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FOREWORD

It is essential for the development of constitutional law to have an academic discussion on topical legal matters. The work of scientists, practitioners of the legal profession or young scholars make a valuable contribution to raising the knowledge and awareness of constitutional law. An active academic platform contributes to a new understanding of the essence of constitutionalism and the standards of its application in practice, and it also ensures broad public participation in the legal discussion.

This edition of the "Constitutional Law Journal" is dedicated to the discussion of a number of issues of constitutional and legal importance, which are relevant both in Georgia and abroad. The publication combines six academic articles of Georgian authors and also a book review of a foreign author. In particular, the journal contains the works of Georgian scholars on important legal matters, such as: the consultative jurisdiction of the European Court of Human Rights (authored by Professor Eva Gotsiridze, Justice of the Constitutional Court), the constitutional assessment of the territorial arrangement of Georgia (authored by Assoc. Professor Tinatin Erkvania), the presidential power of pardon (authored by Assoc. Professor Tamar Avaliani), evidentiary standards in cases of domestic violence and family crimes (authored by Professor Marine Kvatchadze, Natia Jugheli and Elene Ghvinjilia), the prohibition of retroactive force of the law in substantive criminal law (authored by Assoc. Professor, Judge Lavrenti Maghlakelidze), *ex post* constitutional control of international agreements (authored by Giorgi Nakashidze) and a book review of Yaniv Roznai on the topic of unconstitutional constitutional amendments (authored by Professor Malkhaz Nakashidze).

In addition, this publication provides case notes of two judgments decided by the Constitutional Court of Georgia in 2021. In particular, the judgments of the Constitutional Court of Georgia of 15 July 2021 №2/1/1289 («Giorgi Beruashvili vs. Parliament of Georgia») and 25 December 2020 №2/2/1276 («Giorgi Keburia vs. Parliament of Georgia»). In the former case, the Constitutional Court assessed the constitutionality of imposing criminal liability for persuading a minor to commit an anti-social act, and in the latter judgement, the constitutionality of the norms of the Criminal Procedure Code regulating the purpose and basis of the search, as well as the evidentiary standard for issuing a guilty verdict were adjudicated.

I am glad that upon reshuffle, several distinguished Georgian and foreign legal scholars from Europe and the United States of America have been added to the editorial board of the "Constitutional Law Journal". A representative editorial board will raise the authority of the publication and provide a better opportunity, on the one hand, for Georgian authors to present their works to the international community, and on the other hand, will ensure Georgian readers' access to the works of many internationally recognised scholars and practitioners.

Professor **Merab Turava**

President of the Constitutional Court of Georgia

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Tinatin Erkvania[*]

UNITARIANISM WITH ATTRIBUTES OF REGIONALISM – CERTAIN ASPECTS AND RELEVANT GEORGIAN CONTEXT

ABSTRACT

The territorial organisation of Georgia in the current context is difficult to describe with complete precision, but it can be defined as unitarianism with regional autonomies. In this respect, the regional autonomies are the Autonomous Republic of Ajara and the Autonomous Republic of Abkhazia. In addition, the temporary administrative-territorial unit established on the territory of the former Autonomous Region of South Ossetia has a special status.

In general, three classical models (conventional classification) are relevant in the context of territorial organisation: unitarianism, regionalism, and federalism. There are several configurations of these three models. Federalism, in a broad sense, is a subtype of regionalism, while unitarianism can also be represented by attributes of regionalism. Regionalism, in a narrow sense, refers to a constitutional-legal format which includes the classification of territorial units into regions and the territorial division of the unified state into regional autonomies (for example, Spain and Italy).

Given all of the above, the main aim of the Article is to overview the extended standard of regional/political autonomy, with a focus on the idea of improving the Georgian model of territorial organisation, only using Catalonia and South Tyrol as examples so far.

This Article was written as part of a research mission to the Faculty of Law of Humboldt University of Berlin. It aims to implement the research project "Strategy for Georgia's De-Occupation and Future Perspectives of Territorial Organisation". The Article presents only one of the topics that have been developed in the framework of this project. In particular, what exactly, for example, Abkhaz political autonomy should

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In general, everything depends on a political decision to be taken by the Georgian state, taking into account the political rights of Abkhazians as an ethnic minority (or people), and this path may end up in the process of federalisation of the country. In this perspective, the concrete prospect of federalisation of Georgia is among the topics to be explored and is the subject of ongoing research within the framework of the above project.

As a result of the constitutional reform in 2017-2018, it was clarified that the territorial structure in Georgia would be reconsidered once jurisdiction over the entire territory was fully restored, and it should be emphasised that the de-occupation process should start with defining legal benchmarks and identifying a specific model of a territorial structure. The political process cannot outpace the legal process and vice versa.

I. INTRODUCTION

The territorial organisation of Georgia in the current context is difficult to describe with complete precision but it can be defined as unitarianism with regional autonomies. In this respect, the regional autonomies are: the Autonomous Republic of Ajara and the Autonomous Republic of Abkhazia. In addition, the temporary administrative-territorial unit established on the territory of the former Autonomous Region of South Ossetia has a special status.

In general, three classical models (conventional classification) are relevant in the context of territorial organisation: unitarianism, regionalism, and federalism. There are several configurations of these three models. Federalism, in a broad sense, is a subtype of regionalism, while unitarianism can also be represented by attributes of regionalism. Regionalism, in a narrow sense, refers to a constitutional-legal format which includes the classification of territorial units into regions and the territorial division of the unified state into regional autonomies (for example, Spain and Italy).

