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CONSTITUTIONAL MEMORY: DID THE LEGISLATOR FORGET THE WAY PAVED FOR HUMAN RIGHTS BY ARTICLE 45 OF THE 1921 CONSTITUTION OF GEORGIA?!

ABSTRACT

The 1921 Constitution of Georgia supported through the content of Article 45 the idea that the rights explicitly enumerated in the Constitution are not exhaustive and final and that the enumeration of some rights does not deny or disparage the existence of other rights. Such a clause can be compared to the outcome of the 'fear and acceptance' concept by *András Sajó*. In a system, where the building of democracy does not have a long history, there is always this fear that the state will try to find a leeway out of the human rights structures. The rationale behind the Ninth Amendment of the US Constitution was exactly the fear of the Founding Fathers, that the rights enlisted in the Constitution could diminish the scale of human rights protection in the future.

The present academic article aims to elucidate the question, whether transferring Article 39 of the 1995 Constitution (the version prior to 16 December 2018), which was the legal successor of Article 45 of 1921 Constitution, from the Second Chapter to the First Chapter diminished the substantive and procedural safeguards for the protection of rights. To answer this question, this article reviews the meaning and the case law regarding the Ninth Amendment of the US Constitution, as well as the case law of the Constitutional Court of Georgia in relation to Article 39. The present article also reviews Article 35 (formerly Article 45) in the light of the 'living constitution' mechanism. As a conclusion, the article summarizes the question, whether the legislator defied the legacy of Article 45 of the 1921 Constitution with the constitutional amendments of 2018.

I. INTRODUCTION

The chronicles of Georgian constitutionalism show that the 1921 Constitution played a groundbreaking role at every crucial stage, as it was obvious that every government

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had an aspiration to found its own legitimacy on the 1921 Constitution.[1] Looking at the historical notes related to the 1921 Constitution, we see that the Georgian constitutionalists paid particular attention to the western legal doctrines.[2] In addition to other evidences, this fact is also proved by the following words of the member of the Constituent Assembly and the State Constitutional Commission of Georgia, lawyer *Giorgi Gvazava*, delivered before the Constituent Assembly: 'We have the huge experience of various nations and enormous materials, we need a guiding idea, we need to find our way to get through these enormous materials [...] the existence of the state itself may be justified only as much as it provides safeguard for personal liberty. [...] the modern states of Europe and America are rights-based states.'[3]

The 1921 Constitution of the Democratic Republic of Georgia supported through the text of Article 45 one of the cornerstones of a rights-based state, stating that the rights explicitly enumerated in the Constitution are not exhaustive and final, and that the enumeration of certain rights does not deny or disparage the existence of other rights. It should be taken into consideration that this Article also served as a foundation for the text of the 1995 Constitution of Georgia and it was in force as Article 39 in the human rights chapter (Second Chapter of the Constitution) in the version of Constitution prior to 16 December 2018. This provision can be compared to the outcome of the 'fear and acceptance' concept by *András Sajó*. In a system, where the building of democracy does not have a long history, there is this constant fear that the state will try to find the leeway out of human rights structures. The rationale behind the Ninth Amendment of the US Constitution was exactly the fear of a part of the Founding Fathers, that the rights enlisted in the Constitution could diminish the scale of human rights protection in the future.

The present academic article aims to elucidate the question, whether transferring Article 39 of the 1995 Constitution (the version prior to 16 December 2018), which was the legal successor of Article 45 of 1921 Constitution, from the Second Chapter to the First Chapter diminished the substantive and procedural safeguards for the protection of rights. To answer this question, this article reviews the meaning and case law regarding the Ninth Amendment of the US Constitution, as well as the case law of the Constitutional Court of Georgia on Article 39. As a conclusion, the article summarizes the question, whether the legislator defied the legacy of Article 45 of the 1921 Constitution with the constitutional amendments of 2018.

[1] *Gegenava D.* (ed.), Constitutional Law of Georgia, 2014, p. 52 (in Georgian).
[2] *Gegenava D.*, European Foundations of Georgian Constitutionalism: The Struggle for the State of Law, International Interdisciplinary Conference, European Values and Identity, Speeches, 2014, p. 119 (in Georgian).
[3] *Gvazava G.*, Speech Delivered at the Constituent Assembly (Evening Sitting of 1 December), in: *Kordzadze Z.*, *Nemsitsveridze T.* (ed.), Chronicles of Georgian Constitutionalism, 2016, p. 130 (in Georgian).

II. ARTICLE 45 OF THE 1921 CONSTITUTION OF THE DEMOCRATIC REPUBLIC OF GEORGIA – ITS MEANING AND HISTORICAL ANALYSIS

The 1921 Constitution of the Democratic Republic of Georgia was a clearly innovative and progressive political and legal document in the world constitutional order of its time. The founders paid particular attention to the fundamental human rights together with the form of government.[4] The basic law was aligned with the main line and values of the constitutions of the following epochs, and, most importantly, it entrenched the human being as the supreme idea, which is the cornerstone of the evaluation system of any developed, democratic state of law.[5] 'It is clear from the spirit of the 1921 Constitution, that its authors aspired to establish a 'rights-based state' through its adoption, where traditional human and citizen rights are based on the principle of personal liberty.'[6]

Besides establishing guarantees for specific rights in the text of the Constitution, the 1921 Constitution also foresaw that certain legally protected goods may have been left beyond the system of constitutional legal protection, in case they did not fall explicitly within the scopes of the rights protected by the Constitution, even if, they were essentially emanated from the basic principles recognized by the Constitution.[7] This approach is an example of a practical emanation of fundamental principles, which served a somewhat complementary function in the Constitution.[8]

More specifically, Article 45 of the 1921 Georgian Constitution stated, that 'The guarantees enumerated in the Constitution do not deny other guarantees and rights, which are not mentioned here, but derive inherently from the principles recognized by the Constitution.' There is a consideration, that, since the founders were familiar with the experience of the US-American and European constitutionalism, they formulated Article 45 as an analog of the Ninth Amendment of the US Constitution.[9]

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[4] *Gegenava D.*, European Foundations of Georgian Constitutionalism: The Struggle for the State of Law, International Interdisciplinary Conference, European Values and Identity, Speeches, 2014, p. 122 (in Georgian).

[5] *Demetrashvli A.*, The Constitution of 21 February 1921 of Georgia from the Perspective of 2011, in: 'At the Beginnings of Georgian Constitutionalism - 90th Anniversary of the 1921 Constitution of Georgia', 2011, p. 12 (in Georgian); *Gegenava D.*, International Interdisciplinary Conference, European Values and Identity, Speeches, p. 119 (in Georgian).

[6] *Papuashvili G.*, 1921 Constitution of the Democratic Republic of Georgia: Looking Back After Ninety Years, in: '1921 Constitution of the Democratic Republic of Georgia', 2011, p. 20 (in Georgian); *Gonashvili V.*, *Eremadze K.*, *Tevdorashvili G.*, *Kakhiani G.*, *Kverenchkhiladze G.*, *Chigladze N.*, Introduction to the Constitutional Law, 2017, p. 34 (in Georgian).

[7] *Gonashvili V.*, *Eremadze K.*, *Tevdorashvili G.*, *Kakhiani G.*, *Kverenchkhiladze G.*, *Chigladze N.*, Introduction to the Constitutional Law, 2017, p. 34 (in Georgian).

[8] *Gonashvili V.*, *Eremadze K.*, *Tevdorashvili G.*, *Kakhiani G.*, *Kverenchkhiladze G.*, *Chigladze N.*, Introduction to the Constitutional Law, 2017, p. 33 (in Georgian).

