary General of the UN, Kofi Annan created special commission aiming at innovative amendments to the UN Charter and generally, the reform of the UN, this reform, in itself, served the strengthening of the elements of constitutionalisation of international law.[3]

It is a fact, that the modern era is remarkable with its globalism. The states can hold wars without leaving their territories through cyber means. The threat of terrorism is immense, added with the problem of total inequality between the states. For historic development of the international law the ongoing trend, that the human rights are not only collectively, as a "part" of a state, but also individually, as rights of single persons, have deserved to be internationally protected, is highly significant. This is also supported by that a person beyond the borders of his/her state holds the tool for protecting the rights individually, without the mediation from the state. A good example of this is the institute of an individual complaint to the international courts.[4] It strengthens the right of a person, as a separate individual on an international arena. A person is not seen as merely a part of a state, a citizen. A person carries the human rights because he/she is a human and not because he/she is a citizen of a specific state.

In order for the international law to play its role in the modern world and successfully resolve all problems existing in international relations, the new comprehension of international law is necessary. This is exactly why the discussions over the constitutionalisation of the international law have become more and more intensive in our century.

In the western democracies particularly interesting trends have been observed. On the one hand – the union between the states are becoming supranational, while on the other hand – as a result of globalization wave in the world it is notable that the nations have developed the instinct of self-preservation. The exit of the United Kingdom from the European Union, the

[1] G Nolte, *Strukturwandel der internationalen Beziehungen und Völkerrechtspolitik* in: Polis und Kosmopolis – Festschrift für Daniel Thürer (Giovanni Biaggini/Oliver Diggelmann/Christine Kaufmann Hg.), Baden-Baden (Nomos 2015). 557-563, S. 557.

[2] J Habermas, *Eine politische Verfassung für die pluralistische Weltgesellschaft* (KJ 2005). 222-247, S. 237; C. Tomuschat, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century*, General Course on Public International Law, Receuil des cours 281 (1999), The Hague 2001. 163 f; A.v. Bogdandy, 'Constitutionalism in International Law: Comment on a Proposal from Germany' (Winter 2006) 47 Harvard International Law Review, Number 1.

[3] B. Fassbender, *UN-Reform und kollektive Sicherheit* (Heinrich Böll Stiftung, Global Issue Papers No. 17, April 2005); On May 31, 2005 Kofi Annan talked about the need of this reform in his speech 'Larger Freedom: – Towards Development, Security and Freedom for All (LF)'.

[4] A Pirtskhalashvili, 'The Theory of Universality of Human Rights' (2014) #2(41) Scientific Journal Justice and Law. 72.

results of the US Presidential Elections, just as the victory of strong right conservative in the French Presidential Elections, the entry of a right-wing party, which is the largest opposition party in German Parliament, in the Parliamentary Elections of Germany with rather large number of votes, have been unexpected to the experts in politics. Observations on the ongoing processes supports the idea that the political elites of the developed democracies are although ready for cultural globalisation and transformation of national law, they are not ready to accept the imported culture, to give up their national identity. Once the latter is under threat, the "nationalism immunity" enhances. The instinct of self-preservation and strive for globalisation provides counter-effect.

2. FROM NATIONAL TO GLOBAL – CONSTITUTIONALISATION

The world was chaotic before state was created. Primitive humans were not aware of each other's rights. They constantly fought within each other for existence. Our ancestors soon realised that the society was in need of a certain order, such order, which would be obeyed by all – the strong and the weak. The order that, on the one hand, would protect them, while on the other hand, would force them to respect each other. The idea of creation of a state is backed by strive towards establishing security and peace. Creating certain order within the state without binding rules and principles – without establishing legal provisions, – is impossible. Establishing the scope of and maintaining the law and the state governance is conditioned by the existence of constitutionalism.

In classic sense, the constitutionalism envisages the ambit of state power, which provides for the duties of government entities, scopes of their authorities and functions, on the one hand and the rights of a person, on the other hand.[5] The content of constitutionalism formally is strengthened by the creation or reform of the Constitution. While in modern sense, the constitutionalism reaches into the international and supranational legislation. The evidence of this, for instance, is the creation of unwritten fundamental rights and basis within the rule of law in the order of European community and European Union and raising other national values to the level of supranational by the judges.[6]

The historic development has demonstrated that the interstate order could not be the guarantee for personal security. World peace is necessary for its achievement. The postulates of world peace are read in the *"Perpetual Peace" written by Kant in 1795*.[7] *Pursuant to the "democratic peace" theory of Kant*, democracies do not have war with each other. Democratic regime, in Kant's opinion, ensures the peaceful foreign affairs policy of a state. Kant proposed three prerequisites to the states for establishing and maintaining peace: 1. all states have to be democratic republics. According to Kant, unlike absolute feudal monarchies,

[5] A Haywood, *Political Ideologies: An Introduction* (Georgian translation, 3rd edition, 2004, Logos Press) 432.
[6] R Arnold 'Rule of Law in the Development of Constitutional Law' (2015) VIII Constitutional Law Review 15, 18.
[7] I Kant, *Zum ewigen Frieden. Ein philosophischer Entwurf* (Königsberg 1795); Additionally it should be noted that Kant was not the first to touch upon the problem of peace. Perpetual peace was the subject of thought during the reformation epoch also, The works of Desiderius Erasmus, *The Complaint of Peace*, Sebastian Franck *Book Fighting for Peace* (1539), American Willian Penn's Essay *Towards the Present and Future Peace of Europe* (1693), Bernardin de St. Pierre's letter *For Perpetual Peace* (1712) and *The Plan for Perpetual Peace* and Rousseau's *Project for Perpetual Peace in Europe* are noteworthy (1782).

western type, democratic governance has significant advantage. In his view, within republican system people become decision maker, thus the government acts within the mandate granted by the people, while war is seen as devastating for people's wellbeing, the wish to start war decreases; 2. International law should be based on federal unity between free states; 3. International law shall become the world citizenship law and all should be loyal towards it. Kant establishes the theory of world state and underlies the fact that the world state will be the guarantee of perpetual peace and will be the type of state union, which limits the possibility of wars between its member states.[8]

Based on the theory of Kant Michael Doyle and Francis Fukuyama brought attention to the theory of democratic peace in the 80s, in their opinion, countries with liberal democracies are remarkable with their peace, since in such countries, as a rule, middle class interested in maintaining peace, so that they can be engaged in sales, production and accumulation of wealth, is extremely strong. Therefore, if democratisation and liberalisation of the world will take place, peaceful world can be created.[9]