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There is a consensus among international organisations (in particular within the UN) as well as legal professionals that Abkhazia and the Tskhinvali Region enjoy no right to

secession.[2] "There is no right of secession, in the name of self-determination, for groups living within a State".[3] Furthermore, even if the Abkhaz nation is granted the status of "people", they still have no right to so-called secession, or withdrawal, from Georgia, since modern international law in this sense leans in favour of state integration and excludes the right of secession[4]. As sui generis, the case of Kosovo, whose declaration of independence has been recognised as legitimate by the International Court of Justice of the United Nations (UN), is entirely unique in this context.[5]

Notably, it is rare for a country's constitution to address the issue of secession. In this respect, two cases are distinguished: when the constitution explicitly prohibits secession (negative secession provisions) or declares it admissible (positive secession provisions).[6] For instance, the constitutions of Ecuador, Myanmar and Palau explicitly prohibit secession.[7] Positive secession provisions concerning the admissibility of secession globally are found in the constitutions of the following three countries only: Ethiopia, Sudan and Saint Kitts and Nevis.[8]

Moreover, two models differ in the case of secessionist aspirations of the central government to manage territorial conflicts: the so-called participatory model (Scotland, Quebec) and the denial model (Catalonia).[9] In the first model, the central government seeks to enable the regional authorities to decide their own destiny through democratic processes, for example, through a referendum. In the second, the central government completely ignores demands for secession and makes no concessions. There is also a third model which relates to the issue of granting extended autonomous rights to a region seeking secession (the autonomy maximisation model).[10]

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[2] Thomas Burri, 'Secession in the CIS - Causes, Consequences, and Emerging Principles' in Christian Walter and others (eds), Self-Determination and Secession in International Law (Oxford University Press 2014) 141; James Ker-Lindsay, The Foreign Policy of Counter Secession – Preventing the Recognition of Contested States (Oxford University Press 2013) 24 et seq; Surya Prakash Sharma, Territorial Acquisition, Disputes and International Law (Brill Nijhoff 1997) 225; Christopher Heath Wellman, A Theory of Secession – The Case for Political Self-Determination (Cambridge University Press 2005) 180.

[3] Photini Pazartzis, 'Secession and International Law in the European Dimension' in Marcelo G. Kohen (ed), Secession – International Law Perspectives (Cambridge University Press 2006) 361; Pau Bossacoma Busquets, Morality and Legality of Secession – A Theory of National Self-Determination (Palgrave Macmillan 2020) 364-365.

[4] Tinatin Erkvania, 'Constitutional Framework of the Conflict Regions in Georgia and the Latest Attempts for their Regulation' (2021) 5(1) Journal of Politics and Democratization 1–33.

[5] Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion of 22 July 2010, ICJ Reports, 2010.

[6] Anna Gamper, 'Regionalismus und Sezession – verfassungsrechtliche Herausforderungen und Antworten im europäischen Vergleich' in Walter Obwexer and others (eds), Integration oder Desintegration? Herausforderungen für die Regionen in Europa (Nomos 2018) 61 et seq.

[7] ibid.

[8] ibid.

[9] ibid.

[10] ibid, 78 et seq.

In general, several types of asymmetry are distinguished in the context of the asymmetry of the region's special status:[1] *functional, political, institutional, symbolic* and *regime asymmetries*. These types of asymmetries influence the formation of policies that differ from the standard political processes of territorial autonomy.

Functional, or *horizontal*, *asymmetry* refers to a case where a region with a special status enjoys extensive autonomy. In this case, one region has stronger powers in terms of its freedom of decision-making than other regions within the same state. Such asymmetry can be linked both to general political powers (for example, Catalonia) and to fiscal and monetary policies (for example, Hong Kong).

Political, or *vertical*, *asymmetry* refers to a case where the powers granted to a territorial unit are stronger (deeper) compared to other regions in the same state. Political asymmetry refers to the extent of self-governance that territorial autonomy has within the limits of assigned functions/powers.

Institutional asymmetry refers to a case where territorial autonomy with a special status has institutions with different names, designs and orders compared to other regions in the same state. The high degree of institutional asymmetry can develop into regime asymmetry.

Symbolic asymmetry refers to a case where territorial autonomy recognises its own identity by accentuating more different symbols than in other regions within the same state. These symbols can emphasise the idea of "nation", "nationality", "people", and "different society". All this may result in the creation of territorial political institutions with different names or territorial flags, emblems, anthems or sports groups.

Finally, regime asymmetry is present when the economic and political regime of a particular territorial autonomy differs from the entire political and economic system of the state to the extent that the two spaces (the regional and the central government) rely on different principles in perceiving political legitimacy and constitutional order. The experiences of central Tibet and Hong Kong ("one state, two systems" – this principle underpins Hong Kong's territorial autonomy) are remarkable in this respect.

In addition to the above, the special status of territorial autonomy may be *devolutionary* or *integrative*. Devolutionary autonomy refers to the case where the powers of the central government are transferred to territorial units that form an integral part of the state concerned. The purpose of the special status of devolutionary autonomy is to satisfy the needs of the society of the territorial unit concerned, implying the acceptance by the latter of the legitimacy of inclusion in the state. Catalonia and Corsica are examples of special devolutionary autonomy.

[1] Susan J. Henders, Territoriality, Asymmetry, And Autonomy: Catalonia, Corsica, Hong Kong, and Tibet (Palgrave Macmillan 2010) 15 et seq.

The special status of territorial autonomy may also be *integrative*. This is the case when a territorial unit is incorporated into a new state and granted the status of autonomy. Hong Kong and Tibet are examples of integrative autonomy from 1997 and the 1950s, respectively. Over time, the characteristics of integrative autonomy may evolve into those of devolutionary autonomy.

The statuses of territorial autonomies also vary according to *temporality*. In particular, this standard (temporality, with a focus on time) refers to cases where territorial autonomy is either permanent or temporary. For example, the special status of Hong Kong's administrative region was determined until a certain date, and that date was 1 July 1947. However, when central Tibet was first incorporated into the People's Republic of China in the 1950s, it was granted a temporal (temporary) special status, without a specific date being indicated. *Permanent* special autonomy does not imply any limits in terms of time and duration. Examples of permanent autonomies are Catalonia and Corsica.