[9] *Putkaradze N.*, Fundamental Human Rights Provided by the Constitution of 21 February 1921, in: 'At the

III. THE NINTH AMENDMENT OF THE US CONSTITUTION – THE FUNCTION AND ROLE IN THE DEVELOPMENT OF THE FUNDAMENTAL HUMAN RIGHTS LAW

1. A BRIEF HISTORICAL REVIEW OF THE ADOPTION OF THE NINTH AMENDMENT

In 1791, during the ratification debates of the US Constitution, the two factions – the Federalists and the Anti-Federalists debated whether a bill of rights should become a part of the Constitution. The Federalists supported the ratification of the US Constitution and were against the inclusion of a bill of rights in the Constitution. In contrast to them, the Anti-Federalists were willing to agree to the ratification of the Constitution, but only in case it would include the bill of rights.[10]

More specifically, the Anti-Federalists considered, that without the bill of rights it was possible to read the Constitution in a way, that would give the federal government unlimited power. Federalists provided three arguments to counter the Anti-Federalists: 1. They argued that the Constitution established the federal government as a government with limited, delegated power and therefore, there was no need of a bill of rights in the first place, since the Congress was not empowered to violate the rights that were subject of concern for the Anti-Federalists; 2. They argued that it was dangerous to include the bill of rights in the Constitution, as it could indirectly grant the state the right to interfere with a specific right, for example: an amendment, which would protect the freedom of the press under certain conditions, could at the same time imply the general federal power to regulate newspapers under the conditions unforeseen by the amendment: 3. They argued that any list of rights would be incomplete and an enumeration of rights could imply that other rights beyond the list were not worthy of protection.[11]

During the debates on the bill of rights, the question was raised, whether it was possible to discover such significant rights along with progress, the existence of which were not imagined at that time.[12] In response to this question, *inter alia*, the following information can be read in the annals of the US Congress: *James Madison* wrote to *Thomas Jefferson*, that the inclusion of a bill of rights in the Constitution would disparage/negate other rights, which were not enumerated. However, he also

Beginnings of Georgian Constitutionalism - 90th Anniversary of the 1921 Constitution of Georgia', 2011, p. 58 (in Georgian); *Gegenava D.*, *Javakhishvili P.*, Article 39 of the Constitution: The IDP Norm Waiting for Asylum and Phenomenon of Fear of Unknown in Georgian Constitutionalism, Academic Herald, Special Issue, Legal, Political and Economic Aspects of Revision of the Georgian Constitution, 2017, p. 144 (in Georgian).

[10] *Wachtler S.*, Judging the Ninth Amendment, Fordham Law Review 59, 1991, p. 600.

[11] *Seidman L. M.*, Our Unsettled Ninth Amendment: An Essay on Unenumerated Rights and the Impossibility of Textualism, Georgetown Law Faculty Working Papers, 2010, pp. 134-135.

[12] Annals of Congress of the United States, 1789, available at: <https://memory.loc.gov/ammem/amlaw/lwaclink.html> (accessed 15.7.2021).

stated that it was possible to protect against this situation.[13] *James Madison* was referring to the Ninth Amendment here.[14]

The Congress proposed the Ninth Amendment to the Constitution in 1789 and its final text reads as follows: 'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.'[15] The Ninth Amendment in turn was determined by the early opinion of *James Wilson*, according to which 'everything that is not enumerated is presumed to be given. The consequence is that an imperfect enumeration would throw all implied power into the scale of government; and the rights of the people would be rendered incomplete.'[16]

2. SCHOLARLY OPINION ON THE NINTH AMENDMENT – THE MEANING OF 'RETAINED RIGHTS'

Despite the fact that the Ninth Amendment refers to the existence of other rights which are not explicitly enlisted in the Constitution, it does not provide any guidance to ascertain, what exactly these additional rights are or how they can be strengthened and enforced.[17] The scholars tried to develop several theories in order to clarify what is meant under the term 'retained rights'. They mostly applied the historical method of interpretation, though other methods were used as well.

Starting the review from the oldest interpretation, the author of the commentary on the US Constitution published in 1833, *Joseph Story,* thought that the function of the Ninth Amendment is to promote the interpretation of the other parts of the Constitution, particularly that of the first eight Amendments. In the view of another author, it can be inferred from this argument, that the Ninth Amendment itself does not stipulate any individual rights. The same approach was taken by another constitutional law scholar, *Thomas Cool*, who disregards the Ninth Amendment altogether.[18]

[13] Annals of Congress of the United States, 1789, available at: <https://memory.loc.gov/ammem/amlaw/lwaclink.html> (accessed 15.7.2021).
[14] *Wachtler S.*, Judging the Ninth Amendment, Fordham Law Review 59, 1991, p. 604.
[15] The Ninth Amendment, US Constitution, Ratified in December 1791 (The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people), available at: <https://constitution.congress.gov/constitution/amendment-9/> (accessed 15.7.2021).
[16] *Massey C. R.*, The Natural Law Component of the Ninth Amendment, University of Cincinnati Law Review 49, 1992, p. 85.
[17] *Jackson J. D.*, Blackstone's Ninth Amendment: A Historical Common Law Baseline for the Interpretation of Unenumerated Rights, Oklahoma Law Review 62, 2010, p. 168.
[18] *Ringold A. F.*, The History of the Enactment of the Ninth Amendment and Its Recent Development, Tulsa Law Review 8, 2013, p. 10.

2.1. The Ninth Amendment and Natural Rights

Based on the historical materials of the drafting and adoption of the Ninth Amendment, *Randy Barnett* argued and supported the theory that the original interpretation of the Ninth Amendment aimed to establish the individual natural rights model and to support the federalism model as well, which protects individual natural rights through the strict limitation of federal power.[19] Therefore, the term 'retained rights' mentioned in the Ninth Amendment does not mean the collective rights of people, as the citizens of the States; it has personal character and belongs to human beings as individuals.[20] Thus, the 'retained rights' have the same character as other rights and fundamental freedoms, which are entrenched by the Bill of Rights and are recognized by the Supreme Court.[21]

A part of the scholars also thinks that the 'retained rights' are genuinely natural rights, which are nurtured from such theoretical works on natural rights, like the works of *John Locke*.[22] For example, *Mark Niles* considered the Ninth Amendment to be based on the teaching of *John Locke* and argued that it was about personal liberty and autonomy. The Ninth Amendment enshrines the right to act freely to the extent that the actions do not harm others or the society *in toto*. The Ninth Amendment provides a right to be free from the illegitimate interference of the government, which aims to restrict personal liberty for any reason (other than the protection of the social/public good).[23]

Jeffrey Jackson thinks that the 'retained rights' enshrined by the Ninth Amendment are individual rights. However, he develops an opinion, that although the Founders might have considered the 'retained rights' as 'natural rights', in view of the fact that they were already existing, these rights were not 'theoretical or philosophical rights' stemming from the works of the theoreticians of natural law. In the view of the Founders, these rights stemmed from English constitutional law, common law and tradition. *Jeffrey Jackson* believes that 'retained rights' are those rights, which the Founders thought they inherited from the English constitutional and common law, naturally, with significant modifications emanating from the experience of the American colonists. Furthermore, the majority of the Founders were not familiar with the works of *John Locke* and other natural law scholars or common law

[19] *Barnett R. E.*, The Ninth Amendment: It Means What It Says, Texas Law Review 85, 2006, pp. 79-80.
[20] *Barnett R. E.*, The Ninth Amendment: It Means What It Says, Texas Law Review 85, 2006, pp. 79-80.
Jackson J. D., Blackstone's Ninth Amendment: A Historical Common Law Baseline for the Interpretation of Unenumerated Rights, Oklahoma Law Review 62, 2010, pp. 168-169.
[21] *Jackson J. D.*, Blackstone's Ninth Amendment: A Historical Common Law Baseline for the Interpretation of Unenumerated Rights, Oklahoma Law Review 62, 2010, pp. 168-169.
[22] *Jackson J. D.*, Blackstone's Ninth Amendment: A Historical Common Law Baseline for the Interpretation of Unenumerated Rights, Oklahoma Law Review 62, 2010, p. 170; *McConnell M. W.*, The Ninth Amendment in Light of Text and History, Stanford Public Law Working Paper No. 1678203, 2010, p. 15.
[23] *Niles M.*, Ninth Amendment Adjudication: An Alternative to Substantive Due Process Analysis of Personal Autonomy Rights, UCLA Law Review 83, 85, 2000, p. 122.