This theory has a lot of critics, since it is considered utopic by the neorealism for several reasons.[10] The followers of neorealism criticise the theory of perpetual peace, on the one hand, because they doubt the Kant definition of democracy and, on the other hand, they have their own explanation for the reasons of peace between the democratic states. The realism and neorealism propose different versions of understanding the peace.[11] These positions doubt democracy having the essential function for peace and focus on other values, for instance, the cultural similarity between the western states.[12] Critics are mainly based on the existence of super-states in the world, since in reality, they are defining international relations, their actions, particularly their wars, have massive impact on international system, unlike other weaker states. The Kant's theory of democratic peace combines both large and small states, while critical position of neorealism has the following point of view in this regard: actions of large and small states cannot be defined with equal measurement, since small states have much limited choice.[13] The counterargument for the theory of neorealist scholars is empirical evidence of the theory of democratic peace, specifically that between the democratic states (in republic sense of Kant) there has been no armed conflict for the past two centuries. If we take into consideration the fact that as a result of democratisation trend taken during the past century in the world, the number of autocratic states have decreased and

[8] Kant, *Zum ewigen Frieden* (n.7). 43.

[9] M Doyle, 'Kant, Liberal Legacies and Foreign Affairs' in R J Art and R Jervis (eds) *International Politics: Enduring Concepts and Contemporary Issues* (translated into Georgian Ilia State University 2011) 115-130; F Fukuyama, *State-Building: Governance and World Order in the 21st Century* (Ithaca, NY: Cornell University Press 2004).

[10] J Habermas (n.2). 246; The strongest critique of Kant was reflected in the article of Christopher Layne: C. Layne, *Kant or Can't: The Myth of the Democratic Peace in Debating the Democratic Peace* (Cambridge & London: The MIT Press 1994).

[11] See the analysis of Peace Theories by the representatives of Realism and Neorealism John Mearsheimer and Kenneth Waltz in A Rondeli, *International Relations* (third edition Tbilisi 2006); also the works of mentioned authors: J J Mearsheimer, *The False Promise of International Institutions*, *International Security* (Winter 1994/1995) Vol. 19, No. 3. 5-49; K Waltz, *Structural Realism after the End of the Cold War*, *International Security* (2000) 25(1), 5-41; J.J. Mearsheimer, *Back to the Future: Instability in Europe After the Cold War*, *International Security* (Summer 1990) Vol. 15, No. 4. 5-56.

[12] E Kodua et al (eds.) *Dictionary-Directory of Social and Political Terminology* (Logos-Press 2004). 351.

[13] See C. Layne, *Analysis* (n.11).

Kant's "democratic peace", despite its critique, is one of the basis of the foreign policy rationale in the West, we may think that in a certain period of time, world peace is achievable.

Some scholars consider that Kant's perpetual peace theory is not at all unachievable utopia, instead it is the ideal that the educated humanity should eternally strive towards.[14] Kant's realism towards perpetual peace is also demonstrated in the fact, that he does not consider the possibility of realisation of this ideal is instant. He discusses the steps, which, in case they are made, could bring the humanity to strongly take the path of achieving this ideal.

The issue of world peace became most relevant after World War II, as it demonstrated that protection of the rule of law and human rights merely at a national level, within a state is not sufficient for world security. Today, with the international terrorism, massive human rights violations and global inequality, considering the cultural and economic globalisation, discussions over the "constitutionalisation of international law" has become particularly topical.

Two world wars of the 20th century have brought the states to the idea of international community. The community of states – on the level of international organisations – is an attempt at reaching the global peace and security. The topic of "constitutionalising" international law has emerged in the international society. In other words, the constitutional principle the states should be based on in classical sense, should also strengthen the order between the states or, more specifically, between the peoples. This very discourse has become the subject of scholarly discussions within the Western European scholars for the past decade.[15]

The processes of constitutionalisation are also obvious in the traditional international law. The evolution of *jus cogens* can be attributed to this type of process, which cannot be avoided by the power of a state in any way, as they provide imperative normative principles. The human rights, the prohibition of use of armed force and other principles relevant to the international society demonstrate the gradual transformation of the international law – legislative norms based on the vertical principles.[16] This very kind of transformation causes acceptance of constitutional-law principles by international law and their reinforcement. A good example of it is the *World Trade Organisation or the European Union, as supranational organisations. Although the adoption of the Constitution of the EU formally failed as a result of the referenda in France and the Netherlands in 2005, European Law in terms of material law is a clear example of the constitutionalisation of the international law. It is well visible where the line between the national and supra-national law is drawn when looking at the political-legal processes developed in Europe.*

On the first stage of development of the international law the goal of the international community was limited to the fight for the justice and democracy. International Courts were created, which more or less were capable of reaching success in safeguarding these values

[14] G Tavadze, *Perpetual Peace: Unreachable Utopia or Political Ideal? Thoughts on Immanuel Kant's Work 'Perpetual Peace'* 3 available at <www.academia.edu> accessed on 30 May 2018.
[15] See articles in G Biaggini, O Diggelmann and C. Kaufmann (eds), *Festschrift für Daniel Thürer, Polis und Kosmopolis* (Nomos Verlag, Baden-Baden 2015); J Habermas, 'Hat die Konstitutionalisierung des Völkerrechts noch eine Chance?,' in: ders., *Der gespaltene Westen* (Frankfurt/M. 2004), S.113 ff.
[16] Arnold (n.6). 18.

within the internal affairs of the states, as well as in disputes between the states. The efficiency of such tools, their execution is frequently debatable, but it is undoubted that the values agreed by the states – the principles of democracy and justice, - are the subject of attention for the international community. The exceptional function in the international law was taken by the constitutional-law principle, the notion of proportionality (Verhältnismäßigkeitsgrundsatzes). In the German literature it is subject of wider discussions within the context of constitutionalisation of the international law.[17]

The implementation of the above mentioned principles serves global security and peace. It has been several decades when on the third level of mankind development the state has taken on a social function. It is undoubtable that in case of inability to work, sickness or old age, a person needs support. The social order of the state is a priority for a developed state. Even though some of them care for establishing social system more and others less, it is relevant to confess that a person is a part of society and when vulnerable, needs support from the government.