In addition, the constitutional status of federal units, territorial units of quasi-federal regional states and regions emerging from decentralisation in unitary states varies in constitutional and legal terms.[2] In general, federalism is a subtype of regionalism. However, regionalism in the narrow sense is often referred to as the "little brother" of federalism. As a rule, regionalism is discussed in the legal scholarly literature in a general context – with a focus on the autonomous rights of the central government of the regions. As for federalism, in this respect, it is often referred to as a specific type of regionalism.[3]

Regionalism is often mentioned in the scholarly literature (and not only), and, in general, federalisation is one of the possible tools for the resolution of territorial/ethnic conflicts.[4]

The present article describes essentially the characteristics of Spanish and, to some extent, Italian regionalism in the way of identifying the standards and institutional features of the Georgian model of regionalism.

[2] Gudrun M. Grabher and Ursula Mathis-Moser (eds), Regionalism(s) – A Variety of Perspectives from Europe and the Americas (New Academic Press 2014) 3 et seq.

[3] ibid; Csilla Dömők, Europa der Nationen und Regionen – eine Geschichte von Einheit und Identität: Regionalismus und Föderalismus in Europa (WVB 2018) 79 et seq.

[4] Michael Wolffsohn, Zum Weltfrieden, Ein politischer Entwurf (DTV 2015); Soeren Keil and Elisabeth Alber, Federalism as a Tool of Conflict Resolution (Routledge 2021) 1 et seq.; Bettina Pettersohn, Konfliktregulierung in multinationalen Demokratien – Föderalismus und Verfassungsreformprozesse in Kanada und Belgien im Vergleich (Nomos 2013) 60 et seq.

II. TERRITORIAL CONFLICTS IN GEORGIA: THE POLITICAL SYSTEM AND AUTONOMY IN ABKHAZIA AND THE TSKHINVALI REGION (SAMACHABLO) – PREHISTORY AND TODAY

1. CONSTITUTIONAL STATUS OF THE ABKHAZIA REGION – PAST AND PRESENT

1.1. Population and administrative division of Abkhazia

It is difficult to determine the exact population of Abkhazia, as the region is occupied by Russia[5] and therefore no census is conducted by the Georgian authorities. In addition, the war in Abkhazia and the ethnic cleansing of Georgians affected the current population of Abkhazia.[6]

The exact number of the current population of Abkhazia is unknown. According to the de facto authorities,[7] the number of the population was 215 972 in 2003 and 240 705 in 2011. However, these figures are not reliable for the Georgian side. According to Geostat's estimates, the region had 179 000 inhabitants in 2003 and 178 000 in 2005. The UNDP estimated between 180 000 and 220 000, while the International Crisis Group estimated between 157 000 and 190 000 in 2006.

The well-known events of 1992-93 dramatically changed the demographic situation in the Autonomous Republic of Abkhazia. The level of migration among the local population increased. The total Georgian population in the occupied territory of Abkhazia decreased by 88.5%. During the Soviet period, according to the 1989 census, and according to the Statistics Division of the Ministry of Economy of the Autonomous Republic of Abkhazia, there were 525 061 residents in Abkhazia, including ethnic Georgians – 239 900 (46%); ethnic Abkhazians – 93 300 (18%); Russians – 74 900 (14%); and Armenians – 76 500 (15%).

According to Article 6(1) of the Law of Georgia on Internally Displaced Persons, "an internally displaced person (IDP) shall be deemed a citizen or a stateless person

[5] Article 2, Law of Georgia on Occupied Territories <https://matsne.gov.ge/ka/document/view/19132?publication=8> [last accessed on 10 May 2022].

[6] The massacre and forced displacement of ethnic Georgians from the territory of the Autonomous Republic of Abkhazia during the Abkhaz war of 1992-1993 and the conflict of 1998. The ethnic cleansing of Georgians is recognised by the Organization for Security and Cooperation in Europe (OSCE) conventions adopted at the Budapest, Istanbul and Lisbon summits (in 1994, 1996 and 1997, respectively). The ethnic cleansing of Georgians in Abkhazia was also recognised by the United Nations (UN) (see General Assembly Resolution A/RES/62/249 of 15 May 2008. In addition, the UN Security Council adopted a number of resolutions on ceasefires in the occupied territories of Georgia).

[7] As a rule, Georgians and Mingrelians are represented as different ethnic groups in the "official" statistics of the de facto authorities. By reinforcing the Mingrelian "identity", the de facto government of Abkhazia seeks to artificially reduce the number of ethnic Georgians living in Abkhazia and, as a result, reduce Georgian influence in Gali district.

permanently residing in Georgia, who was forced to leave his/her permanent place of residence and move within the territory of Georgia, because the aggression of a foreign country, an armed conflict or massive violations of human rights posed a threat to his/her or his/her family member's life, health or freedom."

According to the latest data from the Ministry of Internally Displaced Persons from the Occupied Territories, Labour, Health and Social Affairs of Georgia, in Georgia there are up to 277 000 internally displaced persons from Tskhinvali and Abkhazia regions. According to the International Displacement Monitoring Centre (IDMC), there are currently 293 000 internally displaced persons in Georgia. The difference in the data is mainly due to a different system of estimation and analysis.

In terms of administrative division, the Autonomous Republic of Abkhazia is administratively divided into 7 municipalities: Azhara municipality, Gagra municipality, Gali municipality, Gudauta municipality, Gulripshi municipality, Ochamchire municipality and Sokhumi municipality.

The area of the Autonomous Republic is 8 700 sq km. The capital of the autonomy is the city of Sokhumi. There are 526 settlements on the territory of the autonomy, including 7 towns (New Athos, Gagra, Gali, Gudauta, Ochamchire, Sukhumi, Tkvarcheli), 5 settlements (Bichvinta, Gantiadi, Gulripshi, Leselidze, Miusera) and 514 villages.

Since 1993, the entire territory of Abkhazia (with the exception of the Kodori Gorge until 2008) has been under the control of the separatist regime.

