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APPLICATION OF THE CONSTITUTIONAL RIGHTS BY THE COMMON COURTS – EFFECTIVE REMEDY FOR HUMAN RIGHTS PROTECTION

ABSTRACT

Application of an unconstitutional law in the process of adjudication entails a risk of human rights violation, therefore, court should ensure prevention of such risk. The aim of this paper is exploring the very measures for reaching the mentioned goal. Scope of application of constitutional rights is not defined in Georgian court practice, which is why this article through comparative research, analysing experience of different countries and utilising the rules of various interpretations of legal acts, investigates the scope and legal consequences of direct application of the Constitution by common courts.

1. INTRODUCTION

In Georgia justice is administered by common courts and their decisions are based on the law. However, application of unconstitutional provision in this process entails a risk of human rights violation. For a person to have access to fair and effective justice, it is necessary for the common court to ensure prevention/remedy of human rights violation through unconstitutional provision. Below the need to equip both common and constitutional courts with all tools/competences for safeguarding human right for the efficiency of justice, shall be emphasised. At the same time, I will separate the competences of these two courts for execution of constitutional rights. Specifically, both courts apply and interpret the Constitution, however, the right to annul the law for its unconstitutionality is an exclusive competence of the Constitutional Court. Therefore, common court is obliged to make a constitutional submission to avoid the application of unconstitutional law. At the same time, it is noteworthy, that the judgment of the

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Constitutional Court does not result in invalidating the disputed provision for legal relationships completed before the date of the judgment. Thus, the court making a submission is authorised to apply the consequences of declaring the provision unconstitutional to the past relationships through the force of the Constitution indicating to its supremacy. Concurrently, the scope of application of constitutional rights is not interpreted in Georgian court practice, therefore, the article analyses practice of different countries to uncover the guiding principles for establishing such scope.

2. Effective Administration of Justice as the Main Function of the Right to a Fair Trial

Respect and protection of human rights is main object and purpose of a democratic society. Every action of the state should not only aim to respect human rights, but also to create the mechanisms necessary for their practical exercise. Nevertheless, the risk of violation of human rights resulting from arbitrary conduct of a state or other action/omission certainly cannot be eliminated. Besides, we should bear in mind that in a number of cases, human rights are naturally in conflict with each other, other constitutional values or state interests, based on which the legitimate limitation of rights is permitted. While deciding upon the conflict between rights or the reasonable balance of human rights and/or other important public interests, the risk of making errors and limiting human rights excessively, in a disproportionate manner is constantly present. Hence, even in the most democratic systems, it is crucial that there be effective mechanisms for identifying the facts of human rights violations, for proper reaction in this regard as well as for restoration of violated rights.

Many international[1] and domestic human rights documents reiterate the necessity to create effective legal means for the protection of human rights. In this regard, fair trial is a universally recognized mechanism of utmost importance. The right to have an access to the court in order to protect human rights is envisaged by constitutions of almost every country, including that of Georgia, whereby Article 31 clause 1 stipulates that "[e]very person has the right to apply to a court to defend his/her rights. The right to a fair and timely trial shall be ensured".[2] The Constitutional Court of Georgia has stated that: "the right to a fair trial, first and foremost, stands for the possibility to bring a complaint before the court with respect to any of the decisions (actions) of every branch of the government and to request their legal assessment in case they result in

[1] See e.g. the European Convention for the Protection of Human Rights [hereinafter, the "ECHR"], 1950, Article 13.

[2] Article 31, paragraph 1, Constitution of Georgia, August 24, 1995, Gazette of Parliament of Georgia, 31-33, 24/08/1995.

breach of human rights".[3] Accordingly, the right to have an access to a fair trial is a general guarantee for the protection of rights, which is applicable to any area and any action limiting human rights.

It is noteworthy that the existence of human rights, or even the fact of identification of violation thereof would be insufficient and deprived of any sense had there been no means for remedying the violation. Hence, the right to a fair trial entails that individuals have an access not only to independent and impartial administration of justice, but also that this justice be efficient. International as well as regional and domestic constitutional acts often explicitly note the necessity for the above-mentioned efficient mechanism for the protection of human rights to exist.[4] In several cases, this is explicitly stated in judicial decisions as well.[5]

Naturally, persons refer to the court principally to restore the violated rights, and not to achieve a mere declaration regarding the fact of violation. The mere declaration of the fact of violation without the possibility to remedy such violation creates not only the feeling of injustice, but also incapacitates the body administering justice and decreases the confidence towards it. A low confidence for the judiciary branch or law in general not only reduces the ways of protecting human rights through legal means but compels an interested party to "seek justice" beyond the scope of the constitutional domain. This threatens the proper functioning of a rule of law state. Thus, the possibility to protect human rights through the courts is an utmost important value for the state. The requirement of effectiveness in administration of justice is an important factor for the proper understanding and interpretation of the constitutional right to a fair trial.