judgments of *Lord Coke*, however, they were informed about the commentaries on the common law, written by *Sir William Blackstone*.[24]

2.2. The Ninth Amendment – No Individual Rights

The second group of scholars opposes the idea that the Ninth Amendment entrenched individual rights. For example, *Kurt Lash* asserts that the Ninth Amendment provides no individual rights; instead, it establishes the collective rights of the States. In particular, these scholars argue, that if it is presumed that the Ninth Amendment is about individual rights, while the Tenth Amendment deals with the governmental power ('The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people'[25]), the State Conventions disappear from the viewpoint as the predecessors of the Ninth Amendment. This group of scholars argues that none of the drafts of the Ninth Amendment proposed by the State Conventions used the 'rights language'.[26] Instead, the State Conventions offered a rule to restrict the construction of federal powers.[27]

2.3. The Ninth Amendment and International Law

Daniel Farber thinks that the Founders might have been inspired by the works of the then-renowned classic theorist of International Law *Emer de Vattel*.[28] He develops a theory, according to which the Ninth Amendment sort of opens the door for the purposes of basing court decisions on International Law. In his opinion, the rights enshrined in International Law, which are not explicitly enumerated in the Constitution, could be implied under the Ninth Amendment.[29]

Kurt Lash also shares the opinion, that the International Law of that time influenced the drafting of the Ninth Amendment, however, he offers a different explanation.

[24] *Jackson J. D.*, Blackstone's Ninth Amendment: A Historical Common Law Baseline for the Interpretation of Unenumerated Rights, Oklahoma Law Review 62, 2010, pp. 171-172, 222.

[25] The Tenth Amendment, U.S. Constitution, Ratified in December 1791 (The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.), available at: <https://constitution.congress.gov/constitution/amendment-10/> (accessed 1.5.2021).

[26] *Lash K.*, The Lost Original Meaning of the Ninth Amendment, Texas Law Review 83, 331, 2004, p. 423.

[27] *Lash K.*, The Lost Original Meaning of the Ninth Amendment, Texas Law Review 83, 331, 2004, p. 423; *Lash K.*, The Lost Jurisprudence of the Ninth Amendment, Texas Law Review 83, 597, 2005, pp. 713-716.

[28] *Farber D.*, Retained by the People: The 'Silent' Ninth Amendment and the Constitutional Rights Americans Don't Know They Have, 2007, pp. 9-10.

[29] *Farber D.*, Retained by the People: The 'Silent' Ninth Amendment and the Constitutional Rights Americans Don't Know They Have, 2007, pp. 103, 184-185; *Lash K.*, Three Myths of the Ninth Amendment, Drake Law Review 56, 101, 2008, p. 876.

He believes, that the Ninth Amendment required a narrow construction of the power delegated to the federal government. To substantiate this, he brings the example of the first constitutional treatise, where *George Tucker* explicitly read the Ninth and Tenth Amendments in the light of the rule of *Vattel's Ius Gentium (Law of Nations)*, which calls for a strict construction of the delegated power. Thus, in the opinion of *Kurt Lash*, the International Law of that time offered the Founders such an interpretation of the Ninth Amendment, according to which the federal government would be restrained from interfering in the issues falling under the sovereign control of the people of the States.[30]

2.4. The Modern Mission of the Ninth Amendment

Finally, a part of the scholars assert based on the interpretive theory, that the Ninth Amendment protects the right unenumerated in the Constitution, but still retained by individuals, i.e. the right to carry out certain activities or practices, which do not lead to any actual physical or economic harm for themselves or other individuals. The moral harm, induced by the discontent or outrage of the public does not suffice for the justification of an interference in the right protected under the Ninth Amendment. The modern mission of the Ninth Amendment is to protect harmless individual freedoms from the interference of the state. The Ninth Amendment is that very ground, where, as *James Madison* wrote, 'State should not act'.[31]

3. THE NINTH AMENDMENT CASE LAW

The Ninth Amendment authorizes the Supreme Court of the United States to recognize other fundamental and protected rights, which, although not enumerated explicitly in the Constitution, are still 'retained by the People'.[32] The U.S. Supreme Court had rarely mentioned the Ninth Amendment in its judgments, until several judges interpreted it in the case of *Griswold v. Connecticut*.[33]

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[30] *Lash K.*, Originalism as Jujitsu, Book Review - *Farber D.*, Retained by the People: The 'Silent' Ninth Amendment and the Constitutional Rights Americans Don't Know They Have, 2007, Constitutional Commentary 25, Issue 3, 2009, p. 525.

[31] *Sanders C. J.*, Ninth Life: An Interpretive Theory of the Ninth Amendment, Indiana Law Review 69, 1994, p. 817.

[32] *Kruschke A. N.*, Finding A New Home for the Abortion Right Under the Ninth Amendment, ConLawNOW 12, 128, 2020, p. 154, available at: <https://ideaexchange.uakron.edu/conlawnow/vol12/iss1/8/> (accessed 14.3.2021).

[33] *Griswold v. Connecticut*, 381 U.S. 479, 1965, available at: <https://supreme.justia.com/cases/federal/us/381/479/> (accessed 1.5.2021). For earlier jurisprudence see the U.S. Supreme Court judgments: *United Public Workers v. Mitchell*, 330 U.S. pp. 75, 94–95, 1947, available at: <https://supreme.justia.com/cases/

3.1 The Pre-Griswold Case Law

The first important legal dispute involving the Ninth Amendment was the case of *Ashwander v. Tennessee Valley Authority*. The petitioners argued that by engaging in power business, the government violated their individual rights to enjoy their private property and to generate the income, which violated the Ninth Amendment. The Court did not find a violation of the Ninth Amendment, stating that the Ninth Amendment does not withdraw the rights which are expressly granted to the Federal Government under the Constitution. The power of the Congress to govern the territory belonging to the United States was one of such rights of the Federal Government.[34]

The second landmark case is *United Public Workers v. Mitchell*, where the petitioner argued, that the citizens have the fundamental right to get involved in political activities and campaigns free from interference of the government. The Court recognized the political rights and declared that unless there were powers delegated by the Congress to the executive power, this specific disputable right would be protected under the Ninth Amendment.[35] Such a differentiation between the constitutional human rights and the power of the Congress in favor of the latter was subjected to the harsh criticism of the society and was evaluated as the unlawful neglect of the Ninth Amendment.[36]

3.2. Griswold v. Connecticut

The Court passed the *Griswold v. Connecticut* judgment in 1965, 174 years after the adoption of the Ninth Amendment. The case involved the constitutionality of the Connecticut statute, which prohibited the use of contraception by married couples. The Court found the law to be unconstitutional with regards to the First, Third, Fourth, Fifth, Ninth and Fourteenth Amendments of the Constitution.[37] In this case, Justice *Arthur Goldberg* made a revolutionary interpretation in the jurisprudence of the U.S. Supreme Court, according to which, 'the right of marital privacy, though that right is not mentioned explicitly in the Constitution, is supported both by numerous decisions

federal/us/330/75/> (accessed 1.5.2021); *Ashwander v. Tennessee Valley Authority*, 297 U.S. pp. 288, 300–311, 1936, available at: <https://supreme.justia.com/cases/federal/us/297/288/> (accessed 1.5.2021); *Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 U.S. pp. 118, 143–44, 1939, available at: <https://supreme.justia.com/cases/federal/us/306/118/> (accessed 1.5.2021). See also the Opinion of *Justice Samuel Chase* in the Case of *Calder v. Bull*, 3 U.S. (3 Dall.) pp. 386, 388, 1798, available at: <https://supreme.justia.com/cases/federal/us/3/386/> (accessed 1.5.2021).