1.2. Political system of the Autonomous Republic of Abkhazia – prehistory and today

When we talk about the political system in the Abkhazia region, in a historical context the Abkhaz Autonomous Soviet Socialist Republic (1931-1992) and the Autonomous Republic of Abkhazia, already within the independent Democratic Republic of Georgia (existing from 1991 up to the present), differs from each other. Besides, the separatist "Republic of Abkhazia" has its political system (from 1992 up to the present).[8]

In addition to the above, from 1921-1931 there was the Abkhaz Soviet Socialist Republic (ASSR). In December 1921, an agreement was concluded between the Georgian Soviet Socialist Republic and the Abkhaz Soviet Socialist Republic, according to which Abkhazia became part of Georgia. On 16 December 1921, the Abkhaz SSR became part of the Georgian SSR on a federal basis to join the Transcaucasian Socialist Federative Soviet Republic (SFSR).[9] On 13 December 1922, the Abkhaz SSR joined

[8] It should be stressed that on 12 October 1999 an Act of Independence of "the Republic of Abkhazia" was passed based on the 1999 referendum. Accordingly, separatist Abkhazia legally considered itself a constituent entity of Georgia until today.

[9] The Transcaucasian Socialist Federative Soviet Republic (the Transcaucasian Federation, the TSFSR)

the Transcaucasian SFSR as a constituent entity of the Georgian SSR. On 19 February 1931, the status of the Abkhaz SSR was changed to an autonomous republic.

The first constitution of the Abkhaz SSR (if we do not take into account the unofficial constitution of 1925) was adopted only in 1927. Prior to this, since Abkhazia had not had its own constitution for years, the 1922 Constitution of the Georgian SSR, which stipulated Abkhazia's place within Georgia, applied to its territory following the signing of the agreement with Georgia.

According to the Law on the Representation of National Minorities in the National Council of Georgia of 13 September 1918, the Abkhazians had 3 out of 26 seats for representatives of national minorities.

In 1918-1921, Abkhazia was part of the Democratic Republic of Georgia with the status of autonomy. This was reflected in the Constitution of Georgia adopted by the Constituent Assembly of the Democratic Republic of Georgia in February 1921, which relates to the national-state structure of the country (see Chapter 11 of the 1921 Constitution of Georgia).

From 11 June 1918, Abkhazia was an autonomous unit of the Democratic Republic of Georgia, which was officially confirmed on 20 March 1919 by the People's Council of Abkhazia, a supreme juridical body elected in the democratic elections conducted for the first time in Abkhazia. On 16 October 1920, the same body approved a draft constitution of autonomous Abkhazia and forwarded it for approval to the Constituent Assembly, a supreme legislative body of the Democratic Republic of Georgia.

Thus, in 1919-1921, there existed the People's Council of Abkhazia, which was a legitimate legislative body and was elected as a result of the first general elections on the territory of Abkhazia on 13 February 1919.

The People's Council of Abkhazia was multi-party and multi-national. It was composed of 40 deputies who represented 7 factions (27 Social Democrats, 4 Independent Socialists, 3 non-partisan right-wingers, 3 Socialist-Revolutionaries (SRs), 1 National Democrat, 1 Socialist-Federalist, 1 non-partisan colonist). Twenty deputies were ethnic Abkhazians. Of the 40 deputies, 7 (4 Independent Socialists and 3 non-partisan right-wingers) had a radically anti-Georgian attitude. They formed an "independent faction" whose aim was to achieve maximum sovereignty for Abkhazia. The first meeting of the Council was held on 18 March 1919. Arzakan Emukhvari was elected chairperson of the Council. Later, he was also head of the Government of Abkhazia. At the meeting held on 20 March, an Act of Autonomy of Abkhazia was adopted. The document also provided

was a Soviet republic that existed between 1922 and 1936. It comprised the Republics of Georgia, Armenia and Azerbaijan, as well as the Abkhaz SSR in 1922-1931. After 1936, the three Transcaucasian countries became part of the Soviet Union separately.

for the drafting of the Constitution of Abkhazia by a parity commission established with the participation of the People's Council of Abkhazia and the Constituent Assembly of Georgia. The adoption of the Constitution was delayed by the uncompromising policy of the opposition. In October 1920, the People's Council of Abkhazia approved the Regulations on the Autonomous Management of Abkhazia. Following the invasion of Abkhazia by the Red Army and the seizure of Sokhumi on 4 March 1921, the People's Council Abkhazia ceased its activities.

On 20 March 1919, the newly elected People's Council of Abkhazia adopted an Act of Autonomy and submitted it to the Constituent Assembly of Georgia for approval. It stated that:

- Abkhazia is part of the state of Georgia as an autonomous element and notifies thereof the Parliament and the Government of Georgia;
- A constitution shall be drafted for autonomous Abkhazia that will regulate the relationship between the central (all-Georgian) authorities and the autonomous authorities;
- A remote parity commission shall be established to draft the constitution, composed of members of the People's Council and members of the Parliament of Georgia;
- Provisions developed by the commission shall be incorporated into the Constitution of the Democratic Republic of Georgia.

On 29 December 1920, the Small Constitutional Commission of the Constituent Assembly of Georgia adopted Regulations on the Management of Autonomous Abkhazia. The Constituent Assembly of Georgia incorporated the basic principles of the autonomy of Abkhazia into the Constitution of Georgia.

On 21 February 1921, the first Constitution of Georgia, adopted by the Constituent Assembly, constitutionally enshrined the autonomous status of Abkhazia as part of the unified state of Georgia – the Democratic Republic of Georgia.

At this stage, the authorities of the Autonomous Republic of Abkhazia in exile are represented by the Supreme Council of the Autonomous Republic of Abkhazia (the legislative body) and the Council of Ministers (the executive body) of the Autonomous Republic of Abkhazia, which have been based in Tbilisi since 1993.