3. JUDICIAL SYSTEM AS ENVISAGED BY THE CONSTITUTION OF GEORGIA

Under the definition provided by the Constitutional Court of Georgia:

> "Constitutionally recognised right to fair trial exists within the constitutionally established institutional system. In particular, the right to a fair trial is not abstract and it entails the possibility of protecting rights through organs of the judiciary branch that are defined by institutional system of the Constitution, with due regard given to institutional requirements envisaged by the Constitution".[6]

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[3] Judgment of the Constitutional Court of Georgia №1/466 dated 28 June 2010 in the case of "Public Defender of Georgia v. Parliament of Georgia" para. II-14.
[4] See e.g. ECHR supra 1, Article 34, second sentence.
[5] See Judgment of the Constitutional Court of Georgia N3/1/466 dated 28 June 2010 in the case of "Public Defender of Georgia v. Parliament of Georgia", para. II-2.
[6] Judgment of the Constitutional Court of Georgia №3/5/768,790,792 dated 29 December 2016, para. II-68.

At the same time, the Constitution of Georgia creates two separate judicial systems. The body of constitutional control is the Constitutional Court,[7] whereas justice is administered by common courts.[8]

Accordingly, under Georgian Constitution, protection of the right to a fair trial implies conducting judicial review of all acts that are limiting human rights,[9] and such a review can be conducted by two separate judicial systems.[10] At the same time, the Constitution does not provide strict definitions of administration of justice and constitutional control.[11] Accordingly, the true substance and scope of these terms should be established in the light of the essence or each of these institutions, whereby both of them together should encompass all the instruments that are necessary for the protection of human rights through the judiciary.

4. Distinguishing Functions of the Common Courts and the Constitutional Court in the Context of Protection of Human Rights

As it has been noted above, the body conducting constitutional control in Georgia is the Constitutional Court. Conducting constitutional review primarily entails the assessment of compatibility of legislative legal acts with the Constitution. However, this competence should not be interpreted in a way that suggests that interpreting and applying Constitution is the exclusive right of the Constitutional Court. Common courts, withing the scope of their competence, also interpret and utilise the Constitution. The Constitution itself prescribes that the Constitutional Court shall "on the basis of a submission by a common court, review the constitutionality of a normative act to be applied by the common court when hearing a particular case, and which may contravene the Constitution according to a reasonable assumption of the court".[12] Clearly, in order for judges of common courts to have a reasonable suspicion regarding constitutionality of the provision, they must first interpret the Constitution.

It is also important to consider that none of the state organs, including common courts are allowed to act in contradiction to the Constitution.[13] Hence, neither can judges of common courts unconditionally and in every case presume the constitutionality of the law and execute it unquestionably. However, establishing the law's compatibility with the Constitution is the exclu-

[7] Article 59, paragraph 2, Constitution of Georgia.
[8] Article 59, paragraph 3, Constitution of Georgia.
[9] See, supra 3.
[10] According to the case-law of the Constitutional Court, the right to a fair trial protects the right to access not only common courts, but the Constitutional Court as well. See e.g. Judgment of the Constitutional Court №3/5/768,769,790,792 dated 29 December 2016, para. II-97,
[11] With respect to the functions of the Constitutional Court, a relatively specific indication can be found in Article 60, however, there are no further references with respect to the functions of common courts in the Constitution.
[12] Article 60, paragraph 4, subparagraph c, Constitution of Georgia.
[13] Article 4, paragraph 4, Constitution of Georgia.

sive competence of the body of constitutional review.[14] Accordingly, taking into account the state of constitutional law in Georgia, its essence and entire architecture, judges of common courts are deprived of the ability to refuse application of the law upon their own initiative and justify this refusal with the incompatibility of the law with the constitution. In such cases, the only correct way for avoiding the application of an unconstitutional provision and/or delivering a judgment based on such a provision would be to refer to the Constitutional Court with a constitutional submission.

This approach is shared not only by the current law but also the existing practice of common and constitutional courts. In particular, Article 7 (3) of the Organic law of Georgia "On Common Courts" provides that:

> "If during the hearing of a particular case the court infers that there is a sufficient basis to believe that a law or any other normative act to be applied by the court in deciding the case may be deemed incompatible, in full or in part, with the Constitution of Georgia, it shall suspend the hearing and refer to the Constitutional Court of Georgia. The hearing shall be resumed after the Constitutional Court of Georgia has made a decision on the matter".[15]

This provision categorically indicates that a judge "**shall suspend"** judicial proceedings if he or she deems that the applicable law is incompatible with the Constitution.

