

*Dimitry Gegenava**

*Paata Javakhishvili***

CONSTITUTIONAL PROCEEDINGS: A NEW CHALLENGE FOR GEORGIAN LEGAL EDUCATION

ABSTRACT

Taking into account the Georgian reality, the traditionalism reigning in law, the often excessive reliance on learning/teaching and evaluation methods, the unconscious fear of novelty, significantly hinder the evolution of disciplines. However, legal education, like the law itself, is a dynamic process and should always be focused on development. From this point of view, teaching the discipline of constitutional proceedings in Georgia is characterized by a range of challenging aspects. The reason for this is the fact that it is often perceived as a substantive legal field, and the mentioned subject is mostly taught in majority of universities due to the changes of characteristics in different fields of law. In addition, the curriculum of the constitutional proceedings usually integrates issues of constitutional review or comparative constitutional justice, which may have problematic reverberations for the purposes of the “Characteristic of Educational Programs in different fields of law”. Because of this, its legal aspect and the peculiarities of educational studies are very relevant, which predetermine the proper delivery of this content and the achievement of appropriate results. Therefore, the paper will discuss both, the thematic side of the teaching of the constitutional proceedings and the issues, related to integration of the discipline of the constitutional proceedings in the curriculum.

I. INTRODUCTION

Legal education, like the law itself, is saturated with very traditional approaches, however, at the same time, it is a dynamic process and must be constantly focused on development. Despite the grandiloquent and lofty goals, its main purpose is to train a practicing lawyer, which is required by the modern labor market.¹ Unfortunately, taking

* Doctor of Law, Vice-Rector and Professor of Sulkhani-Saba Orbeliani University [d.gegenava@sabauni.edu.ge].

** Doctor of Law, Assistant of the Law Faculty of Ivane Javakhishvili Tbilisi State University, Associate Professor of Sulkhani-Saba Orbeliani University [paata.javakhishvili@tsu.ge].

¹ David R. Barnhizer, ‘The Purposes and Methods of American Legal Education’ (2011) 36(1) Journal of the Legal Profession 1-2; Cruz Reynoso and Cory Amron, ‘Diversity in Legal Education: A Broader View, A Deeper Commitment’ (2002) 52(4) Journal of Legal Education 491.

into account Georgian reality, traditionalism reigning in the field of law, often excessive attachment to classical, sometimes outdated methods of teaching and evaluation, subconscious fear of the new, significantly hinders the evolution of programs and disciplines. The legal practice develops at a speedy pace in parallel with the arising challenges, and the academic sphere cannot catch up with it physically,²³ due to which we can frequently observe disappointment and despair caused by the first contact with the practice. In this regard, the issues related to teaching of constitutional proceedings as an educational discipline are interesting, and of course, there are quite a lot of challenges in the process of teaching it.

The substantive and thematic aspects of the constitutional proceedings is problematic, because it is often perceived as a substantive legal field under the influence of constitutional control or comparative constitutional review. It should also be noted, that the vast majority of universities started teaching the mentioned subject “under compulsion”, only after the change in the characteristics of different fields of law.⁴ In addition, it is directly related to the ability to understand human rights and, most importantly, to know and use safeguard mechanisms.⁵ Because of this, its legal side and the nuances of education studies, which ensure the proper delivery of this content and achievement of relevant results, are very relevant. Therefore, the paper will discuss, on the one hand, the content side of teaching of the constitutional proceedings and the thematic composition, and on the other hand, the nuances related to integration of this subject directly into the curriculum and its teaching.

² Legal market research in Georgia, research report, prepared by the research and consulting company “ACT” (Tbilisi, 2021) (in Georgian).; Natia Khantadze, *Legal Practice Programs in Georgia: Evaluation and Recommendations* (Tbilisi 2019) (in Georgian).

³ It is true that this is not only a problem of Georgia, and it is a challenge of law in general all over the world. As Pound noted, “law in books” and “law in action” often differ from each other. Roscoe Pound, ‘Law in Books and Law in Action’ (1910) 44(1) *American Law Review* 12-36. However, they should not be so far apart from each other, that one becomes a mere fiction and the other a desperate reality.

⁴ The characteristic of fields of law are approved by the order of the director of the LEPL – the National Center for Education Quality Enhancement, and, accordingly, it is mandatory for all universities that implement the relevant program of law.

⁵ *Teaching Human Rights Law in Georgia at the Level of Higher Education, A Special Report of the Public Defender of Georgia* (2021) <<https://www.ombudsman.ge/res/docs/2021121616234346487.pdf>> [last accessed on 15 November 2022].