[34] *Ashwander v. Tennessee Valley Authority*, 297 U.S. pp. 288, 300-311, 1936, available at: <https://supreme.justia.com/cases/federal/us/297/288/> (accessed 1.5.2021).

[35] *United Public Workers v. Mitchell*, 330 U.S. p. 75, 1947, available at: <https://supreme.justia.com/cases/federal/us/330/75/> (accessed 1.5.2021).

[36] *Ringold A.F.*, The History of the Enactment of the Ninth Amendment and Its Recent Development, Tulsa Law Review 8, 2013, pp. 12-13.

[37] *Griswold v. Connecticut*, 381 U.S. p. 479, 1965, available at: <https://supreme.justia.com/cases/federal/us/381/479/> (accessed 1.5.2021).

of this Court and by the language of the Ninth Amendment, which reveal that the Framers of the Constitution [...] believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments.'[38]

Alongside this interpretation, it is noteworthy that *Arthur Goldberg* did not construct the Ninth Amendment as an independent source of any right.[39] Under his construction, the Ninth Amendment is the solid ground to believe, that 'liberty' mentioned in the Fifth[40] and Fourteenth[41] Amendments is not restricted to the rights explicitly mentioned in the first eight Amendments. The judgment also underscores, that the judges should look to the traditions and (collective) conscience of the people to determine which principles are fundamental and which are not.[42]

3.3. The Post – Griswold v. Connecticut Case

After the *Griswold v. Connecticut* Case, the Ninth Amendment served as a ground of many court petitions. Everyone from pupils to policemen referred to the Ninth Amendment to argue about the unconstitutionality of rules, which for example, regulated the length of hair; On the basis of the Ninth Amendment, petitioners asked for clean water and air and the right to same-sex marriage.[43]

The most important continuations of the *Griswold v. Connecticut* case are the judgments related to the criminalization of abortion by the States. In the landmark case of *Roe v. Wade*, the Court ruled, that the prohibition of abortion violated the Ninth Amendment right of women, to make a decision on an issue, which by their nature belonged to the sphere of the fundamental right to privacy.[44] The constitutional protection of sexual

[38] See the Concurring Opinion of Justice *Arthur Goldberg*, *Griswold v. Connecticut*, 381 U.S. p. 479, 1965, available at: <https://supreme.justia.com/cases/federal/us/381/479/> (accessed 1.5.2021).

[39] *Kutner L.*, The Neglected Ninth Amendment: the 'Other Rights' Retained by the People, Marquette Law Review 51, 1967, p. 129.

[40] The Fifth Amendment involves a cluster of rights, which are related to the civil and criminal proceedings. For additional explanations, see Cornell Law School, Legal Information Institute, Unenumerated Rights, Ninth Amendment, Rights Retained by People, available at: <https://www.law.cornell.edu/constitution/fifth_amendment> (accessed 21.3.2021).

[41] The Fourteenth Amendment involves a whole range of aspects of citizenship and civil rights. It is applied most often in the proceedings as the basis for the right of equality. For additional explanation, see Cornell Law School, Legal Information Institute, Unenumerated Rights, Ninth Amendment, Rights Retained by People, available at: <https://www.law.cornell.edu/constitution/amendmentxiv> (accessed 21.3.2021).

[42] *Griswold v. Connecticut*, 381 U.S. pp. 479, 487-493, 1965, available at: <https://supreme.justia.com/cases/federal/us/381/479/> (accessed 1.5.2021).

[43] New Jersey State Bar Foundation, Invoking the Ninth Amendment, available at: <https://njsbf.org/2020/11/06/invoking-the-ninth-amendment/> (accessed 1.5.2021).

[44] *Roe v. Wade*, 410 U.S. p. 113, 1973, available at: <https://supreme.justia.com/cases/federal/us/410/113/> (accessed 1.5.2021).

and reproductive privacy rights also stem from the *Griswold v. Connecticut* case, which should be considered as an 'embryonic' case in this regard.[45]

In view of the modern case law of the U.S. Supreme Court, it can be stated, that the Court mostly tries to find the specific unenumerated rights behind various amendments, but not under the Ninth Amendment.[46] It may be assumed, that the Court follows the construction of Justice *Arthur Goldberg* in this manner, who declared that the Ninth Amendment does not set forth any independent right and on the other hand, it avoids providing a refuge for unenumerated rights in the Constitution under the Ninth Amendment.

4. OUTLINE

According to the famous dictum of *John Marshal*, 'It cannot be presumed that any clause in the Constitution is intended to be without effect, and therefore such construction is inadmissible unless the words [of the Constitution] require it'.[47] It falls to the future case law of the Court to answer the question, how the court can ascertain that the right is fundamental on the one hand, and that it is protected from interference on the other, when there is a dispute about a fundamental right, which cannot reasonably stem from any amendment of the Bill of rights, including the Ninth Amendment.[48] One group of scholars of the Ninth Amendment asserts that despite the fact that the Ninth Amendment can genuinely be considered as 'the long lost arc' of the judicial lawmaking, there is no reason to perpetuate this situation any longer and the future will show how it will play out in the case law.[49]

IV. ARTICLE 39 OF THE CONSTITUTION OF GEORGIA (THE VERSION PRIOR TO 16 DECEMBER 2018)

Article 45 of the 1921 Constitution served as a basis for the text of the 1995 Constitution of Georgia and until 16 December 2018 it was in effect in the human rights chapter (Second Chapter of the Constitution) as Article 39 (hereinafter 'Article 39'). According to this Article, 'The Constitution of Georgia shall not deny other universally recognized

[45] *Slaughter G. G.*, The Ninth Amendment's Role in the Evolution of Fundamental Rights Jurisprudence, Indiana Law Journal 64, 1988, p. 100.
[46] *Lash K.*, The Lost History of the Ninth Amendment, 2009, pp. 3-11.
[47] *Marbury v. Madison*, 5 U.S. pp. 137, 174, 1803, available at: <https://supreme.justia.com/cases/federal/us/5/137/> (accessed 21.3.2021).
[48] Cornell Law School, Legal Information Institute, Unenumerated Rights, Ninth Amendment, Rights Retained by People, available at: <https://www.law.cornell.edu/constitution-conan/amendment-9> (accessed 21.3.2021).
[49] *Jackson J. D.*, The Modalities of the Ninth Amendment: Ways of Thinking about Unenumerated Rights Inspired by Philip Bobbitt's Constitutional Fate, Mississippi Law Journal 75, 2006, p. 544.

rights, freedoms, and guarantees of an individual and a citizen that are not expressly referred to herein, but stem inherently from the principles of the Constitution'. Namely, Article 39, contentweise similar to Article 45 of the 1921 Constitution, functioned like 'a window' to certain extent for those universally recognized human and citizen rights, freedoms and safeguards, which were not explicitly mentioned in the Constitution, but were inherently derived from the constitutional principles.[50] Along with the constitutional principles, Article 39 introduced international law in the constitutional order and exactly on the basis of the international legal acts, it created the legal basis for the constitutional protection of such rights, like the right to social security and social assistance, for example.[51]

As a result of the Constitutional Amendments of 2018, Article 39 was moved from the Second Chapter to the First Chapter (Article 4, Paragraph 2 of the Constitution of Georgia), which means that an individual is no more entitled to challenge the constitutionality of any legal rule with regard to Article 39 pursuant to the Constitution of Georgia[52] and the Organic Law of Georgia on the Constitutional Court of Georgia.[53] To respond to the question, whether the abovementioned change reduced the procedural and substantive guarantees provided by Article 39, the present part of the article reviews the essence of Article 39 as a tool of a 'living constitution' and analyzes the related case law of the Constitutional Court.