Accordingly, after the occupation of Georgia by Soviet Russia, the Abkhaz Soviet Socialist Republic (the Abkhaz SSR, officially from 31 March 1921 to 19 February 1931) was established, which was independent for a certain period of time. In particular, on 16 December 1921, the Abkhaz SSR joined the Georgian SSR under the relevant agreement and became subordinated to the latter. In 1931-1992, there existed the Abkhaz Autonomous Soviet Socialist Republic (the Abkhaz ASSR), which was part of the Georgian SSR.

Notably, the Abkhaz side still refers to the fact of the existence of the Abkhaz SSR and demands the restoration of independence based on the same standard.

Following the restoration of Georgian independence, on 9 July 1991, the Abkhaz ASSR passed a Law on the Elections of Deputies of the Supreme Council of the Abkhaz ASSR (amended on 27 August 1991). Under this law, 28 seats were allotted to the representatives of Abkhaz nationality, who made up just 18% of the population of the Autonomous Republic. The Georgian population, which then made of about 47.6% of Abkhazia, had 26 seats, while the remaining national minority had 11 seats.

On 23 July 1992, a group of separatist-minded deputies of the Supreme Council of the Abkhaz ASSR, despite not having 2/3 of the votes necessary to implement constitutional amendments, by a simple majority, completely abolished the 1978 Constitution of the Abkhaz ASSR, renounced the name "the Abkhaz Autonomous Soviet Socialist Republic" and proclaimed the new Republic of Abkhazia. Later, the Georgian faction of the deputies of the Abkhaz ASSR replaced the aforementioned name with the "Autonomous Republic of Abkhazia".

According to the version of the 1978 Constitution of the Abkhaz ASSR at the material time, the passing of laws and other acts on issues of the legal status of Abkhazia, and the making of decisions on issues related to amendments to the Constitution of the Autonomous Republic and on holding a referendum and electing or appointing high-ranking officials, as well as relevant bodies, should have been carried out by the two-thirds of the deputies of the Supreme Council of the Abkhaz ASSR. Despite this, with the adoption of the illegal Declaration on the State Sovereignty of Abkhazia, the leadership of the Abkhaz ASSR consistently began to implement legislative and organisational measures, the ultimate goal of which was to infringe on the territorial integrity of Georgia and secede from Georgia.

This policy forced Georgian deputies (26 seats) and other representatives of national minorities (11 seats) to leave the Supreme Council of the ASSR.

At the time, in 1991-1992, by a decree of the Presidium of the Supreme Council of the Abkhaz ASSR (the Supreme Council elected its standing and accountable body, the Presidium of the Supreme Council of the Abkhaz ASSR, which performed the functions of the highest state authority of the Abkhaz ASSR during the period between the sessions of the Supreme Council), normative acts were adopted, whereby a number of laws of the Republic of Georgia were declared invalidated in Abkhazia.

On 24 July 1992, Abkhazian legislators adopted a decision, according to which the 1978 Constitution of the Abkhaz ASSR ceased to have an effect and the 1925 Constitution of the Abkhaz SSR was restored, while no such legislative act was adopted in 1925. In 1925, there was only a draft of such a document. The constitutional requirement that

such a decision could be adopted only by the votes of two-thirds of the deputies were neglected.

In 1994-1996, the Parliament of Georgia adopted several important resolutions. These were the resolutions of 10 March 1994, 24 February 1995, 14 June 1995, 17 April 1996 and 25 December 1996.

- By the resolution of 10 March 1994, the Parliament of Georgia dissolved the Supreme Council of the Abkhaz ASSR, recognised the Government of the Autonomous Republic of Abkhazia as a government-in-exile and repealed the Law of the Abkhaz ASSR of 9 July 1991 (as of 27 August 1991) on the Elections of the Supreme Council of the Abkhaz ASSR (Georgians also called this law an apartheid law because only 26 deputy seats were given to the Georgian population). Under the same resolution, all the legal acts adopted in violation of the then legislation of Georgia, including the Autonomous Republic of Abkhazia, were declared to have no legal effect.
- By the resolution of 24 February 1995, the Parliament of Georgia restored the seats of 26 deputies of the Supreme Council of Abkhazia, in particular, declaring "those deputies elected to the Supreme Council of the Abkhaz ASSR in 1991 and representing the genuine interests of the majority of the population of Abkhazia and who did not take part in the anti-constitutional activities of the Gudauta separatist group – to be the Supreme Council, a supreme representative and legislative body of the Autonomous Republic of Abkhazia".
- On 14 June 1995, by a resolution of the Parliament of Georgia, due to the state of emergency in the Autonomous Republic of Abkhazia, the members of the Parliament of Georgia elected in Abkhazia were admitted by way of co-option to the membership of the Supreme Council of Abkhazia. Accordingly, the resolution stipulated that, in addition to the above-mentioned 26 deputies, the Autonomous Republic of Abkhazia also includes deputies elected to the Parliament of Georgia from the Autonomous Republic of Abkhazia in 1992.
- According to the resolution of 17 April 1996, the so-called Constitution of the Republic of Abkhazia adopted by separatists, the institution of a president, and the treaties and agreements with foreign entities have no legal force and are null and void. This also applies to all governing bodies and their decisions, as well as civil law agreements in conflict with the legislation of Georgia and the Autonomous Republic of Abkhazia".
- The Resolution of the Parliament of Georgia of 25 December 1996 "On Extending the Term of Powers of the Supreme Council of the Autonomous Republic of Abkhazia" provided for the extension of the powers of the Supreme Council of the

Autonomous Republic of Abkhazia until the actual restoration of the jurisdiction in Georgia.

The Supreme Council of the Autonomous Republic of Abkhazia currently consists of the members elected in 1991 and the members elected in 1992 from the Autonomous Republic of Abkhazia to the Parliament of Georgia. Some of them are no longer alive today, and the question of a further full or partial renewal of the Supreme Council remains contentious and problematic (obviously, before the restoration of territorial integrity, if this process lasts long). The current constitution of the Autonomous Republic of Abkhazia is an amended and revised version of the Constitution of the Abkhaz ASSR of 6 June 1978 (the latest version is the version updated in 2019).