At the same time, the practice of the Supreme Court of Georgia demonstrates that common courts make constitutional submissions even in cases, where the unconstitutionality of an applicable law is clear and incontestable, and this is also indicated in the case-law of the Constitutional Court. For instance, in its judgment N1/4/592, the Constitutional Court declared that imposing imprisonment as a form of punishment for the purchase-possession of 70 grams of dried marijuana with the intent of its personal use was unconstitutional.[16] After delivering the said judgment, a number of provisions remained in the Georgian legislation, which were prescribing imprisonment and as form of penalty for purchase-possession of marijuana in the amount of less than 70 grams in dried form.[17] Unconstitutionality of these provisions was evident for the Supreme Court, however it held that it was not competent to refuse application of

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[14] See e.g. Hans Kelsen, *Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution*, The Journal of Politics Vol. 4, No. 2 (May 1942), pp. 185-186, Published by: The University of Chicago Press on behalf of the Southern Political Science Association. pp. 185-186.

[15] Article 7, paragraph 3, Organic Law of Georgia "On Common Courts", December 4, 2009, Legilative Herald of Georgia, 41, 08.12.2009.

[16] Judgment of the Constitutional Court of Georgia №1/4/592 dated 24 October 2015 in the case of "Citizen of Georgia Beka Tsikarishvili v. Parliament of Georgia", para. III-2.

[17] Penalties for the consumption of different amounts of marijuana were prescribed by different provisions of the Criminal Code. At the same time, in its judgment N1/4/592, the Constitutional Court examined constitutionality of the law that had already lost legal effect, hence, formally speaking, the Court did not invalidate the rule regarding the penalty for marijuana in amount of less than 70 grams.

the existing (although unconstitutional) laws and thus applied to the Constitutional Court with a constitutional submission on each separate criminal case, requesting to declare the disputed provisions invalid.[18] On its part, the Constitutional Court deemed the aforesaid disputed provisions to be the applicable law in cases before the common court,[19] held that they override the Court's N1/4/592 judgment, and thus declared them invalid.[20]

It should be pointed out that part of lawyers, including some of the judges of common courts, are of the opinion that common courts are entitled to refuse application of unconstitutional laws and decide a case based directly on the Constitution.[21] However, two of the courts of the highest instance share the view that declaring norms unconstitutional and annulling the laws adopted by legislators on these grounds is the exclusive competence of the Constitutional Court. Accordingly, the aforesaid approach is supported by legislation as well as by the practice of both highest instance courts.

5. The Relevance and Scope of Application of the Constitution of Georgia by the Common Courts

The competence of the Constitutional Court of Georgia, as a rule, is limited to constitutional revision of normative acts.[22] However, declaring certain normative act unconstitutional frequently fails to result in automatic restoration of the violated right. Common courts interpret and utilise constitutional standards established by the Constitutional Court. Common courts are the ones applying constitutional standards when deciding specific case and, therefore, are equipped to ensure efficient protection of person's rights. Thus, it is of utmost significance to define the scope of application of constitutional rights for deciding a specific case by the common courts.

As stated above, in order to avoid the application of unconstitutional law, common court is obliged to refer to the Constitutional Court with a submission. However, it is no less relevant to

[18] See constitutional submissions: 869, 866, 865, 856, 830, 819, 818, 817, 816, 815, 807, 806, 805, 804, 803, 802, 801, 800, 799, 798, 797, 796, 788, 787, 786, 785, 784, 778, 777, 776, 775, 774, 773, 772, 771, 710, 709, 708.

[19] When common courts request to declare unconstitutional a provision, which is not applicable to a given case, the Constitutional Court does not examine constitutionality of the disputed provision (See Ruling of the Constitutional Court of Georgia N3/3/ 685,686,687,688,689,736,737,758,793,794,820 dated 29 September 2016).

[20] Ruling of the Constitutional Court of Georgia №3/1/708,709,710 dated 26 February 2017; Ruling of the Constitutional Court of Georgia №3/1/855 dated 15 February 2017; Ruling of the Constitutional Court of Georgia №3/2/771,775,776,777,786,787,788 dated 29 September 2016.