1. ARTICLE 39 – A TOOL OF A 'LIVING CONSTITUTION'?

The Constitution is a living organism, which grows and develops over time in view of its logical framework and interaction with the environment, under the influence of historical, social and political factors.[54] It is more than impossible to explicitly entrench every fundamental right in the Constitution. It is even more impossible for the legislator to be able to foresee the circumstances in advance, so that in the future no case will arise,

[50] *Gegenava D.*, *Javakhishvili P.*, Article 39 of the Constitution: The IDP Norm Waiting for Asylum and Phenomenon of Fear of Unknown in Georgian Constitutionalism, Academic Herald, Special Issue, Legal, Political and Economic Aspects of Revision of the Georgian Constitution, 2017, p. 145 (in Georgian).

[51] *Eremadze K.*, Defenders of Freedom in the Pursuit of Freedom, 2018, p. 369 (in Georgian).

[52] Constitution of Georgia, Article 60, Paragraph 4, Subparagraph 'a': 'The Constitutional Court reviews the constitutionality of a normative act with respect to the fundamental human rights enshrined in the Second Chapter of the Constitution on the basis of a claim submitted by a natural person, a legal person or the Public Defender.' available at: <https://matsne.gov.ge/ka/document/view/30346?publication=36 > (accessed 1.7.2021).

[53] The Organic Law of Georgia on Constitutional Court of Georgia, Article 39, Paragraph 1, Subparagraph 'a': '1. The right to lodge a constitutional claim with the Constitutional Court on the constitutionality of a normative act or its individual provisions shall rest with citizens of Georgia, other natural persons residing in Georgia and legal persons of Georgia, if they believe that their rights and freedoms recognized under the Second Chapter of the Constitution of Georgia have been violated or may be directly violated.' available at: <https://matsne.gov.ge/ka/document/view/32944?publication=29> (accessed 1.7.2021).

[54] *Coan A.*, Living Constitution Theory, Duke Law Journal 66, 2017, p. 100.

which will entail the need of the constitutional protection of a new fundamental right. In order to protect against such situations, the universally recognized legal principles are applied as assisting mechanisms. This mechanism is entrenched in those rules of the Constitution, which convey the respect for universally recognized rights.[55]

In the academic-analytical work related to the adoption of 1921 Constitution, *Giorgi Gvazava* stated that 'the State is a living organism, [...] The aim of the Constitution is not to regulate and arrange everyday needs and rights development, but to create more permanent rights principles, within the scope of which and according to which these regulations and arrangements will take place'.[56] In this regard, *John Marshall's* famous dictum is noteworthy, according to which, the unconditional and ultimate source of authority are the people, which is evidenced by the power of the adoption and the amendment of the Constitution.[57] However, under the power delegated by the people, 'Constitution is what the judges say it is'.[58] Thus, in order for the general constitutional provisions to transform into living and effective rules and address the challenges present in the modern society, it is unconditionally important, that the judges demonstrate competence and courage.[59]

Therefore, it is important for the constant viability of the order of constitutional rights, to have the judiciary acting in the interests of human rights on one hand, and to have a constitutional blueprint on the other hand, which allows for the human rights protection, that is not strictly limited to the rights explicitly enlisted in the Constitution. The so-called enigmatic Article 39 was that the last means, which ensured the non-exhaustiveness of basic rights within the idea of a 'living constitution', and which provided, when needed, the opportunity to breathe life into the basic rights not enumerated in the Constitution.[60] For example, part of the scholars consider, that Article 39 had a clear prospect for the

[55] *Zoidze B.*, Constitutional Review and Order of Values in Georgia, 2007, p. 155 (in Georgian).

[56] *Gvazava G.*, The Main Principles of Constitutional Right, in: *Kordzaze Z.*, *Nemsitsveridze T.* (eds.), Chronicles of Georgian Constitutionalism, 2016, p. 189 (in Georgian).

[57] *Rehnquist W. H.*, The Notion of a Living Constitution, Harvard Journal of Law & Public Policy 29, 1976, p. 404, available at: <https://www.ejtn.eu/Documents/About%20EJTN/Independent%20Seminars/Human%20Rights%20BCN%2028-29%20April%202014/Rehnquist_Living_Constitution_HJLPP_2006.pdf> (accessed 29.3.2021).

[58] *Rehnquist W. H.*, The Notion of a Living Constitution, Harvard Journal of Law & Public Policy 29, 1976, p. 407, available at: <https://www.ejtn.eu/Documents/About%20EJTN/Independent%20Seminars/Human%20Rights%20BCN%2028-29%20April%202014/Rehnquist_Living_Constitution_HJLPP_2006.pdf> (accessed 29.3.2021).

[59] *Rehnquist W. H.*, The Notion of a Living Constitution, Harvard Journal of Law & Public Policy 29, 1976, p. 407, available at: <https://www.ejtn.eu/Documents/About%20EJTN/Independent%20Seminars/Human%20Rights%20BCN%2028-29%20April%202014/Rehnquist_Living_Constitution_HJLPP_2006.pdf> (accessed 29.3.2021).

[60] *Gegenava D.*, *Javakhishvili P.*, Article 39 of the Constitution: The IDP Norm Waiting for Asylum and Phenomenon of Fear of Unknown in Georgian Constitutionalism, Academic Herald, Special Issue, Legal, Political and Economic Aspects of Revision of the Georgian Constitution, 2017, p. 144 (in Georgian).

creative development of the basic rights in view of the constitutional principles and *inter alia*, for the establishment of legal guarantees for the rights of disabled persons, the right of cultural identity and other unenumerated, so-called implied rights of the Constitution.[61]

2. THE CASE LAW OF THE CONSTITUTIONAL COURT OF GEORGIA ON ARTICLE 39

Georgia has established the European model of constitutional review, according to which the Constitutional Court is the specialized body carrying out the constitutional review.[62] By declaring a law or part of it unconstitutional, the Constitutional Court of Georgia functions as a 'negative legislator'.[63] As a result of invalidating the unconstitutional laws, it provides significant assistance to the legislator in structuring its legislative will correctly.[64] While carrying out the legal review, the only legal criterion for the Constitutional Court of Georgia is the Constitution of Georgia. Thus, the human rights referred to in Article 39 were the rights emanated from the Constitution of Georgia and they had been the object of protection for the Constitutional Court of Georgia.[65]

There were a number of cases, where the Constitutional Court of Georgia granted the constitutional protection to rights under Article 39.[66] The Court declared that only those rights may fall within the scope of Article 39 of the Constitution, which are not part of the scope of other constitutional provisions.[67] As a result, Article 39 worked for the protection of those rights, which were not entrenched in the Constitution, but were derived from the constitutional principles.[68] Thus, this norm demonstrated once again,

[61] *Burduli I.*, *Gotsiridze E.*, *Erkvania T.*, *Zoidze B.*, *Izoria L.*, *Kobakhidze I.*, *Loria A.*, *Macharadze Z.*, *Turava M.*, *Pirtskhalaishvili A.*, *Putkaradze I.*, *Kantaria B.*, *Tsereteli D.*, *Jorbenadze S.*, Commentary to the Constitution of Georgia, Chapter II, Citizenship of Georgia, Basic Human Rigts and Freedoms, 2013, p. 483 (in Georgian).

[62] *Gonashvili V.*, *Eremadze K.*, *Tevdorashvili G.*, *Kakhiani G.*, *Kverenchkhiladze G.*, *Chigladze N.*, Introduction to the Constitutional Law, 2016, p. 447, cited in: *Gonashvili V.*, *Eremadze K.*, *Tevdorashvili G.*, *Kakhiani G.*, *Kverenchkhiladze G.*, *Chigladze N.*, Introduction to the Constitutional Law, 2017, p. 443 (in Georgian).

[63] *Faber R.*, The Austrian Constitutional Court – An Overview, Vienna Journal on International Constitutional Law 1, 2008, p. 51 cited in *Gegenava D.*, Constitutional Law of Georgia, 2007, p. 295 (in Georgian).

[64] *Zoidze B.*, Constitutional Review and Order of Values in Georgia, 2007, p. 155 (in Georgian).