It is interesting that the same trend is demonstrated in the evolution of social state as in the development of democratic and rule of law state principle. Fair distribution of welfare envisages not only distribution between specific persons or citizens, but also between the states. It is noteworthy that it has reached beyond the frontiers of statehood and has already adopted international meaning. It is confirmed not only through the regulations of regional organisations (i.e. the European Union), but also by the regulations of wold communities (UN). It is becoming vivid day by day that achieving equal development and wellbeing of member states of the European Union is its one of the most relevant goals. Within the scope of social solidarity between the states UN Sustainable Development Agenda – 2030 is of particular significance. The goal of eradicating social problems of the world is set as a goal in this very agenda. Out of its 17 principles social problems have highest priority. The first three goals set are the eradication of poverty and hunger in the UN member states (192 countries) and creation of efficient healthcare system.[18] The Agenda also stresses out that equal education, dignified work conditions, economic growth and elimination of inequality within and between the states shall be achieved through partnership. This document has particular social weight as the developed states recognise that they have "social responsibility" towards other, "poorer" states. Historic development demonstrates that the mankind has reached the stage where it has become obvious and irreversible that not only the commonwealth of states, but also the international commonwealth has taken on certain social responsibilities.

In the most utilitarian sense a person, who has a lot of material wealth, prefers to live in the environment where there are no extremely poor around, since when minimal living conditions are absent, his/her property and security is under threat. This threat is frequently represented by a person living on the verge of poverty and hunger, as in the event of exigencies he/she does not have the means to work and earn living honestly. In the process of

[17] J Rauber, 'Verhältnismäßigkeit und völkerrechtliche Systembildung, Überlegungen zur einheitsbildenden Funktion des Verhältnismäßigkeitsgrundsatzes im Völkerrecht der Konstitutionalisierung' (2015) ZaöRV 75 Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht,), 259-298.

[18] A/RES/70/1 *Transforming our world: the 2030 Agenda for Sustainable Development* Available here: <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf > accessed 30 May 2018.

globalisation the number of so called economic migrants is rather high, seeking for shelter in rich states of the world. Therefore rich, developed states, pragmatically, of course prefer to "care" for development of other states proactively.

Therefore in the 21st century the world has reached the stage of development where together with democracy and the rule of law principles, social solidarity is recognised as well. The extreme inequality established in our century creates fertile ground for forging these values along with the globalisation.[19]

3. FROM GLOBAL TO NATIONAL – NATIONAL IDENTITY OF THE CONSTITUTION

The globalisation processes ongoing in the modern world have somewhat "restraining" function. This serves the goal of ensuring the cultural globalisation does not become the threat of destruction for national self-being. In this regard the theory of dividing states into "cultural nations" and "nation-states" is of particular relevance.

German historian, Friedrich Mainecke defined two types of nations at the end of the 19th century: cultural nations and nation states.[20] If the self-consciousness of nation states was linked to their statehood, cultural nations existed regardless from the statehood and their national integration was defined not through being the subject of international law, or formally speaking, through having a Constitution, but through the national culture, language, religious, spiritual and material cultural traditions instead. Thus the cultural nations have their own legal identity as well.[21]

This process is not homogenised and cannot be resorted to a specific ethnic group or its traditional existence or beliefs and understandings. On the quite contrary, cultural nation is not based on origins or blood ties, but on the unity of cultural elements. These elements are achieved through exchanged and synthesis with other cultures. In such situations it is frequent when cultural investments are made from other cultures; hence what is given in the existing culture or is created from within is imported and admitted from abroad. An attempt of bringing a similar model to Georgia was made by Ilia Chavchavadze and Tergdaleulebi, who had the project of creating cultural nation of Georgia.[22]

Based on the above mentioned, the threat of losing cultural identity is not eminent, if the state is established as a cultural nation. It has relevant immunity, which only receives what is acceptable for its national identity. The same goes for the national law, which is seen even historically, with large readiness towards the reception of European law.[23] According to Besarion Zoidze Georgia has never been a closed country with its national values; it has

[19] See in more details A Phirtskhalashvili, *Social Justice, New Order for 21st Century World* available here:<http://european.ge/socialuri-samartlianoba-axali-tsesrigi-xxi-saukunis-msopliosatvis/> accessed on 30 May 2018.
[20] F Meinecke, Werke: *Weltbürgertum und Nationalstaat Gebundene Ausgabe* (1 January 1962) H. Herzfeld (ed).
[21] ibid.
[22] G Maisuradze *From 'Cultural Nation' to Narcissism,* Internet-platform, Radio Freedom, available here:<https://www.radiotavisupleba.ge/a/blog-giorgi-maisuradze-cultural-nation/25245883.html> accessed on 30 May 2018.
[23] B Zoidze, *The Reception of the European Private Law in Georgia* (Tbilisi 2005). 19- 23.

always shown high interest towards progressive cultures. In his opinion the art of reception does not envisage mirroring the law of other states. The observations of scholars demonstrate that when translating foreign law, whole effort was directed to avoiding something threatening for national law or damaging Georgian consciousness to sneak into Georgian reality.[24]

Very interesting examples and at the same time relevant cases with regards to controlling legal identity are two judgements of the Federal Constitutional Court of Germany. The mentioned case is known as "identity control" (Identitätskontrolle and so called Solange III)[25] and covers the European Arrest Warrant. The Federal Constitutional Court of Germany adopted judgment 2 BvR 2735/14 on December 15, 2015. This Judgment of the Court confirmed the type of the link that has to be between the German constitutional law and the European Union law. This link is viewed through the lens of German national law. The Federal Constitutional Court of Germany took the case for consideration so that it could more clearly delimit the contours of material-law and procedural-law, which review the conformity with European Union Law and the German Constitution.

A citizen of the USA filed a complaint to the Federal Constitutional Court of Germany, who disputed the constitutionality of the Judgment of the Supreme Court of Dusseldorf Land of November 7, 2014 (OLG Düsseldorf). The Supreme Court of the Land based its reasoning on the European Arrest Warrant. A claimant, a citizen of the USA, was sentenced to 30 years of jail time after he was arrested based on the European Arrest Warrant in Germany pursuant to the Judgment of the Florence Court in Italy for being a member of criminal gang in 1992, which was responsible for importing and selling cocaine in the country. The claimant requested his extradition to Italy to be ceased. The European Arrest Warrant, which was issued in Italy but had to be executed in Germany, in the opinion of the claimant contradicted the principle of culpability guaranteed by the Constitution of Germany *(nulla poena sine culpa)*. The latter pursuant to the Basic Law and national law of Germany envisages that the arrest warrant in absentia contradicts the principle of responsibility based on culpability (apart from for several exceptions, which was not characteristic to the case at hand). Article 79, paragraph 3 of the Basic Law of Germany establishes the "guarantee of perpetuity" of the Basic Law itself, according to which: "Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible". The mentioned provision establishes the characteristic principle to the Basic Law of Germany, without which this institution would be stripped from its identity. Therefore it declares such provisions unchangeable until the Basic Law exists. The Federal Constitutional Court of Germany considered the judgment of the Supreme Court of Dusseldorf Land in contradiction to the Constitution. It declared that in this particular case the principle of culpability was infringed so much that the dignity of a person, guaranteed by Article 1 of the Constitution and declared unchangeable by Article 79, paragraph 3, was not sufficiently protected by the state. The dignity of a person is highest, unchangeable value of the Constitution of Germany, which in turn is characteristic to the Basic Law of Germany.