[21] Following the call announced by the High Council of Justice on 10 May 2019 for the selection of judges of the Supreme Court in order to fill the vacant positions, hearings have been held in the HCoJ and the Parliament, where several candidates (acting judges of the courts of different instances) noted that in practice, whenever the applicable law is unconstitutional, they decide disputes based directly on the Constitution. See the audio protocols of the interviews, available here: http://hcoj.gov.ge/ge/press/audio-skhodmis-oqmi/uzenaesi-sasamartlos-mosamarleobis-kandidatebis-gasaubrebebis-audio-oqmebi [last accessed on December 28, 2019].

[22] Article 60, Constitution of Georgia.

analyse, how a common court can use declaration of unconstitutionality of the disputed provision on the case pending before it.

Pursuant to paragraph 5 of article 60 of the Constitution of Georgia:

> "A judgment of the Constitutional Court shall be final. An act or a part thereof that has been recognised as unconstitutional shall cease to have legal effect as soon as the respective judgment of the Constitutional Court is made public, unless the relevant judgment envisages a later time frame for invalidating the act or a part thereof."

This provision defines the moment of declaring the disputed norm invalid and determines at the constitutional level as to when does it cease to have effects. Unequivocally, for the period/relationships that had occurred before the judgment of the Constitutional Court was delivered, the norm declared unconstitutional maintains its legal force and has regulatory effect on a relationship. Thus, with respect to relationships that had taken place before publication of the judgment of the Constitutional Court (completed civil relationships, issued administrative-legal acts), regulating law does not change with the judgment of the Constitutional Court.

It should also be noted that common courts consider cases that are distinct by substance. When the case concerns future relationships (e. g. a person requests from a public body for a certain act to be conducted in the future or he or she wants to enter into property relation with private individuals) declaring a norm unconstitutional as a result of the submission will have an incontrovertible effect. The common court will deliver its judgment in the light of new regulatory framework established after declaring the disputed norm unconstitutional and invalid. However, the results of declaring a norm unconstitutional based on a constitutional submission are less clear when common courts decide upon the relationships that have already completed. For instance, when a person is requesting to annul the fine issued by the police officer based on unconstitutional law or to render a contract concluded in the past void/valid.

In this case, the legality of the police officer's action is not questioned since he or she was acting in accordance with the law that was in force by the time of action, and the judgment of the Constitutional Court does not affect the regulating law for the period before the judgment was delivered. However, it is important to establish what impact the fact that the law applied by the police officer was incompatible with the Constitution should have on the outcome of the case. It should be taken into account that a specific constitutional provision and even more so - the one establishing human rights - has been in effect in the past as well and hence the applied law was incompatible with the Constitution even when fine had been issued.

Under the second sentence of Article 4 (4) of the Constitution of Georgia, "[t]he Constitution of Georgia shall be the supreme law of the State". At the same time, during the collision of norms, *i.e.* when one legal relationship is governed by different acts, the Court can decide the dispute based on the law that is higher positioned in the hierarchy. Hence, if the relationship is regulated

directly by the Constitution, the Court can decide a dispute based on the Constitution and, as a result, annul the fine issued by the police officer.[23]

At the same time, it is well-established that common courts are entitled to deliver a judgment based on the Constitution in cases where a subject to the dispute is not regulated under the law (legal vacuum). According to the Constitutional Court of Georgia, "the Constitution not only recognises and protects human rights and liberties but also defines their content and scope. Thus, constitutional rights exist even without their legal recognition or declaration, and they continue to exist even when the law does not specify the grounds of realisation thereof".[24]

Taking into account the aforementioned, for determining the scope of application of human rights by the common courts in each case, it is important to establish which relationships are regulated directly by the constitutional rights, *i.e.* for which relationships they constitute the directly applicable law.

6. DIRECT EFFECT OF CONSTITUTIONAL RIGHTS

There is no practice in the case-law of the Constitutional Court of Georgia regarding the scope of direct effect of the constitutional rights. The Court has not yet defined the type of relationships and conditions where constitutional rights can be applied directly. Therefore, it is relevant to analyse the practice of other countries with relevant experience and case-law. I believe, such analysis will significantly support Georgian jurisdiction in adopting guiding criteria for establishing the scope of direct effect of the rights protected by the Constitution of Georgia.

Generally, pursuant to the conventional view, human rights have emerged to safeguard persons from the abuse of the State.[25] Naturally, it is not disputable that the major aim of the Constitution, including of the constitutional rights, is to define the duties of the state.[26] Supreme/Constitutional Courts of different states agree on the minimum, that the constitutional rights by all means apply to the vertical relations, against the Government.[27] In other words,

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[23] Certainly, with the reservation that the unconstitutionality was established by the Constitutional Court. As it has been stated above, the Constitution of Georgia grants the competence to examine compatibility of laws with the Constitution exclusively to the Constitutional Court.