II. THE PLACE OF CONSTITUTIONAL PROCEEDINGS IN THE EDUCATIONAL CURRICULUM

The legal profession is subject to regulation,⁶ consequently, in Georgia legal education is also regulated⁷ and academic qualifications in law are subject to special state supervision.⁸ This implies relevant restrictions and additional standards at the level of both, the legislative acts and bylaws.⁹ Within the framework of the higher education reform, in 2011, the “Characteristics of educational programs in the field of law” was approved¹⁰, which defined the basic principles mandatory for legal education programs (especially undergraduate and graduate) in terms of knowledge, skills and values (broken down into 5 detailed criteria).¹¹ The mentioned document quite voluminously described the issues, that a Bachelor of Law should know after completing the educational program, although constitutional proceedings were not among them. There could be many reasons for this, starting with the developing, albeit relatively limited for that period, i.e. 15 years of experience of the Constitutional Court, ending with less interest towards this field, and the lack of knowledgeable practitioners or researchers. In 2020, a new characteristic of the field was approved, which qualitatively changed the existing standard in all directions, expanded the range of mandatory issues to be learned, and included constitutional proceedings as well (at a Bachelor of Law level).¹²

The constitutional proceedings must be presented in various forms in undergraduate law programs, and violation of this obligation will naturally have a negative impact on the evaluation of the program. However, naturally, the framework document cannot determine the content details that the mentioned discipline should include.

⁶ Article 2(z2), The Law of Georgia on Higher Education <<https://www.matsne.gov.ge/document/view/32830?publication=99>> [last accessed on 15 November 2022].

⁷ *ibid*, Article 2(z3) and Article 75(2)(a).

⁸ *ibid*, Article 76(1).

⁹ *ibid*, Articles 76 and 77.

¹⁰ The characteristics of the field (with the learning outcomes established on their basis) describe the knowledge, skills and/or autonomy-responsibility related to the relevant qualification. see National Qualifications Framework Guide, National Center for Education Quality Enhancement (2022) 45 <<https://eqe.ge/en/page/parent/787/erovnuli-kvalifikatsiebis-charcho>> (in Georgian) [15.11.2022].

¹¹ Order N224 of June 11, 2011 of the Director of the National Center for LEPL – The National Center for Education Quality Enhancement on the “Approval of characteristics of educational programs in the field of law”.

¹² “Characteristics of the educational program in the field of law”, III, 3.1.1, approved by the Order of the Director of the National Center for Education Quality Enhancement of April 2, 2020 (MES 12000326937).

III. CONSTITUTIONAL PROCEEDINGS V. CONSTITUTIONAL REVIEW: THEMATIC DELIMITATION

According to the Constitution of Georgia, constitutional proceedings is an independent form of procedural law, through which the Constitutional Court exercises judicial power.¹³ Implementation of the constitutional review is regulated by procedural norms, the unity of which represents the substance component of the constitutional proceedings. The latter has a lot in common with other forms of litigation, although it also has a number of peculiarities,¹⁴ which derives from the specific legal nature of the Constitutional Court.¹⁵ Georgian legislation does not contain a unified definition of the constitutional proceedings. A part of the researchers interprets the constitutional proceedings as the procedure established by the law for consideration and resolution of issues belonging to the jurisdiction of the Constitutional Court,¹⁶ while some of the constitutionalists, instead of the definition, focus on the issues covered by the concept of the constitutional proceedings.¹⁷ Despite the different and non-uniform approach, in the end, the constitutional proceedings can be defined as the manner and procedure, in which the Constitutional Court exercises the constitutional review (i.e., the procedural and not the substantive side of constitutional review).

The basis of the constitutional proceedings is the Constitution of Georgia, and additionally, procedural rules are determined by the Organic Law on the Constitutional Court of Georgia¹⁸ and the Rules of Procedure of the Constitutional Court. The Constitutional Court of Georgia is a judicial body of constitutional review which ensures the supremacy of the Constitution of Georgia, constitutional legality and protection of

¹³ Article 60(1), Constitution of Georgia <<https://www.matsne.gov.ge/ka/document/view/30346?publication=36>> [last accessed on 15 November 2022].

¹⁴ Giorgi Kakhiani, *The Constitutional Control in Georgia, Theory and Practice Analysis* (Meridian Publishing House, 2011) 289 (in Georgian).

¹⁵ Alec Stone Sweet, 'Constitutional Courts (2012) Yale Law School Legal Scholarship Repository 817; Donald P. Kommers, Russel A. Miller, 'Das Bundesverfassungsgericht: Procedure, Practice and Policy of the German Federal Constitutional Court' (2008) 3(2) *Journal of Comparative Law* 196; Georg Vanberg, 'Legislative-Judicial Relations: A Game-Theoretic Approach to Constitutional Review' (2001) 45(2) *American Journal of Political Science* 347; Christian Starck, 'Constitutional Review in the Federal Republic of Germany', Translated by J. Ignaski (1984) 2 *Notre Dame International and Comparative Law Journal* 87.