[65] *Burduli I.*, *Gotsiridze E.*, *Erkvania T.*, *Zoidze B.*, *Izoria L.*, *Kobakhidze I.*, *Loria A.*, *Macharadze Z.*, *Turava M.*, *Pirtskhalaishvili A.*, *Putkaradze I.*, *Kantaria B.*, *Tsereteli D.*, *Jorbenadze S.*, Commentary to the Constitution of Georgia, Chapter II, Citizenship of Georgia, Basic Human Rights and Freedoms, 2013, p. 483 (in Georgian).

[66] *Eremadze K.*, Defenders of Freedom in the Pursuit of Freedom, 2018, p. 369 (in Georgian).

[67] Ruling of the Constitutional Court of Georgia of 8 September 2017 – *Citizen of Georgia Paata Kobuladze v. The Government of Georgia* (N 1/17/738), II para. 3, available at: <https://constcourt.ge/ka/judicial-acts?legal=1276> (accessed 1.7.2021).

[68] Recording Notice of the Constitutional Court of Georgia of 29 May 2007 – *The Public Defender of*

that the required precondition for the recognition of a right is not its entrenchment in any constitutional article; instead, the main legal precondition is that the right is derived from the constitutional principles.[69] According to the explanation of the Constitutional Court, Article 39 'does not provide for rights and freedoms'.[70] Nevertheless, the constitutional provision of Article 39 covers those rights, which although indirectly, but still derive from the constitutional principles and this latter approach constitutes a constitutional solution, a regulation of a sort.[71] These constitutional legal principles are the following: democratic form of government; economic freedom; social state; state of law; protection of universally recognized human rights and freedoms.[72] To answer the question of when the dispute based on Article 39 would be successful in the Constitutional Court, the case law of the Constitutional Court states the following: 'Article 39 can be referred to, when the right is not entrenched in the Constitution of Georgia, or the scope of the constitutional right is more narrow, than what is emanated from the international obligation.'[73] More precisely, under the case law of the Constitutional Court of Georgia, this Article was applied, when even after interpreting the explicitly enumerated norms of the Constitution, no adequate counterpart was found for the standards provided in the international legal document.[74]

The Constitutional Court of Georgia has evaluated the specific legal cases against the obligations stemming from the international acts based on Article 39 on multiple occasions. For example, in the 2002 judgment in the case of *Bachua Gachechiladze et al. v. The Parliament of Georgia*, while discussing the International Law and general importance of the complainants' rights, the Constitutional Court focused on the

Georgia v. The Parliament of Georgia (N2/2/416), II para. 1, available at: <https://constcourt.ge/ka/judicial-acts?legal=429> (accessed 1.7.2021).

[69] *Zoidze B.*, Constitutional Review and Order of Values in Georgia, 2007, p. 155 (in Georgian).

[70] Judgment of the Constitutional Court of Georgia – *1. Citizen Avtandil Rijamadze v. The Parliament of Georgia; 2. Citizen Neli Mumladze v. The Parliament of Georgia* (N2/6/205,232), II para. 1, available at: <https://www.constcourt.ge/ka/judicial-acts?legal=176> (accessed 1.7.2021).

[71] Recording Notice of the Constitutional Court of Georgia of 29 May 2007 – *The Public Defender of Georgia v. The Parliament of Georgia* (N 2/2/416), II para. 1, available at: <https://constcourt.ge/ka/judicial-acts?legal=429> (accessed 1.7.2021).

[72] *Tugushi T.*, *Burjanadze G.*, *Mshvenieradze G.*, *Gotsiridze G.*, *Menabde V.*, Human Rights and the Case Law of the Constitutional Court of Georgia, 2013, p. 537 (in Georgian).

[73] Judgment of the Plenum of the Constitutional Court of Georgia of 11 July 2011 - *The Public Defender of Georgia v. The Parliament of Georgia* (N3/2/416), II para. 66, available at: <https://www.matsne.gov.ge/ka/document/view/1404703?publication=0> (accessed 1.7.2021); Ruling of the Constitutional Court of Georgia of 10 June 2009 - *Citizens of Georgia – Davit Sartania and Aleksandre Macharashvili v. The Parliament of Georgia and The Minister of Justice of Georgia* (N1/2/458), II paras. 22-23, available at: <https://constcourt.ge/ka/judicial-acts?legal=404> (accessed 1.7.2021); Ruling of the Constitutional Court of Georgia of 30 July 2010 - *Citizens of Georgia – Otar Kvenetadze and Izolda Rcheulishvili v. The Parliament of Georgia* (N 1/5/489-498), II para. 3, available at: <https://www.constcourt.ge/ka/judicial-acts?legal=488> (accessed 1.7.2021).

[74] *Tugushi T.*, *Burjanadze G.*, *Mshvenieradze G.*, *Gotsiridze G.*, *Menabde V.*, Human Rights and the Case Law of the Constitutional Court of Georgia, 2013, p. 537 (in Georgian).

obligations established under the international treaties, namely, Article 22[75] and Article 25[76] of the Universal Declaration of Human Rights. The Court pointed out, that as clearly indicated from the text of the Declaration, the States should aspire to fulfill their international legal obligations through the national and international measures.[77] In the same case, the Constitutional Court provided a crucial interpretation of the scope of Article 39 in the light the obligations settled under the international treaties of Georgia. Namely, with regards to the social rights it decided that for their protection, the State should at least ensure the minimum core level of these rights. 'Otherwise, international-legal obligations of the states are meaningless.'[78] Therefore, the Court interpreted on the issue of the recognition of social rights in Georgia based on Article 39, that the social and economic rights are constitutionally recognized rights, according to the established case law.[79] The Court provided a broader interpretation of Article 39, when it expanded the scope of Article 39 not on the basis of a binding international instrument for Georgia, but on the basis of the recommendatory international document. In this case, the Constitutional Court used the Recommendation of the Council of the European Union of 27 October 1981 on electricity tariff structures (81/924).[80]

[75] The Universal Declaration of Human Rights, Article 22: 'Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.' available at: <http://www.supremecourt.ge/files/upload-file/pdf/aqtebi3.pdf> (accessed 1.7.2021).

[76] The Universal Declaration of Human Rights, Article 25, Paragraph 1: 'Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.' available at: <http://www.supremecourt.ge/files/upload-file/pdf/aqtebi3.pdf> (accessed 1.7.2021).

[77] Judgment of the Constitutional Court of Georgia of 18 April 2002 – *1. Bachua Gachechiladze, Simon Turvandishvili, Shota Buadze, Solomon Sanadiradze and Levan Kvatsbaia, 2. Vladimer Doborjginidze, Nineli Andriadze, Guram Demetrashvili and Shota Papiashvili, 3. Givi Donadze v. The Parliament of Georgia* (N1/1/126,129,158), II para. 3, available at: <https://constcourt.ge/uploads/documents/5e5fabc956497.docx> (accessed 1.7.2021).

[78] Judgment of the Constitutional Court of Georgia of 18 April 2002 – *1. Bachua Gachechiladze, Simon Turvandishvili, Shota Buadze, Solomon Sanadiradze and Levan Kvatsbaia, 2. Vladimer Doborjginidze, Nineli Andriadze, Guram Demetrashvili and Shota Papiashvili, 3. Givi Donadze v. The Parliament of Georgia* (N1/1/126,129,158), II para. 4, available at: <https://constcourt.ge/uploads/documents/5e5fabc956497.docx> (accessed 1.7.2021).

[79] Judgment of the Constitutional Court of Georgia of 18 April 2002 – *1. Bachua Gachechiladze, Simon Turvandishvili, Shota Buadze, Solomon Sanadiradze and Levan Kvatsbaia, 2. Vladimer Doborjginidze, Nineli Andriadze, Guram Demetrashvili and Shota Papiashvili, 3. Givi Donadze v. The Parliament of Georgia* (N1/1/126,129,158), II para. 3, available at: <https://constcourt.ge/uploads/documents/5e5fabc956497.docx> (accessed 1.7.2021), as cited in *Dzamashvili B.*, Social and Economic Rights: Basic Rights or State Policy Directives?, Law Review 1, 2015, p. 401.