[24] Ruling of the Constitutional Court of Georgia №1/494 dated 28 December 2010 in the case of "Citizen of Georgia Vladimer Vakhania v. Parliament of Georgia", para. II-11.

[25] John Locke was developing the position, that human rights protect humans from the state, and it is the role of the government to ensure the protection thereof. See, for instance, J Locke, *Second Treatise on Government*, 1689, chapters VII and XIX.

[26] Among others, see the first sentence of paragraph 4, article 4 of the Constitution of Georgia.

[27] See, e.g., Judgments of the Supreme Court of the United States of America on *Burton v. Wilmington Pkg. Auth.*, 365 U.S. 715 (1961), *Peterson v. City of Greenville, S.C.* 373 U.S. 244 (1963); Judgment of the Supreme Court of Canada on *RWDSU v. Dolphin Delivery Ltd.* (1986) 2 SCR 573, the latter available here: https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/181/index.do, Judgment of the Constitutional Court of Germany BVerfGE

constitutional rights safeguard a person from the State, it is undoubtful, that person can apply for the constitutional right directly against the state and demand an action from based on it (direct vertical effect).

At the same time approaches are not homogenous regarding the application of the constitutional rights on horizontal relationships. It is rare when human rights documents and/or courts indicate on the direct horizontal effect of the constitutional rights.[28]

US Supreme Court is a strong follower of the position of applying the constitutional rights towards only the state. Its approach is based on the state action doctrine, pursuant to which, evaluation of human rights violation is done by the Court only in the case, where there is a state action.[29] The Supreme Court of the United States does not indicate on existence of the positive obligations of the state on adopting law or in other way safeguarding persons from violations of rights by private parties.

At the same time, in certain cases US Supreme Court envisions the notion of "state action" widely and supposes, that human rights violation may happen through the actions of private actor, when there is high engagement from the state in such action.

For instance, in the case of *Burton v. Wilmington Pkg. Auth*., a restaurant, situated in the publicly owned vehicle parking building, refused a person services only because the latter was a person of colour. The building was constructed through public funds, for public purposes and was ran by one of the units of Delaware State. The restaurant was renting the space from this unit. The Supreme Court of Delaware declared that the actions of the restaurant were not state action and thus it did not have the duty derived from the Fourteenth Amendment not to discriminate its clients. The case ended up in the Supreme Court. The Supreme Court stated that the building was public property, serving public use and established, that there was significant link between the actions of the state and a private actor, considered the state action to be present in the case and found Wilmington Pkg. Authority in violation of the Fourteenth Amendment.[30]

In another instance, on the case of *Peterson v. City of Greenvile*, ten persons of colour were punished for trespassing private property. Specifically, they set at the lunch counter of private shop. Manager called the police and stated that the store had been closed and everyone should

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7, 198 – Lüth, 15 January, 1958 (elaborated on below), available here: https://germanlawarchive.iuscomp.org-/?p=51 [links last accessed on December 28, 2019].

[28] See Judgment of the Supreme Court of South Africa on the case *Khumalo and Others v. Holomisa* (CCT53/01) [2002] ZACC 12; 2002 (5) SA 401; 2002 (8) BCLR 771 (14 June 2002); Article 8, paragraph 2 of the Constitution of South Africa; Judgments of the Supreme Court of Ireland on cases *Meskell v. C.I.E* (1973), *Attorney General (Society for the Protection of the Unborn Child (Ireland) Ltd) v. Open-Door Counselling Ltd*, (1988), *Crowley v. Irish National Teachers Organisation* (1980).

[29] See, e.g., *Virginia v Rives*, 100 U.S. 313 (1880), available at: https://supreme.justia.com/cases/federal/us/100/313/case.html [last accessed on December 28, 2019].

[30] *Burton*, supra 27.

have left the building. The Claimants did not follow this order and refused to leave the area. This resulted in imposing liability on them. Later, the manager of the store stated that by providing services to the claimants, he would have violated the municipal regulation, requiring segregation by colour. The Court declared that in this instance state participation in private decision making was significant. State adopted a measure, establishing the requirement of segregation and the manager of the store merely executed it. He was in fact deprived of other choices; therefore, the Supreme Court saw state action in this case and declared the denial of entry in the diner in violation of the Fourteenth Amendment, therefore the Court struck down the punishment.[31]

Thus, the violation of the human rights established by the US Constitution by the private actors can be considered only when there is significant nexus with state action.[32] At the same time, in each mentioned case the respondent was a state institution not the private person, whose actions were disputed by the claimants. In these cases, it was actually established that the state violated the rights of claimants through imposing obligation on private persons to discriminate.