¹⁶ Kakhiani, *supra* note 14, 289.

¹⁷ Besik Loladze, Zurab Macharadze, Ana Firtskhalashvili, *Constitutional Justice* (Tbilisi 2021) 347 (in Georgian).

¹⁸ Until 2018, the "Law of Georgia on Constitutional Proceedings" was also in force, which, as a rule, should have defined the issues of the constitutional proceedings separately, but in reality, it only partially regulated the proceedings, and moreover, it thematically even overlapped with the organic law. Regarding the conflict of regulations, see Dimitri Gegenava, *Constitutional Justice in Georgia: Key Systemic Problems of Litigation* (Tbilisi 2012) (in Georgian); Kakhiani, *supra* note 14.

human constitutional rights and freedoms.¹⁹ Based on this functional purpose of the Constitutional Court of Georgia, the constitutional proceedings organically connected with implementation of the function of the constitutional control. However, despite the relationship between these institutions, unification of these concepts would not be appropriate. On the contrary, in order to determine the relationship between the concepts of the constitutional proceedings and the constitutional review, it is important to consider the substance of the constitutional review itself, and to separate its main features from the constitutional proceedings. In addition, this is particularly relevant, because some Georgian universities teach the topics, related to the constitutional proceedings as integrated with the constitutional review, which is naturally possible, although it is definitely a question, as to what extent does this or that curriculum and educational discipline respond to the idea of the “Characteristics of educational program in the field of law”, which implies, that a Bachelor of Law must necessarily know the issues related to constitutional proceedings. It is also important, that inclusions of the “constitutional proceedings” in the name of the discipline automatically focuses on procedural issues, which, considering the practice of the Accreditation Council of Higher Education Programs, turns out to be a serious challenge (in essence, it was difficult for some universities to take all this into consideration).²⁰

Determining the thematic issues related to the constitutional review in such a way, that the list is isolated from the concept of the constitutional proceedings is difficult, but still possible. Constitutional review essentially includes the following issues: the supremacy of the Constitution and the Constitutional Court as a mechanism of legal protection of the Constitution, the constitutional review and politics, the relationship between the constitutional control, the constitutional supervision and the constitutional control, models of the constitutional review, types of the constitutional review, sources of the constitutional control, the legal nature of the Constitutional Court, the place of the Constitutional Court in the governmental system, the formation of the Constitutional Court, the status of the member of the Constitutional Court, the legal nature of the decision of the Constitutional Court.²¹ The mentioned issues should not be considered

¹⁹ Article 1(1), Organic Law of Georgia on the Constitutional Court of Georgia <<https://www.matsne.gov.ge/document/view/32944?publication=32>> [last accessed on 15 November 2022].

²⁰ For example, see the Minutes of the meeting of the Council of Accreditation of Educational Programs of February 2, 2021 N53927; Minutes of the meeting of the Council of Accreditation of Educational Programs of January 31, 2021 N50839.

²¹ Marco Goldoni, ‘At the Origins of Constitutional Review: Sieyès’ Constitutional Jury and the Taming of Constituent Power’ (2012) 32(2) *Oxford Journal of Legal Studies* 211; Schnutz Rudolf Dür, ‘Improving Human Rights Protection on the National and The European Levels - Individual Access to Constitutional Courts’ (*Studii Si Anticole* 2015) 42; Georg Vanberg, ‘Legislative-Judicial Relations: A Game-Theoretic Approach to Constitutional Review’ (2001) 45(2) *American Journal of Political Science* 347; Arnold Reiner, ‘Constitutional Courts of Central and European Countries as a Dynamic Source of Modern Legal Ideas’ (2003) 18 *Tulane European and Civil Law Forum* 109.

in the category of the disciplines, that focus directly on the constitutional proceedings. The teaching of the constitutional review should essentially be implemented at the level of the Master of Law program,²² since it considers comparative legal aspects in terms of content and requires a different depth of analytics and already existing knowledge. Taking this into account, it is appropriate to define the issues of the constitutional review (in a comparative legal perspective) at the level of the Master of Law, while it is expedient, that at the Bachelor's level are taught issues, directly related to the constitutional proceedings, which will provide both, the knowledge of the procedural issues and relevant skills, the development of which requires adequate time, and most importantly, it is necessary, to focus more on the procedural topics.

IV. CONSTITUTIONAL PROCEEDINGS: LEARNING OUTCOMES AND EVALUATION METHODS

For any educational discipline, the information and knowledge, that the student should gain after successfully completing the subject, and then use in practice, is of the utmost importance.²³ In this process, the fact, that the mentioned knowledge corresponds directly to the content of the subject and the set goals, has a special weight. Unfortunately, the practice of the Accreditation Council proves, that the thematic confusion of the constitutional review and the constitutional proceedings, as well as overlap between the procedural issues and substantive legal issues, is quite frequent.