2. LEGAL STATUS OF THE TSKHINVALI REGION (ALSO KNOWN AS SOUTH OSSETIA) – PAST AND PRESENT

2.1. Population and administrative division of the Tskhinvali Region

The Tskhinvali Region (i.e. Shida Kartli, or Samachablo) currently covers the territory of the Autonomous Region of South Ossetia of the former Georgian SSR (1922-1990). The territory of the former autonomy is part of the regions of Shida Kartli and Mtskheta-Mtianeti. In addition, there is a temporary administrative-territorial unit on the territory of the former Autonomous Region of South Ossetia, which includes the territory of the former Autonomous Region of South Ossetia (abolished in 1991). This temporary administrative-territorial unit was created by the resolution of the Parliament of Georgia of 8 May 2007. On 10 May of the same year, by an order of the President of Georgia, its administration (the so-called Administration of South Ossetia) was formed.

In addition, in 2007, a law on the creation of appropriate conditions for the peaceful resolution of the conflict in the former Autonomous Region of South Ossetia was adopted, which "aims to create all conditions for the former Autonomous Region of South Ossetia to define autonomous status within the state of Georgia, to confer on it broad political self-governance and to hold democratic elections with a view to ensuring the cultural identity of the Ossetian people in the state of Georgia and the political self-government of the region".

The self-governing units in the Tskhinvali Region are: Akhalgori municipality, Eredvi municipality, Tighva municipality, Kurta municipality, Java municipality and the city of Tskhinvali.

As for the population of the Tskhinvali Region, in Soviet times, according to the 1989 census, the population of the Autonomous Region of South Ossetia was 98 527, of whom 65 232 (66%) were ethnic Ossetians and 28 544 (29%) were Georgians. After the

August 2008 war, figures were published for 2012, according to which 51 600 people were living in the Tskhinvali Region, including 46 000 (89%) ethnic Ossetians and 4 600 Georgians (9%). In 2015, the *de facto* authorities of the Tskhinvali Region conducted a census. The population of the "Republic" is 53 532, including 48 146 ethnic Ossetians (90%) and 3 966 (7%) Georgians.

As of December 2009, over 251 000 internally displaced persons from Abkhazia and the Tskhinvali Region were registered in Georgia, representing about 6% of Georgia's population. After the Russian-Georgian conflict in August 2008, up to 26 000 people were added to those numbers.

As a result of this war, Georgia lost the Kodori Gorge, also known as upper Abkhazia, the Liakhvi Gorge and the Akhalgori region.

2.2. Political system of the Tskhinvali Region – prehistory and today

On 6 March 1921, after the occupation of Georgia, the Revolutionary Committee (Revcom) of South Ossetia was set up. The final legalisation of the terms "South Ossetia" and "North Ossetia" took place in 1922-1924 when first "the Autonomous Region of South Ossetia" was formed (April 1922) and two years later "the North Ossetian ASSR" (July 1924). The so-called Autonomous Region of South Ossetia was part of the Georgian SSR from 20 April 1922 to 11 December 1990.

Today's Tskhinvali Region includes the territory of the Autonomous Region of South Ossetia of the former Georgian SSR (1922-1990). As a result of the Georgian-Ossetian conflict that started in 1989, the Supreme Council of Georgia abolished the status of region on 10 December 1990.

The separatist forces declared independence in 1990 under the name of the "Soviet Democratic Republic of South Ossetia", which led to hostilities in the region in 1991-1992.

On 11 December 1990, the Supreme Council of the Republic of Georgia passed a Law on Abolishing the Autonomous Region of South Ossetia. In 1991, Tskhinvali and Znauri districts were abolished, Tskhinvali district merged with Gori district, and Znauri district with Kareli district. Several villages in Java district were transferred to Sachkhere and Oni districts. The town of Znauri was named Kornisi. At the same time, in 1990-1991, there was an armed confrontation between the central government of Georgia and the forces of the Autonomous Region of South Ossetia. On 24 June 1992, Georgia and Russia signed an agreement in Dagomys, according to which Russian military units in the Tskhinvali Region were given the status of "peacekeeping mission". As a result of the agreement, hostilities ceased, three peacekeeping battalions (Georgian, Russian

and Ossetian) were deployed in the conflict zone, the Tskhinvali Region was divided into the Georgian and Ossetian zones, and a mixed commission consisting of Georgia, Russia, South Ossetia and North Ossetia was established. After the 2008 war, Georgia left the mixed commission, withdrew from the CIS and officially called the presence of Russian armed forces in the Tskhinvali Region an occupation.

In 2008, the Law on Occupied Territories was adopted. This law applies to Abkhazia and the Tskhinvali Region (the territories of the former Autonomous Region of South Ossetia).

III. UNITARIANISM WITH REGIONAL AUTONOMIES IN SPAIN AND ITALY

1. CATALONIA REGION AS A MODEL OF TERRITORIAL AUTONOMY (SPAIN) FOR GEORGIA

The standards of Spanish and Italian regionalism, in particular, Catalonia[10] and Trentino-Alto Adige/South Tyrol's models of territorial autonomy can serve as interesting examples for determining the status of the Parliament of the Abkhazia region. In both cases, the question of granting territorial autonomy is linked to the protection of ethnic minorities. Both Spain and Italy do not officially grant the status of "people" to respective ethnic minorities (in the case of Catalonia, the Catalans; and in the case of Tyrol, the Germans and Ladins)... Hence, in this context, a discussion on peoples' right to political self-determination in relation to the territorial autonomies of Spain and Italy take place (so far) only in a political context, without the presence/creation of relevant constitutional and legal bases.

The formation of various autonomous units in Spain took place under complex procedures between 1979 and 1983.[11] The Basque Country, Catalonia, Galicia and Andalusia were the first to adopt the Statute of Autonomy *(Estatutos de Autonomía)*.