It is noteworthy, that in the US Constitution, unlike the Constitution of Georgia, the wording of the provisions establishing human rights is different. Namely, almost all human rights provisions demonstrate that they are directed to the state. For instance, while the Constitution of Georgia established the right of religion, belief, expression, First Amendment of the US Constitution states:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances".

Similar wordings are found in other human rights provisions as well,[33] for instance, Fourteenth Amendment indicates, that:

> "[…] No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

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[31] *Peterson*, supra 27.

[32] For instance, in the case of Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974), the Court indicated that there has to be significant link between the state and disputed actions, in order to consider the later to be an act of state. In this case the Court did not consider the actions of communal service providers to be of such nature, although they were strictly regulated by the State.

[33] Except of Thirteenth Amendment. This provision abolishes slavery and has forbidding nature for all. The text is as follows: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

Thus, the approaches of the Supreme Court have developed, and the mentioned provisions were defined as the acts imposing duties only to the State.

The wording of the human rights has significantly changed in more recent documents.[34] Similarly to the Constitution of Georgia, they, as a rule, indicate to the existence of human rights generally and the texts itself do not unequivocally indicate that the sole addressee is State (for instance: "freedom of thought and expression is safeguarded, it is prohibited to persecute a person for a thought and the expression thereof", "right to property or inheritance is recognised and guaranteed"). At the same time, similar documents, as a rule, include separate provisions, establishing the scope of application of the constitutional rights (so called "application clause"). Such provision(s) establish guiding principles for establishing the scope of direct effect of the constitutional rights.

For instance, Article 32 of the Canadian Charter of Rights and Freedoms states:

> "This Charter applies
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> (*a*) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
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> (*b*) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province"[35]

Paragraph 3 of Article 1 of the Constitution of Federal Republic of Germany establishes, that "[…] basic rights shall bind the legislature, the executive and the judiciary as directly applicable law."[36] Based on the mentioned provisions, the Supreme Court of Canada[37] and the Constitutional Court of Germany[38] exclude the application of the constitutional provisions directly to the private actors.

In each instance the approach is derived from the logic, according to which the constitutional rights do not impose obligations of individuals. Since the dutybound parties are the state bodies, demands based directly on the constitution can only be made towards them. Private person

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[34] See articles 1-19 of the Basic Law of Federal Republic of Germany; Canadian Charter of Rights and Freedoms; European Convention on Human Rights and Fundamental Freedoms; etc.
[35] Canadian Charter of Rights and Freedoms, 1982, available at: https://laws-lois.justice.gc.ca/eng/Const/page-15.html [last accessed on December 28, 2019].
[36] Basic Law of the Federal Republic of Germany, article 3(1), available at: https://www.btg-bestellservice.de/pdf/80201000.pdf [last accessed on December 28, 2019].
[37] E.g. see: RWDSU v. Dolphin Delivery Ltd. (1986), available at: https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/181/index.do [last accessed on December 28, 2019].
[38] *Lüth*, supra 27.

cannot make a claim against another private person demanding the latter to act or to restrain from acting based directly on the constitutional rights.[39]

Based on all abovementioned it is vivid, that the scope of application of the constitutional rights, as a rule, depends on the constitutional wording of the provisions establishing rights and/or special provisions on their application within the constitutions.

7. The Application of Constitutional Rights Pursuant to the Constitution of Georgia

It is noteworthy, that much like the constitutions of other states, the Constitution of Georgia also includes the provision regarding the scope of application of the human rights. Namely, article 4, paragraph 2 of the Constitution states:

> "The State acknowledges and protects universally recognised human rights and freedoms as eternal and supreme human values. While exercising authority, the people and the State shall be bound by these rights and freedoms as directly applicable law."

Similarly, to the Constitution of the Federal Republic of Germany, the Constitution of Georgia establishes that the human rights law is directly applicable law. At the same time, it indicates that human rights bind the people and the government, **only while exercising authority.** What is envisioned as exercising authority by the people is elaborated by the Constitution itself, namely, per the second sentence of the second paragraph or article 3: "People are the source of state authority. People exercise power through their representatives, as well as through referendums and other forms of direct democracy". Therefore, it is highly possible, that constitutional provisions shall apply to the forms of exercising power by the people, including to the conformity of the results of referenda to human rights. However, human rights guaranteed by the Constitution, as a directly applicable law, cannot itself bind humans with duties in the relationships, where they do not exercise power.