[80] The Judgment of the Constitutional Court of Georgia of 30 December 2002 – *Citizen of Georgia, Shalva Natelashvili v. The Parliament of Georgia, the President of Georgia and the Georgian National Energy Regulation Commission (GNERC)* (N1/3/136), I para. 8, available at: <https://constcourt.ge/ka/judicial-acts?legal=116> (accessed 5.7.2021).

As a conclusion, it can be stated, that in view of the case law of the Constitutional Court of Georgia, the goal of Article 39 is to ensure the protection of rights and freedoms in the case, when the rights derived from the constitutional principle or from the obligations imposed on Georgia at the international level is not explicitly set in the constitutional norms, or does not fall within the scope of the enumerated constitutional rights.

V. DID THE TRANSFER OF ARTICLE 39 FROM THE SECOND CHAPTER TO THE FIRST CHAPTER OF THE CONSTITUTION REDUCE THE SUBSTANTIVE AND PROCEDURAL SAFEGUARDS OF RIGHTS PROTECTION?

As reviewed in the fourth part of this article, the Constitutional Court of Georgia applied the mechanism provided in Article 39 and transformed it into an effective room of broad manoeuvre. Therefore, since a 'norm is the only form of existence of basic rights'[81], Article 39 was transformed into a rule, which granted the viability to the rights unenumerated in the Constitution. In view of the undertaken amendments, namely, the transfer of Article 39 from the Second Chapter to the First Chapter, it is interesting from the human rights perspective, what solution will follow from the transformation of this norm from a means of protection of rights to a principle.

The explanatory note to the Draft Constitutional Law of Georgia on the Amendment of the Constitution of Georgia states the following: 'For legal certainty, it is appropriate, that the constitutional complaints brought before the Court are based on specific basic rights entrenched in the Second Chapter of the Constitution, which ensures the application of those clear criteria by the Constitutional Court in its decision-making, that are established in the doctrine of these rights. It should also be noted, that the Second Chapter of the Constitution provides for a comprehensive protection of basic human rights, even in case, when any given aspect of individual's freedom is not protected under the specific provision of the Constitution. The Constitution enshrines the right of dignity of a human being, the right to free personal development and other basic rights, based on which individuals can fully protect any aspect of individual freedom and activities.'[82]

From the very first reading it becomes clear, that the Constitution of Georgia does not allow the opportunity anymore that was available until now to introduce a legal dispute on the basis of Article 39 and find a law unconstitutional with regard to it, after Article

[81] *Izoria L.*, *Korkelia K.*, *Kublashvili K.*, *Khubua G.*, Commentary to the Constitution of Georgia, Fundamental Human Rights and Freedoms, 2005, p. 334 (in Georgian).

[82] The Explanatory Note on the Draft Constitutional Law of Georgia, Article 4, available at: <https://info.parliament.ge/file/1/BillReviewContent/149115?fbclid=IwAR09W5ujU45YLZIeJ3UV5jddzXPhSDTjVuzMa_7M_akbPAU_XIMvajRDZxc> (accessed 25.3.2021).

39 was transferred to the First Chapter of the Constitution. However, the explanatory note argues instead, that it is fully possible to find the legal goods protected under Article 39 in other articles of the Constitution. The following text of the explanatory note is also noteworthy, according to which '[it is appropriate] to base a complaint on the specific basic rights enshrined in the Second Chapter of the Constitution'.[83] It can be inferred from this statement, that the legislator's decision to move Article 39 to the First Chapter was also determined by the approach taken by the legislator, that Article 39 was not a norm establishing a specific right; it was seen as an abstract and enigmatic rule instead.

The proposed route may not appear painless in the process of systemic development and refinement of the human rights protection, since the mentioned rights, including the right to dignity and freedom of personal development cannot substitute the established window function of Article 39 in regard to the constitutional principles or international obligations with mathematical accuracy. However, it should be noted for fairness, that it is fully possible for the Constitutional Court of Georgia to read out the constitutional safeguards provided by the pre-amendment text of the Constitution in the articles mentioned in the explanatory note to the constitutional amendment in case of necessity. Apart from this, we consider, that the solution chosen by the legislator significantly worsened the position of the prospective complainants to the Constitutional Court. This argument is based on the fact, that the actual and direct legal force of Article 39 have been manifested on multiple occasions in the judgments of the Constitutional Court of Georgia and this Article was not an ambiguous legal norm (as the explanatory note suggests); it used to be a door for the specific rights instead, that are left unenumerated in the text of the Constitution.

The case of *Citizen of Georgia Shalva Natelashvili v. The Parliament of Georgia*, the President of Georgia and The Georgian National Energy Regulation Commission substantiates this assertion. The Constitutional Court found a violation with regards to Article 39 in this case, and it was exactly this judgment, where the Court expanded the scope of Article 39, *inter alia*, based on recommendatory international documents.[84] The judgment of the Constitutional Court in the case of No. 174 Constitutional Complaint of the Citizens of Georgia – 1. *Tristan Khanishvili, Tedore Ninidze, Nodar Chitanava, Levan Aleksidze and others (total 11 complainants) v. The Parliament of Georgia* is also noteworthy. Here, the Court decided that the impugned norm had to be declared unconstitutional with regard to Article 39 of the Constitution of Georgia, which *inter*

[83] The Explanatory Note on the Draft Constitutional Law of Georgia, Article 4, available at: <https://info.parliament.ge/file/1/BillReviewContent/149115?fbclid=IwAR09W5ujU45YLZIeJ3UV5jddzXPhSDTjVuzMa_7M_akbPAU_XIMvajRDZxc> (accessed 25.3.2021).

[84] Judgment of the Constitutional Court of Georgia of 30 December 2002 – *Citizen of Georgia, Shalva Natelashvili v. The Parliament of Georgia, the President of Georgia and the Georgian National Energy Regulation Commission (GNERC)* (N1/3/136), I para. 8, available at: <https://constcourt.ge/ka/judicial-acts?legal=116> (accessed 5.7.2021).

alia, protected the right of social security of the complainants. The Court emphasized Article 9 of the International Covenant on Economic, Social and Cultural Rights[85] and declared the norm unconstitutional.[86]

Article 39 of the Constitution was directly applicable even earlier, when the Constitutional Court stated in its 2002 judgement in the case of *Bachua Gachechiladze et al v. The Parliament of Georgia*, that the constitutional basis of the complainants' rights was Article 39 and it found the specific impugned norms unconstitutional with regard to Article 39. The tangible consequences of the application of Article 39 are also elucidated in the judgment of the Constitutional Court of Georgia, where the Court Chamber decided, that the state was obligated to ensure the right of the population to form the local self-government bodies and to elect heads of respective bodies independently, without the interference of state bodies or officials. The legal basis for finding a violation in this case was Article 39. The Court also referred to the international act here, namely, the International Covenant on Civil and Political Rights of 1966 and the international obligations established under this Covenant.[87]

Thus, in addition to the broad prospects of lawmaking and development of the scopes of rights, Article 39 of the Constitution of Georgia played a practical role and provided an effective and real mechanism of the protection of human rights. In view of this tangible role, we can consider, that Article 39, as a legal successor of Article 45 of the 1921 Constitution of the Democratic Republic of Georgia, was not only an emanation of a symbolic inspiration of the Ninth Amendment of the U.S. Constitution, but it also served that very goal, that the founders of the 1921 Constitution had in mind. Transferring Article 39 to the First Chapter of the Constitution deprived individuals of the possibility to bring the constitutional complaints before the Constitutional Court and challenge the constitutionality of a normative acts or part of it, if they consider that the right that has been violated or may get directly violated, is a right not explicitly stated in the Second Chapter of the Constitution.[88]

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[85] Article 9 of the International Covenant on Economic, Social and Cultural Rights: 'The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.' available at: <https://matsne.gov.ge/ka/document/view/1483577?publication=0> (accessed 5.7.2021).