[24] ibid 23.

[25] Beschlusses 2 BvR 2735/14 des BVerfG vom 15.12.2015 ("Solange III"/"Europäischer Haftbefehl II"), See the analysis of the judgment in D Burchardt, ZaöRV 76 (2016), 527-551 *Die Ausübung der Identitätskontrolle durch das Bundesverfassungsgericht* – Zugleich Besprechung des Beschlusses 2 BvR 2735/14 des BVerfG vom 15.12.2015 ("Solange III"/"Europäischer Haftbefehl II").

The argumentation given by the Constitutional Court is rather interesting.[26] Primarily the argument of the Court regarding the control of the cultural identity is based on the issue, that it does not contradict article 4, paragraph 3 of the Treaty on European Union, which envisages sincere cooperation of the member states. It focuses on the fact that the identity control of a state is not substantial threat to the common legal system of the European Union due to two reasons. Primarily, this is because the identity control is rare, secondly – the control shall always be restrained and favourable towards the system of the European Union.

In its argumentation the Federal Constitutional Court of Germany bases its argument on article 23, paragraph 1 of the Basic Law of the country, which prescribes: "*With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law. To this end the Federation may transfer sovereign powers by a law with the consent of the Bundesrat. The establishment of the European Union, as well as changes in its treaty foundations and comparable regulations that amend or supplement this Basic Law, or make such amendments or supplements possible, shall be subject to paragraphs (2) and (3) of Article 79".*

According to the principle *nulla poena sine culpa* there is no punishment without culpability. It is not only the foundation principle for criminal law, but also provides for the elementary requirement of constitutional principle of rule of law to establish the culpability. Violation of this principle causes violation of the fundamental value guaranteed by the Basic Law of Germany, minimal standards for guarantees of human dignity.[27] Review of the minimal standards for guarantees of human dignity is the most relevant criterion for the test of identity control.

It is also significant that the Federal Constitutional Court of Germany discusses the Charter of Human Rights of the European Union. It indicates towards the article 47, paragraph 2 and article 48 of the Charter and concludes, that in view of German national law the judgment of German court (OLG Supreme Court of Dusseldorf Land) does not respond to the requirements of article 47, paragraph 2 and article 48 of the Charter.

It is noteworthy that the Federal Constitutional Court of Germany in its judgment establishes the necessity of cultural identity as a special requirement for its own future case-law – the identity control should be favourable towards the law of European Union (Europarechtsfreundlichkeit).[28] In the view of the Court, the constitutional provisions are directly applicable law for the Government, which is obliged to safeguard human dignity both with and without the European Law.[29]

[26] BVerfG, Beschluss 2 BvR 2735/14 vom 15.12.2015, Rn. 36.
[27] BVerfG, Beschluss 2 BvR 2735/14 vom 15.12.2015, Rn. 39.
[28] The above mentioned approach is criticised by the German scholars since the positive attitude towards European Union Law is merely imaginary and the Court only declares this approach. See Burchardt (note 25), 527-551.
[29] BVerfG, Beschluss 2 BvR 2735/14 vom 15.12.2015, Rn. 41 ff; It should also be noted that soon after the Federal Constitutional Court of Germany adopted this Judgment the European Court of Justice interpreted in its Judgment C 404/15 on April 5, 2016 that the guarantees of the human dignity enshrined in the Charter of

The pre-requisites of the identity control test for the Court was the "Mangold Judgment" of the European Court of Justice.[30] The Constitutional Court of Germany has responded it in its judgment of July 6, 2010 with so called "Honeywell" judgment.[31] The Court stated in this judgment so called *ultra-vires-Kontrolle* criteria for the test. This envisages the Constitutional Court checking the law of European Union considering if the relevant institutions of the European Union had the authority to adopt relevant legal act, if they infringed formally into the authorities of German Government with regards to the exercise of state governance.

Federal Court of Germany in its so called "Honeywell" judgment stated that the Mangold case, which was rather disputed in Germany, was formally adopted with correct direction within the European Union law and passed the test of *ultra-vires-Kontrolle*. Unlike the judgment of Identitätskontrolle, so called Solange III,[32] where in this case the Federal Court within the dispute at hand, checked the material conformity of the European Arrest Warrant with regards to the provisions of the Basic Law of Germany establishing its unchanged and perpetual basis.

CONCLUSION

The globalisation process ongoing nowadays in the world is necessary for achieving world security and peaceful cohabitation. Despite the trend in our century demonstrating the development of legal, cultural and value-based globalisation, it is not irreversible. We also see the unequivocal paths towards both global and national directions. This very process is the challenge for the legal scholars, on the one hand the reception of international law principles and values agreed with western society, while on the other hand, meticulous checks conducted on them, comparing and assessing them with the national values.

The assessment of the case-law of the Federal Constitutional Court of Germany analysed above allows us to state that the national Constitutional Court has preserved two "exit doors". One takes it from the supranational union law so that it does not assume the competences of state government, even if it is supranational European Union law, while the other serves safeguarding fundamental and perpetual provisions of the national Constitution and legal system.

In this situation it is remarkable how national and global can coexist in harmony. Remaining in the global legal system is possible through maintaining the national foundation. It is noteworthy that if the judiciary in this case does not take the role of the institution responsible for checking the power, the globalisation of the law will be under threat. A good example of this could be the exit of the United Kingdom from the European Union.

European Union, is the basis for measurement of the basic human rights in general. However the Court did not make direct reference, that this test can be used by the national court when checking the identity control.

[30] Case C-144/04 *Mangold-Urteil* [2005] so called "Mangold Judgement".

[31] Honeywell-Entscheidung 2 BvR 2661/06, 6. 07.2010.

[32] BVerfGG (n.25).