Catalonia is one of Spain's 17 regions which, together with the Basque Country and Galicia, enjoys the status of historical autonomy *(nacionalidades históricas)*.[12]

As of today, all the autonomous units enjoy an equal degree of political autonomy and there are rather few differences between their powers (mainly some specific cultural and linguistic powers, civil legislation and some specific provisions on police and public security, immigration, etc.). The only exception is the specific financial system of the Basque Country and Navarre.

[10] Regarding the origin, development and prehistory of the territorial autonomy of Catalonia see Henders, supra note 10, 49 et seq.

[11] Regarding cultural, linguistic and political pluralism in the Kingdom of Spain and thus territorial autonomies see EUI Working Paper, EUF No. 95/6, Language, Collective Identities and Nationalism in Catalonia, and Spain in General, Andrés Barrera-González, 1995.

[12] See the official web page: Gencat <https://web.gencat.cat> [last accessed on 10 May 2022].

The Generalitat of Catalonia (Spanish: *Generalidad de Cataluña*) is a unity of political institutions that carry out the self-governance of the autonomous region of Catalonia in accordance with the Statute of Autonomy. According to the 2006 Statute of this regional autonomy, the Generalitat comprises three institutions:

- the Parliament of Catalonia, which drafts and adopts laws and controls the President and the Government,
- the President of the Generalitat, elected by Parliament from among the deputies and appointed by the King, is the supreme representative of the Generalitat,
- the Government of Catalonia, which consists of the President of the Generalitat and ministers (consellers). The Government implements the laws adopted by Parliament, directs the administration and has the power to initiate laws.

The Parliament of Catalonia is unicameral and consists of 135 members elected every four years by direct universal suffrage. They are elected in four constituencies (provinces): 85 in the province of Barcelona, 17 in the province of Girona, 15 in the province of Lleida and 18 in the province of Tarragona. Seats are allocated based on the *D'Hondt* method at the constituency level. Only those parties which receive at least three per cent of the vote in the constituency concerned are included in Parliament.

Parliament adopts laws in accordance with the Statute of Autonomy of Catalonia (the latest version of the Statute has been in force since 2006). The Statute of Catalonia regulates, on the one hand, the powers of the autonomous region vis-à-vis the state of Spain and, on the other hand, the relations of the regional institutions of Catalonia and is therefore the functional equivalent of the Constitution. Amendments to the statute require consent from the Parliament of Catalonia, approval by the Parliament of Spain *(Cortes Generales)* (in the form of an organic law) and approval by a referendum throughout the Catalonia region.

The Regional Parliament of Catalonia elects the President of the Generalitat of Catalonia *(President de la Generalitat de Catalunya)*, who is the head of the regional autonomy. The President of the Generalitat has the power (Statute of Autonomy, Article 67, No 8) to appoint the *Conseller Primer* (i.e. Prime Minister) and appoint other ministers who together form the *Consell Executiu*, or the regional government.

All the institutions of the regional autonomous government of Catalonia together (the Parliament, the President and the Government) form the Generalitat of Catalonia.

The Statute of Autonomy of Catalonia is an organic law of Spain and is the basis of the legal order of the Autonomous Region of Catalonia. It is recognised by Article 147 of the Constitution of Spain as part of the Spanish legal system and regulates the rights and obligations of the citizens of Catalonia, the political institutions of Catalonia, their responsibilities and relations with the state of Spain, as well as the financial resources of the Generalitat of Catalonia.

The first Statute of Catalonia was adopted in 1979. It was confirmed by the referendum held throughout Catalonia and was ratified by the Parliament of Spain in November 1979. On 18 December 1979, *King Juan Carlos I* signed the Statute of Autonomy of Catalonia as the organic law of the state. It entered into force on 31 December.

Until 2006, the political institutions of Catalonia were based on the 1979 Statute of Autonomy. On 30 September 2005, the Parliament of Catalonia adopted "a draft of a new Statute of Autonomy of Catalonia", known as "the Statute of Miravet" because of the place where it was negotiated. After long and emotional negotiations between the parties represented in the Parliament of Spain, about half of the articles of the draft law were changed. On 30 March 2006, the Congress of Deputies of Spain voted for the text. On 10 May 2006, the Parliament of Spain finally approved the statute. In the final referendum held on 18 June 2006, 73.9% of Catalans voted for the new statute. After *King Juan Carlos I* signed the statute on 19 July 2006, it entered into force on 9 August 2006.

On 31 July 2006, a political party called the PP *(Partido Popular)* filed a constitutional claim with the Constitutional Court of Spain *(Tribunal Constitucional)*, in which it considered 114 out of 223 articles of the Statute of Autonomy unconstitutional. Among the provisions appealed, there were about thirty similar or identical articles that are also contained in the statutes of Andalusia and the Balearic Islands. After almost four years of consideration, the court pronounced its decision on 28 June 2010. Interestingly, with regard to referring to Catalonia as a "nation" in the preamble of the Statute of Autonomy, the Constitutional Court found that this had no legal force in general and had no legal effect in interpreting the other provisions of the statute. The claim as a whole was not granted.

The representation of the regions in the central parliament is of interest. Spain is a constitutional/parliamentary monarchy. In general, the *"Cortes Generales"* represent the Parliament of Spain. This constitutional body consists of two houses: the Congress of Deputies *(Congreso de los Diputados)* and the Senate *(Senado)*. They exercise legislative power in the state, approve the state budget, supervise the activities of the Government and fulfil all other functions assigned under the Constitution. No one can be a member of both houses at the same time. There is no imperative mandate. All citizens of Spain who have attained the age of 18 have the right to vote and ballot.

According to Article 68 of the 1978 Constitution of Spain, the Congress of Deputies is composed of 300-400 deputies elected by universal, free, equal, direct and secret suffrage. The Constitution contains the following additional provisions: the electoral constituencies *(circunscripciones)* cover 50 provinces and 2 enclaves of Ceuta and Melilla in North Africa. There are 52 electoral constituencies in total (Article 68.2). Elections are held in defined electoral constituencies in accordance with proportional representation (Article 68.3).