With regards to the private actors, those provisions of the Second Chapter of the Constitution of Georgia, which establish specific direct duties and requirements based on their content can be directly applicable. For instance, paragraph 2 of article 23 of the Constitution of Georgia, which

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[39] However, there are rare instances of regulating the issue differently. For instance, Paragraph 2 of Article 8 of the Constitution of South Africa directly indicates the possibility of applying the rights horizontally. According to the provision: "A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right (Article 8, Constitution of South Africa, 1996, available at: https://www.justice.gov.za/legislation/constitution/SAConstitution-web-eng.pdf [last accessed on December 28, 2019].

states: "2. Political party membership of persons enlisted in the Defence Forces or bodies responsible for state and public security, and those appointed as judges, shall cease."

However, the provision establishing human right (e.g. "The right to own and inherit property shall be recognised and guaranteed") cannot itself be considered as directly applicable to private parties.

Based on aforementioned, although an authoritative definition on this issue is not yet given by the courts of Georgia, considering the experience of developed states and the provisions of the Constitution of Georgia, one can conclude, that the Constitution of Georgia allows direct effect of human rights law only to the vertical relationships, against the state.

8. INDIRECT EFFECT OF HUMAN RIGHTS ESTABLISHED BY THE CONSTITUTION

The Constitution of Georgia is the most general document establishing standards for multiple legal fields. Human rights not only establish negative duties of the state (for the state not to violate human rights), but also demand it to take positive actions, within which it will defend persons from the violation of rights based from the actions of other private parties. With regards to the legislator, its positive duty is demonstrated through establishing relevant legal order for ensuring the realisation of a right.[40] Thus the legislator within its constitutional duty regulates both vertical (relationship between a person and the state) and horizontal (between the private parties) relationships. As for the Constitutional Court, it evaluates the constitutionality of the provisions regulating each of these relationships and establishes whether they are in conformity with the constitutional standards.[41] Thus based on the practice of the Constitutional Court of Georgia, it is unequivocal, that the requirements of human rights, among others, apply to the regulations of private party relationships.

Hence the Parliament of Georgia is dutybound to regulate legal relationships pursuant to the Constitution. Legislative process aims at adopting acts in conformity with the Constitution and they should be defined by the implementor with this concept in mind, including by the common courts as well. Based on the aforementioned, when the law adopted by the parliament allows for several different meanings, one of which results in unconstitutional consequences, common court is obliged to define and apply it with the content conforming with the Constitution. The mentioned demand of the Constitution is particularly relevant for the provisions of general nature, which are frequently given for the relationships of private law.

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[40] The Constitutional Court indicates towards this duty in number of its judgments. E.g. see: Judgment of June 26, 2012 N3/1/512 on the case of "Citizen of Denmark, Heike Cronqvist v. the Parliament of Georgia", II-33.

[41] For instance, see the Judgments of the Constitutional Court of January 29, 2014 N1/1/543 on "Ltd 'Metalinvest' v. the Parliament of Georgia"; October 17, 2017 N3/4/550 on "Citizen of Georgia Nodar Dvali v. the Parliament of Georgia".

Constitutional courts of multiple countries establish the duty to define the general provisions in conformity with constitution. For instance, the mentioned principle was established in the legal system of the Federal Republic of Germany by the Constitutional Court in 1958 in the case of Lüth.[42]

Lüth, joined by several others, demanded boycotting a movie, the producer of which also worked on several anti-Semite movies during Nazi regime. Lüth demanded the cinemas, movie distributors and the society to boycott the movie indicating towards the amorality of the producer. The producer and the distributors of the movie applied to the court and demanded Lüth to be prohibited from boycotting demands. The Court of Hamburg satisfied the claim, basing its decision on article 826 of German Civil Code[43] and stated that Lüth's actions were against "good morale".

In the mentioned case the Federal Court of Germany indicated that the basic rights, first of all, were the rights safeguarding citizens from the state; however, the basic rights envisaged by the Basic Law of Germany establish and embody the objective system of values, which apply to all legal fields. These principles should guide both the legislator when adopting a law, and the adjudicator, including the court, when it is faced with the task of defining it. Therefore, when elaborating on article 826 of the Civil Code, the relevance of freedom of expression should have been taken into account. In each individual instance the decision should be adopted through balancing the freedom of expression and the interests of the addressee of expression.[44]

This approach ensures defining civil code provisions in the manner, which will allow limiting freedom of expression only within the bounds permitted by the Constitution. Specifically, prohibiting any kind of expression based on the civil code provision is allowed only in the instances, where circumstances of specific case demonstrate the interests of the addressee of expression outweigh the interests of safeguarding freedom of expression.