It is natural, that offering anything “foreign” in overdose, however positive and attractive it might be, always causes reversal to the “own”. The state should be the one choosing the correct dosage, regardless to which branch of power it is – the common values, culture should be taken in relevant amount, and reflected in the law. Otherwise the globalisation, which in itself has the perspective of achieving perpetual peace and has no alternative in modern world, will be a failed project for the world.

Annex

STATISTICAL OVERVIEW OF THE COURT'S ACTIVITIES

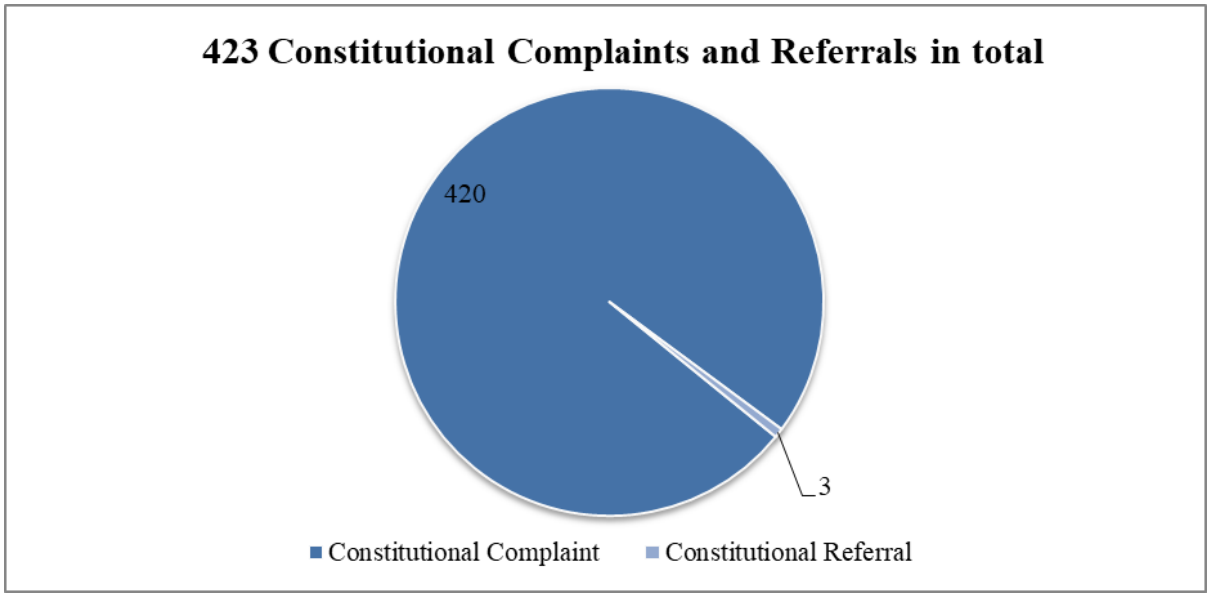
The Statistical data provides important information about the activities of the Constitutional Court of Georgia, main features of the constitutional adjudication and constitution justice in Georgia. The charts, which provide summarised data of the Constitutional Court for 2017 describing the main areas of the activities undertaken by the Court, are provided. Moreover, for simplicity and more clarity for perception of the data, here follows several definitions.

"Case" and "Complaint" - certain part of statistical data deals with the finalised complaints and cases. In the process of constitutional adjudication several constitutional complaints may be joined as one case. In other words, "case" may consist of several constitutional complaints. For example, the judgement no. 1/650, 699 finalised the constitutional proceedings on two constitutional complaints, judgement no. 1/9/701,722,725 finalised the constitutional proceedings on three constitutional complaints, etc.

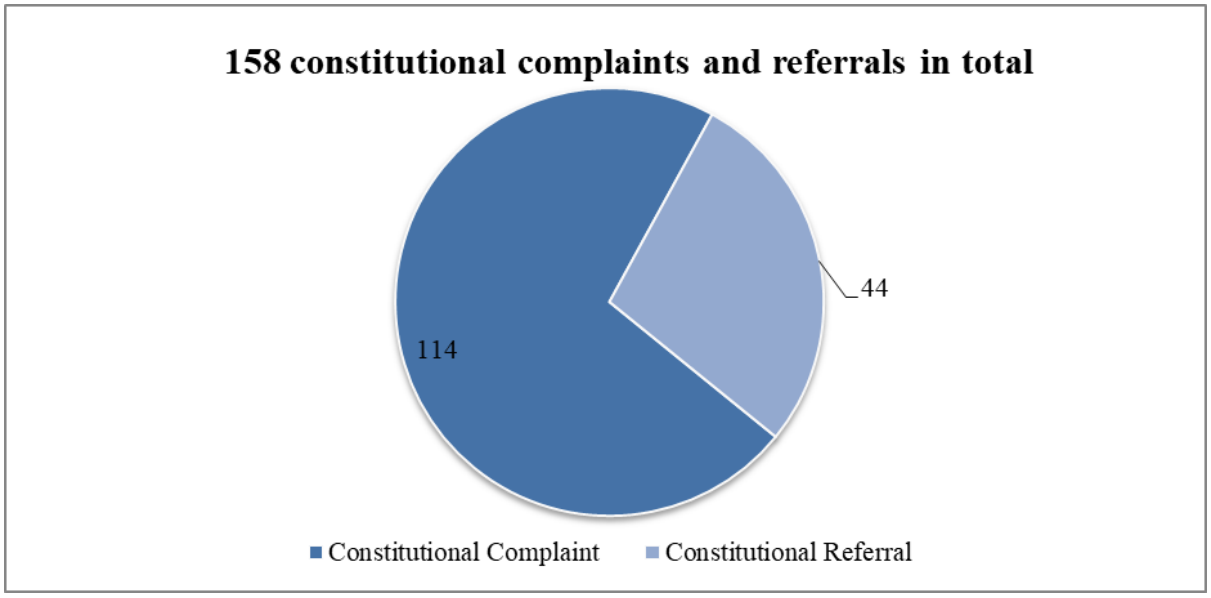
Competences – the chart N5 provides information on finalised cases by the competences. The competences of the Court are regulated under the Constitution of Georgia and legislation on the operation of the Constitutional Court of Georgia. The chart identified the competences according to article 19 of the Organic Law of Georgia "on the Constitutional Court of Georgia". For example, the competence 19(1)(e) on the chart refers to the competence set forth in Article 19(1)(e) of the above-mentioned law.