The end goal of teaching of the constitutional proceedings is to ensure, that a Bachelor of Law has knowledge of the constitutional proceedings, and most importantly, is able to participate in it (legal activity is largely directly related to representation in courts and the process of litigation).²⁴ Consequently, its content should be fully focused only on legal-procedural topics, in particular, the legal nature of constitutional proceedings, principles of the constitutional proceedings, the procedure of adoption of decisions of the Constitutional Court, stages of the constitutional proceedings, such as registration of the constitutional claims/constitutional submissions, acceptance for review on the merits, review on the merits, exercise of the powers of the Constitutional Court, procedural aspects, etc.

²² “Characteristics of the educational program in the field of law”, III, 3.1.1, approved by the Order of the Director of the National Center for Education Quality Enhancement of April 2, 2020 (MES 12000326937), III, 3.2.

²³ Declan Kennedy, Formation and implementation of learning outcomes (translation by L. Bakradze, edited by L. Bakradze and A. Kitiashvili, Tbilisi 2014) 8-12.

²⁴ Types of economic activity (2nd edition, National Statistical Service of Georgia, Tbilisi 2016) 282 <https://www.geostat.ge/media/13408/NACE-Rev-2_Georgian_2016.pdf> (in Georgian) [last accessed on 15 November 2022].

It is quite possible, considering the attitude to the subject (especially if the constitutional proceedings are integrated with the constitutional review), to additionally teach the topic of the constitutional review, although this should not happen at the expense of reducing the time dedicated to the issues of the proceedings itself. Their mere inclusion in the syllabus will not meet either the requirements of the characteristics of the field of law, or even more so, the goal of teaching, oriented towards the needs of the modern labor market.

Along with knowledge, it is important that as a result of studying of the constitutional proceedings, the student should be able to use this knowledge in practice and possess appropriate skills. These necessary skills can be grouped into several areas: 1. Drafting and making motivation for procedural documents: here is meant both a constitutional claim and a counterclaim (in the functional sense of this word, the document, which represents a legal response of the constitutional body adopting the challenged normative act), petition, amicus curiae submissions, and etc. Special attention should be paid not only to the filling of official forms, but also to the qualitative side of substantiation (argumentation on the basis of uniform court practice, theory of rights and other important sources); 2. Determination of the claim, selection of the mechanism of protection of the right, taking into account the uniform judicial practice; 3. Substantiated presentation of positions at the oral hearing (both during the preliminary, as well as substantive hearing), formulation of questions and answers, technique of persuasive participation in the court debates; 4. Application of the principles of the constitutional proceedings and procedural mechanisms during the proceedings; 5. Compliance with ethical norms (which should also be integrated into the responsibility-autonomy component and be verifiable by the appropriate evaluation method).

Determining the learning outcomes shall have no sense and shall be a mere formality, if it is not supported by the evaluation methods and criteria, that ensure the achievement of the outcomes determined by the content of the subject. If the evaluation methodology is focused on the evaluation of theoretical knowledge, none of the goals will be achieved. Within the framework of studying the constitutional proceedings, the student must create procedural documents and directly participate in moot constitutional proceedings. These components should constitute the largest share of aspects, subject to evaluation, and most importantly, appropriate feedback should be received.

V. CONCLUSION

The practice of teaching constitutional proceedings is gradually introduced in Georgia. Making it obligatory is of course an important step for development, although it is definitely not easy to implement. Despite its uniqueness for legal education and practical activities, unfortunately, both in terms of content and formality, the formation of the

structure and design of the educational discipline encountered many difficulties. Most of the challenges can be solved and educational efforts can be channeled in the right direction.

The contents of the constitutional proceedings and the constitutional review are different from each other, and their confusion contradicts the goal of the characteristic of the field of law, which is to ensure, that a Bachelor of Law knows the constitutional proceedings. The latter is completely procedural in nature and focuses directly on the practical implementation of the constitutional control. Therefore, its content should fully cover the topic of litigation (and not comparative constitutional review). Although it is possible to study it together with the issues related to the constitutional review, it should not suffer due to the thematic overlap and focus on the substantive legal direction. In this regard, it is expedient to teach the constitutional proceedings as a separate discipline.

Along with knowledge, it is necessary for the graduate to have appropriate skills, as a result of which he/she will be able to directly participate in the constitutional proceedings (using appropriate forms and mechanisms at all stages). This is directly related to the methods of evaluation of knowledge and criteria, which should include preparation of relevant documents and oral demonstration of procedural skills. Otherwise, it is impossible to measure the learning outcomes and be real and focused on the labor market. Despite the high and diverse goals, the main purpose of the undergraduate law program is to prepare a practicing lawyer, who must be able to apply the acquired knowledge and skills in practice, the need of which is even more obvious in the case of the constitutional proceedings.