At the same time, apart from the mentioned example, the duty to define general provisions of civil law in conformity with the human rights is seen in the law and practice of other countries (e.g. Spain,[45] Italy,[46] Japan[47]). General provisions, such as – good faith, morale, public order, good morale, etc., – characteristic to the Continental European Civil Law, are used by the courts as a so called "gate" for applying basic rights to civil law. The mentioned provisions create

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[42] Lüth, supra 27.
[43] The text of the provision: "A person who, in a manner contrary to public policy, intentionally inflicts damage on another person is liable to the other person to make compensation for the damage".
[44] Lüth, supra 27, B1, paras 1-3.
[45] Aharon Barak, *Constitutional Human Rights and Private Law*, Human Rights in Private Law. Ed. Daniel Friedmann and Daphne Barak-Erez. London: Hart Publishing, 2001, p. 24.
[46] Ibid.
[47] Ibid.

somewhat grounds for balancing the rights of parties when judging the matter.[48] Specifically, courts define general provisions, based on their general-abstract nature, in such a manner, that constitutional rights and principles are considered within.

Considering the examples given above, it is relevant for the Georgian common courts to share European experience. Establishing correct practice by the common courts is of vital significance, so that each general provision is defined in conformity with human rights; while in the event one of such definitions is in contradiction with the requirements of the basic rights, revising such meanings (constitutionality of normative content) is possible, in our case – in the Constitutional Court of Georgia.

9. CONCLUSION

As a conclusion, one can state, that the right to effective court remedy guaranteed by the Constitution of Georgia, first of all, entails the possibility to restore the violated right through the court. At the same time, it is indisputable, that despite the immensely great role and significance of the Constitutional Court, common courts are the entities of the judiciary power, deciding on remedying violation of human right in each individual case. Therefore, in order to efficiently exercise the right to a fair trial, it is of vital importance for the common courts to utilise all instruments permitted by the Constitution, including in instances, where the violation of the right stems from the law.

As it was already stated, in order to ensure the above mentioned, one of the most efficient tools is to apply the Constitutional Court through a submission by the common court and when the provision is declared unconstitutional, the latter can decide the case based directly on the Constitution.

At the same time, it was underlined that the Constitutional rights establish both negative and positive duties of the state. With regards to the negative duties, it is clearer and more determinable what demands a person can make towards the state. For instance, it is obvious, that expropriation of the right to property should not take place without proper compensation. Therefore, in such a case, if a person is deprived of property by the state, a person may protect his/her right to property without specific legal regulation.

At the same time, common courts are well placed to ensure the application of the provisions regulating civil relationships in conformity of the constitution, through defining general provisions in light of the requirements of the Constitution (in certain cases, it is possible, for the

[48] Supra 45, pp.21-22.

common courts to apply to the Constitutional Court for evaluating the constitutionality of the normative contents of specific provisions).

It is noteworthy that within the two instruments elaborated on above, common court still is not able to ensure restoration of a right based on specific civil law provisions. However, considering participation in civil law relationships is, as a rule, based on the person's will, the risk of irreparable damage to the right caused by specifically defined prohibition is relatively small. For instance, if unconstitutional law clearly prohibits purchase of some items, a person can first dispute the constitutionality of a prohibition and then buy them.

At the same time, it is natural, that the common court cannot fully take on the role of legislator through directly (or indirectly) applying the constitutional rights. Specifically, within the civil law relationships the perspectives of safeguarding human rights are somewhat obscure for the instances of legal vacuum (for instance, in the cases, when the legislator does not regulate certain civil law relationships, does not provide for the rules to recognise or execute the contract, etc.). Simultaneously, considering the possibility of using legal analogies in civil law relationships, it is less likely not to be able to find provisions which the court would apply through analogy and define in conformity with the Constitution.

In certain instances, the responsibility of state may become relevant for not creating legal order and as a result violating constitutional right (and/or when specific formulations of provisions regulating private party relationships, the definition of such provisions in conformity with the Constitution is impossible). However, establishing what criteria should be followed for a person to remedy the violated right from the state in such an instance requires separate in-depth analysis, which is not a subject of this paper.

Thus, it is clear, that the Constitution of Georgia, through the mutual efforts of the Constitutional and Common Courts and appropriate collaboration, creates the preconditions to property uncover the violation of human right through law and to remedy the right efficiently. This, in high probability, shall become even more apparent following the development of the case-law of these two institutions of the judiciary.