Overruling Provisions - the charts N6 and N10 separately present the overruling provisions. Here we refer to the cases provided in Article $25(4^1)$ of the Organic Law of Georgia "on the Constitutional Court of Georgia". More specifically, when the Constitutional Court ascertains at the preliminary session, that the disputed normative legal act or part thereof contains the rules identical to the rules that have been declared unconstitutional by the Constitutional Court, it adopts ruling on non-admissibility of the complaint for consideration on merits and on invalidation of the disputed act or a part thereof.

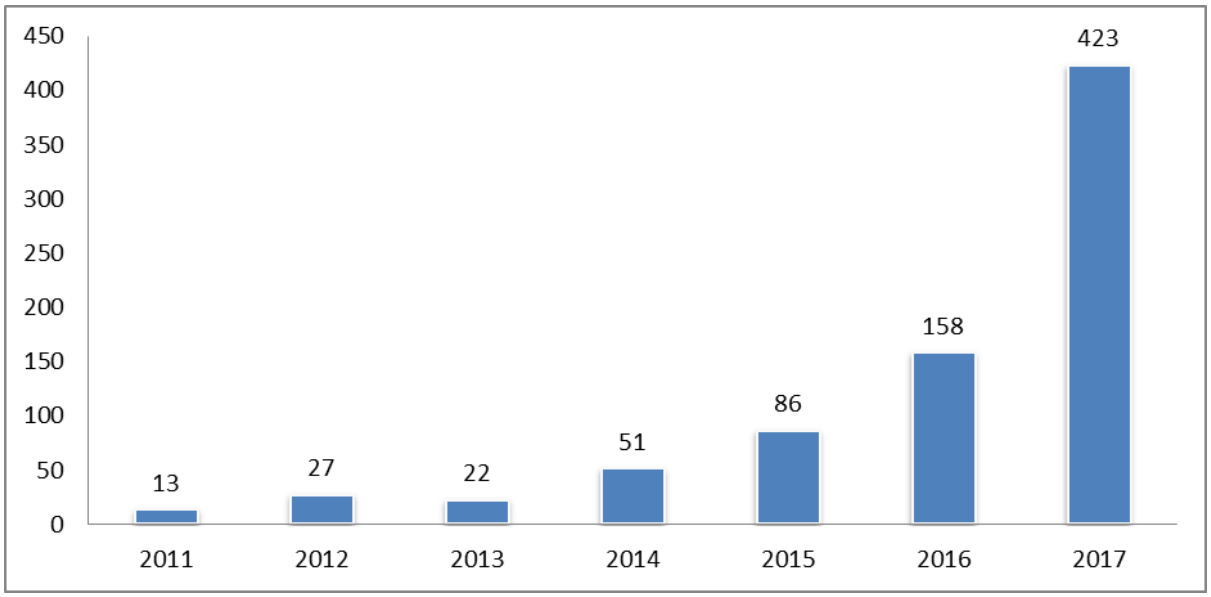