[86] Judgment of the Constitutional Court of Georgia of 15 October 2002 – *No. 174 Constitutional Complaint of the Citizens of Georgia – 1. Tristan Khanishvili, Tedore Ninidze, Nodar Chitanava, Levan Aleksidze, et al. (Total 11 Complainants) v. The Parliament of Georgia* (N1/2/174,199), II para. 2, available at: <https://constcourt.ge/ka/judicial-acts?legal=230> (accessed 1.7.2021).

[87] Judgment of the Constitutional Court of Georgia of 16 February 2016 – *Citizens of Georgia – Uta Lipartia, Giorgi Khmelidze v. The Parliament of Georgia* (N1/2/213,243), available at: <https://constcourt.ge/ka/judicial-acts?legal=211> (accessed 1.7.2021).

[88] Constitution of Georgia, Article 60, Paragraph 4, Subparagraph 'a', available at: <https://matsne.gov.ge/ka/document/view/30346?publication=36> (accessed 1.7.2021); The Organic Law of Georgia On Constitutional Court of Georgia, Article 39, Paragraph 1, Subparagraph 'a', available at: <https://matsne.gov.ge/ka/document/view/32944?publication=29> (accessed 1.7.2021).

It is also noteworthy that in the aforementioned cases the Constitutional Court not only found violations with regard to Article 39 of the Constitution, but it also paid particular attention to the fulfillment of international legal obligations taken upon by Georgia. As a result, it can be considered, that for the purposes of the progressive interpretation of rights, the Constitutional Court directly involved the need of the consideration of the obligations imposed by the international law in its reasoning. This approach is nothing short of a step taken in favor of human rights. Article 26 of the 1969 Vienna Convention on the Law of Treaties establishes the principle of *'Pacta Sunt Servanda'*, according to which, 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith'. According to Article 4, Paragraph 5 of the Constitution of Georgia, 'The legislation of Georgia shall comply with the universally recognized principles and norms of international law. An international treaty of Georgia shall take precedence over domestic normative acts, unless it comes into conflict with the Constitution or the Constitutional Agreement of Georgia'. As a result, the presence of Article 39 in the Second Chapter provided the complainants with the prospect to apply to the Constitutional Court on one hand, and one the other hand, it provided them with the opportunity to argue the existence of a specific right, which was not explicitly enumerated in the Constitution in the light of international law under Article 39 for the strategic litigation purposes. Thus, Article 39 was an umbrella-right to certain extent for those claimants, who theoretically could not find the counterpart of their violated right in other articles. Naturally, the disappearance of Article 39 from the Second Chapter does not *inter alia* rule out the expansion of the scopes of other constitutional rights in the light of international law. However, it is noteworthy, that as the explanatory note suggests, every complainant, who decides to bring a claim with regards to what has been the scope of Article 39 until recently, will have to find the specific constitutional safeguard, which does not fit the scope of other constitutional Articles under the right of dignity or the freedom of personal development, which compared to the previous regulation, imposes substantial burden on the complainant.

Thus, the amendment has on one hand reduced the scope of the norm, which introduced the mechanism of the 'living constitution' in the Constitution of Georgia and on the other hand, it limited the standing of prospective complainants to challenge the constitutionality of specific norms with regards to rights protected under Article 39, which is clearly a regulation worsening the systemic protection of rights.

VI. CONCLUSION

The present work gives an affirmative answer to the question of whether the legislator defied the legacy of Article 45 of the 1921 Constitution with the 2018 amendments. This claim is based on the review of Article 45 of the 1921 Constitution of the Democratic

Republic of Georgia and the Ninth Amendment of the U.S. Constitution as an inspiration for the drafting of Article 45, which is followed by the elaboration on the theoretical and procedural role of Article 39 (the version prior to 16 December 2018) in the list of human rights and freedoms protected in the Second Chapter of the Constitution and its link to the effective mechanisms of the 'living constitution'.

This analysis demonstrates, that through the 2018 amendments the legislator defied the procedural role of Article 39, the legal successor of the Article 45 of the 1921 Constitution, in the context, where based on the case law of the Constitutional Court of Georgia, Article 39 ensured the protection of rights and freedoms in the case, when the right was not explicitly stated in the norms of the Constitution of Georgia, but was inherently derived from the constitutional principles and the obligations imposed on the state at the international level. Moreover, it can be stated, that Article 39 played a bigger practical role in case law of the Constitutional Court of Georgia, than the Ninth Amendment of the U.S. Constitution has in this regard. This is due to the fact that, as demonstrated in the third part of this article, in spite of some landmark cases, the general trend of the courts shows that the judges shun referring to the Ninth Amendment as a basis of specific constitutional rights and find the constitutional guarantees among the explicitly enumerated rights in the Constitution. In contrast to this, as it was reviewed in the fourth and fifth parts of this article, the Constitutional Court of Georgia has found a violation with regards to Article 39 of the Constitution on multiple occasions. As a result, it can be stated that prior to the amendments of 2018, individuals with a standing to apply to the Constitutional Court had an important legal tool at their disposal for the protection of their rights, which were not enumerated in the Constitution, but inherently derived from constitutional principles or international legal obligations taken upon by the state.

Moreover, some criticism should be voiced with regards to the following statement of the explanatory note on the Draft Constitutional Law of Georgia on the Amendment of the Constitution of Georgia: 'For legal certainty, it is appropriate, that the constitutional complains brought before the Court are based on specific, basic rights entrenched in the Second Chapter of the Constitution, which ensures the application of those clear criteria by the Constitutional Court in its decision-making, that are established in the doctrine of these rights.'[89] It can be inferred from this claim, that Article 39 did not contain any specific right, whereas the case law of the Constitutional Court of Georgia proves the very opposite; even the rights to social security and social assistance 'found a refuge' under Article 39.

[89] The Explanatory Note on the Draft Constitutional Law of Georgia, Article 4, available at: <https://info.parliament.ge/file/1/BillReviewContent/149115?fbclid=IwAR09W5ujU45YLZIeJ3UV5jddzXPhSDTjVuzMa_7M_akbPAU_XIMvajRDZxc> (accessed 25.3.2021).

In this regard, it is symbolic to remember the words of the invited member of the Constitutional Commission, lawyer *Konstantine Mikeladze*, who stated in the process of the adoption of the 1921 Constitution, that 'Rights are available as long, as there are duties. [...] The Constitution may include such norms, the function of which is to make the basic rights of individuals inviolable for the ordinary legislator and executive authorities, i.e. they should have appropriate safeguards.'[90] Hence, as the Constituent Assembly included Article 45 in the text of the Constitution in 1921 and then Article 39 was drafted as an analog of Article 45 in 1995, this reinforced the will that Article 39 regulated specific right/rights, regarding to which the state had specific obligations. As it was noted repeatedly, this can be seen in the case law of the Constitutional Court, as well.

As a result, the transfer of Article 39 from the Second Chapter to the First Chapter limited the opportunity of individuals to bring claims based on this article to the Constitutional Court. Moreover, this amendment also reduced the scope of the mechanism of the 'living constitution' in the Constitution of Georgia, even though, we can hope that the Constitutional Court will not, in view of the principles recognized in the First Chapter of the Constitution, forget the path of human rights paved up until now. Therefore, in spite of such a reduction of the legacy of Article 45 of the 1921 Constitution, it is important that the Constitutional Court of Georgia continues its progress towards the passing of judgments in favor of human rights and finds some important, valuable pillars, which will allow the citizens to dispute for the protection of those rights again, which are recognized under the constitutional principles and international obligations imposed on the state, but are not explicitly stated in the constitutional text.

[90] *Mikeladze K.*, Constitution of the Democratic State and Parliamentary Republic, Some Considerations on Drafting of the Constitution of Georgia in: *Kordzaze Z.*, *Nemsitsveridze T.* (ed.), Chronicles of Georgian Constitutionalism, 2016, p. 77 (in Georgian).