1. THE AMOUNT OF CONSTITUTIONAL COMPLAINTS AND REFERRALS REGISTERED IN 2017



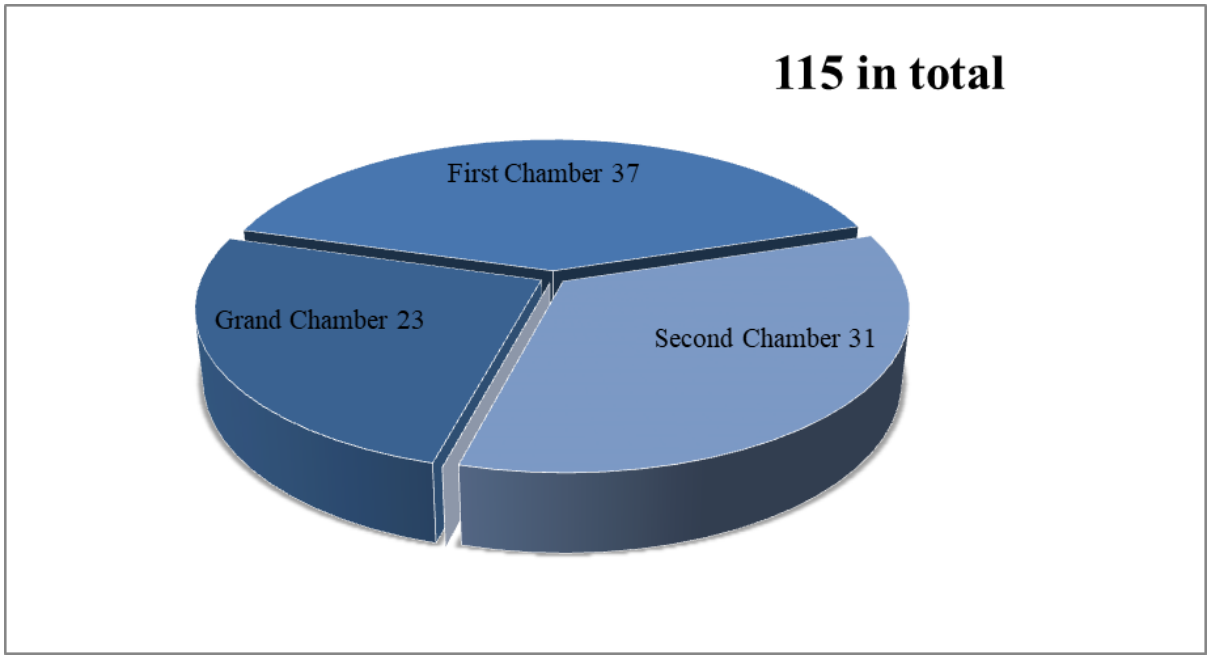
2. THE AMOUNT OF CONSTITUTIONAL COMPLAINTS AND REFERRALS REGISTERED IN 2016



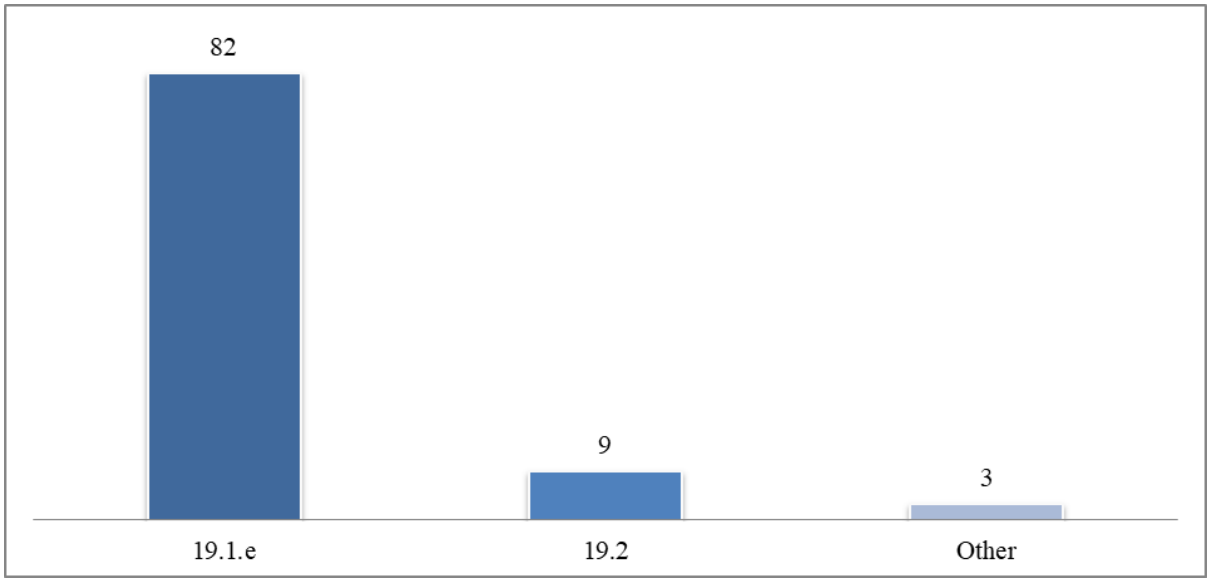
3. THE AMOUNT OF CONSTITUTIONAL COMPLAINTS AND REFERRALS BY YEAR



4. COMPLAINTS ON WHICH THE PROCEEDINGS COMPLETED IN 2017



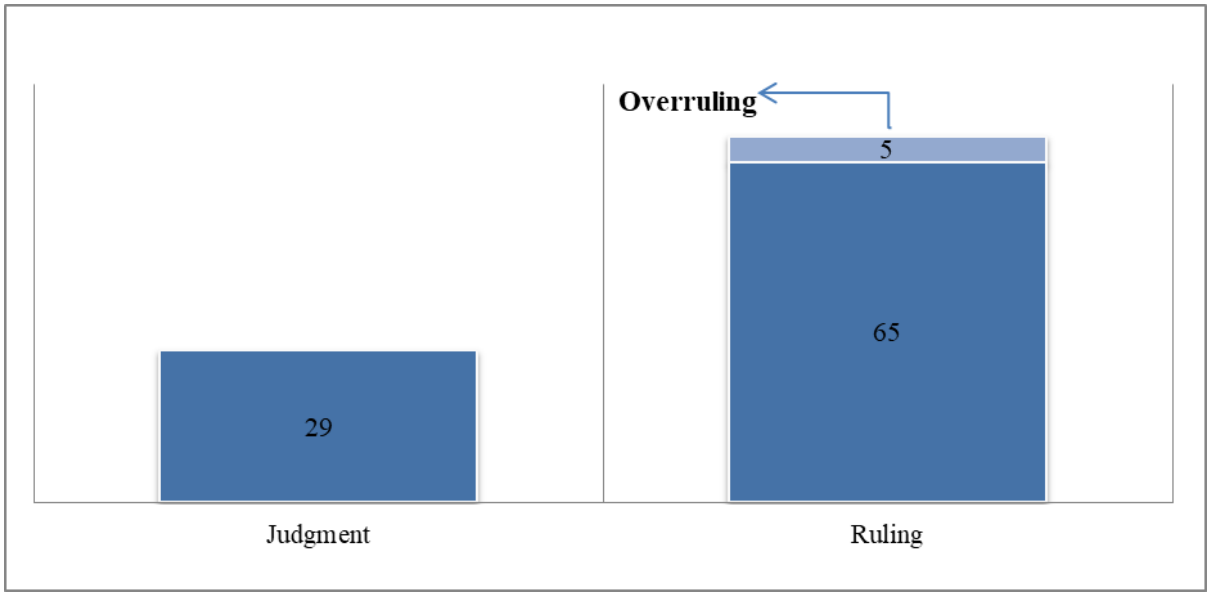
5. Cases completed by the Constitutional Court of Georgia in 2017 by its competences



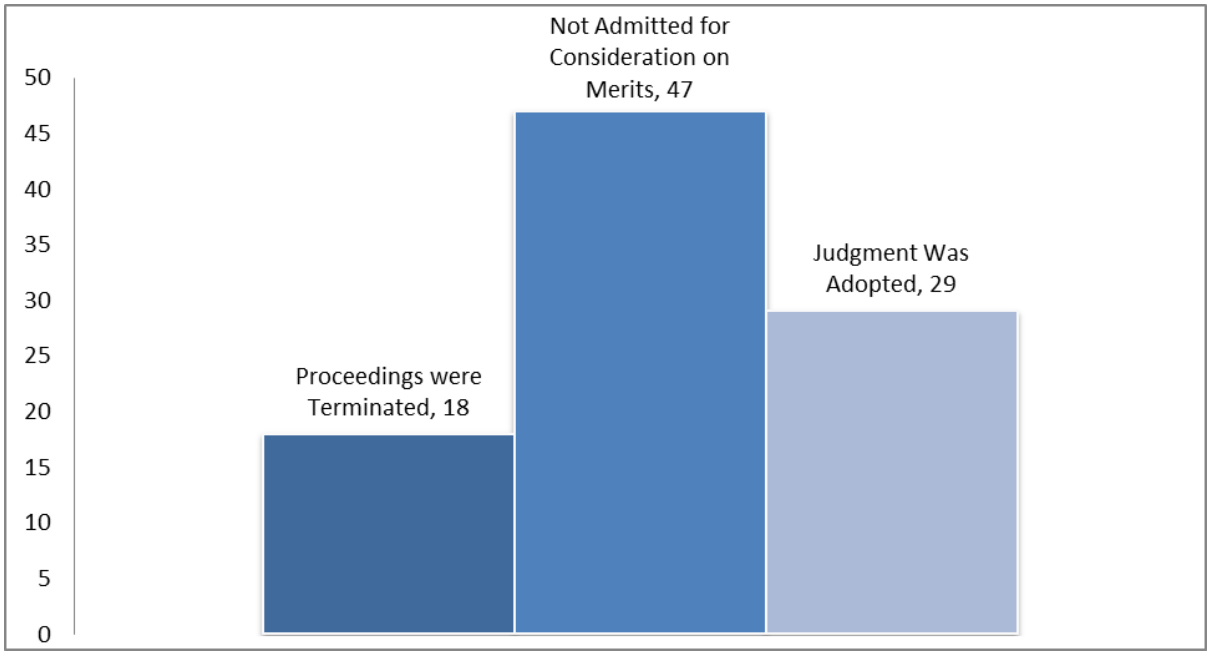
** "19.1.e" competence envisages the competence prescribed by article 19, paragraph 1, subparagraph "e" of the Organic Law of Georgia "On Constitutional Court"*

*** "19.2" envisages competence prescribed by paragraph 2 of the same article*

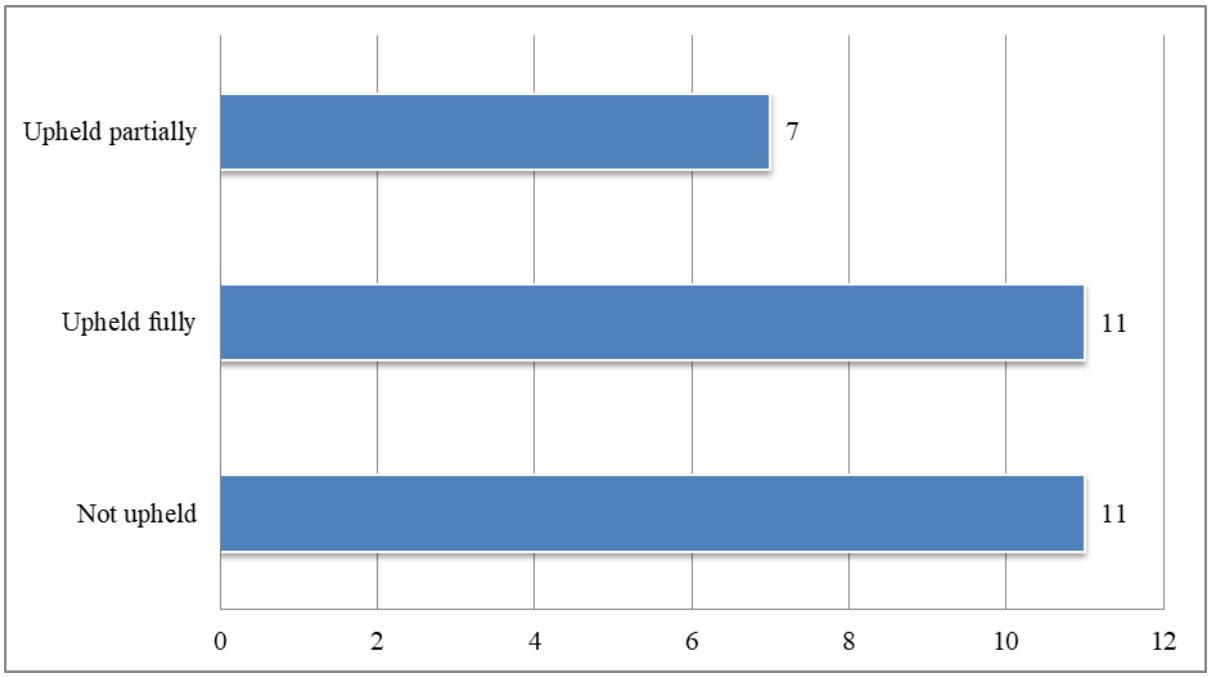
6. Final acts of the Constitutional Court in the cases completed in 2017



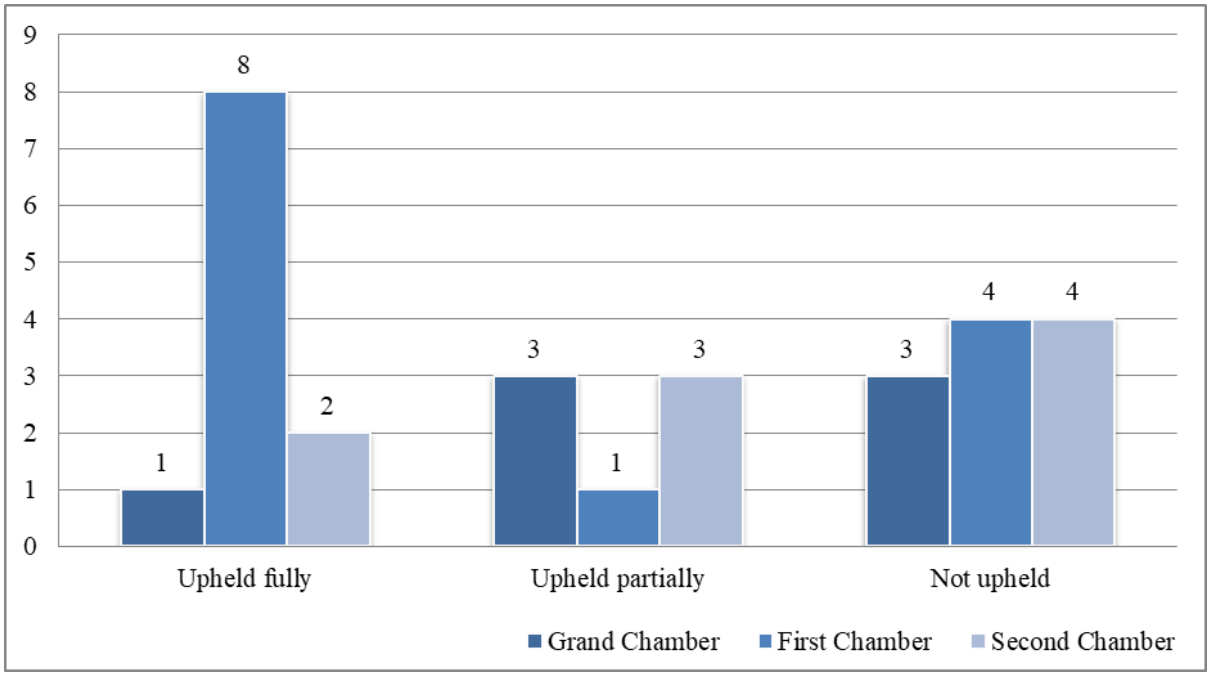
7. Grounds of completion of cases by the Constitutional Court in 2017



8. Judgments of the Constitutional Court by years



9. Outcomes of the judgments of the Constitutional Court by adjudicating Chambers



10. Amount of Recording Notices adopted by the Constitutional Court in 2017