The Senate is the upper representative house of the regions, comparable, for example, to the German Bundesrat, the Austrian Bundesrat and the Council of States of Switzerland. The Senate of Spain currently has 259 members, of whom 208 are elected by general, free, equal, direct and secret suffrage in the following way:

- each province elects four senators (irrespective of the size of the population);
- large islands – Gran Canaria, Mallorca and Tenerife – elect three senators;
- small islands – Ibiza-Formentera, Menorca, Fuerteventura, La Gomera, El Hierro, Lanzarote and La Palma – elect one senator each;
- the African exclaves of Ceuta and Melilla elect 2 senators;
- in addition, the regional parliaments of the autonomous regions of Spain appoint one senator each and an additional senator per one million inhabitants in the region concerned. The number of senators appointed under this system is oriented to the development of the population for each new election and is therefore variable. In total, there are currently 58 senators (since 2011), who are appointed to the Senate by indirect elections. The Senate is also elected for a term of four years.

The Spanish Parliament is a bicameral system. The Congress is a house that provides real people's representation, and the Senate is "a house of territorial representation" (Article 69 of the Constitution). Each province has four senators in the Senate, irrespective of the size of the population.

Overall, the Congress of Deputies has a strong political advantage over the upper house of the Parliament (the Senate).

The Prime Minister and ministers of Spain do not have to be Members of the Parliament at the same time, but the government submits reports on a weekly basis to both the Senate and the Congress at a parliamentary session known as *"sesión de control"* (see Section V of the 1978 Constitution of Spain, § 108). Ministers of lower rank, such as secretaries of state or deputy ministers, are interviewed in parliamentary committees.

According to Article 2 of the 2006 Statute of Catalonia, the highest regional political bodies are:

- the Parliament;
- the President;
- the Government;
- the Council Securing the Statute of Autonomy (Article 76 of the Statute);
- the Ombudsman of Catalonia (Article 78 of the Statute);
- the Court of Auditors (Article 80 of the Statute);
- the Catalan Audiovisual Council (Article 82 of the Statute).

In addition to the above, Catalonia has an independent judicial system and the Council of Justice. Catalonia also has its own Attorney General (see Articles 95-109 of the Statute).

Under the 2006 Statute of Catalonia, the powers of the region are:

- Exceptional powers: the Generalitat has legislative, executive and regulatory powers and is able to pursue independent policies in specific areas. Within the limits of exclusive powers, Catalan legislation is predominantly applicable to other provisions.
- Shared/competitive powers:[13] in matters, in which the Statute of Autonomy grants shared powers to the Generalitat and the central public authorities, the Generalitat has executive and regulatory powers according to the scope defined by the central government (this scope is determined by the Statute). The Generalitat has the right to pursue its own policy, subject to the above criteria. In addition, Parliament adopts laws and expands/makes more specific the criteria defined in the statute to enable the exercise of shared powers.
- Implementing powers: the Generalitat, as part of its executive powers, has regulatory powers, which involve the capacity to adopt resolutions to ensure the implementation of laws adopted by the central authorities, as well as the power to set up its own administrative bodies. In general, these include all the functions and actions that comprise the idea of public governance.
- The Statute of Catalonia separately highlights powers/competencies relating to the implementation of European Union law.
- The Statute also regulates separate matters relating to subventions and their management based on individual powers (see Article 114).
- The Statute also defines the scope and extent of the exercise of autonomous powers (Article 115).

As regards the specific areas in which these powers are exercised, the latter is defined in Articles 116-173 of the Statute. Furthermore, the description of each power specifies whether the power is exclusive, shared/competitive or implementing.

The 2006 Statute of Autonomy of Catalonia also contains a list of basic rights. Individual chapters regulate the relations of the Generalitat with the central government and other bodies of autonomous units, the European Union, the Generalitat's foreign policy powers, the financing of the Generalitat, and the issue of the possibility to reform the statute.

[13] Compare the so-called idea of competitive federalism to Articles 72, 74 and 105 of the Federal Constitution of Germany.

In general, the autonomous regions of Spain can participate in the political decision-making process of EU bodies through the Spanish delegation. Such participation takes place through internal and various sectoral conferences and, since 1997, directly through the committee system that oversees delegated acts implemented by the European Commission (formerly Comitology). In addition, from 9 December 2004, the autonomous units and autonomous cities can participate in certain meetings and working groups of the Council of the European Union.

In general, the upper house of the Parliament of Spain is not considered a representative body of the regions, which is often regarded as a weakness of Spanish regionalism.[14] Another weakness of Spanish regionalism is the lack of horizontal cooperation between the autonomous regions.[15] Moreover, a distinctive feature of Spanish regionalism is the model of bilateral cooperation between the autonomous regions and the central authorities. However, this bilateral cooperation is rather symbolic in practice and, as is often noted, rarely have there been issues that the central government has discussed within the framework of such cooperation with the regions.[16]

In general, as Spain is not a federal state, its judicial system is mainly centralised and belongs to the central government, in contrast to federal systems where only the courts of last resort essentially operate at the central level. The same model applies to the organisation of the judicial system in Italy, which is also a federal republic.

2. TRENTINO-ALTO ADIGE/SOUTH TYROL AS A MODEL OF TERRITORIAL AUTONOMY (ITALY) FOR GEORGIA

South Tyrol's autonomy derives from the principles of protection of ethnic minorities, stemming from the existence of German-speaking and Ladin-speaking groups of the population within the territory of Italy.[17]

Italy is divided into 20 regions, of which 5 (Sardinia, Sicily, Trentino-Alto Adige/South Tyrol, Friuli-Venezia Giulia) enjoy a special status *(statuto speciale)* in the form of regional autonomy. One of them is the region of Trentino-Alto Adige/South Tyrol

[14] María Jesús García Morales, 'Zukunftsperspektiven des spanischen Autonomienstaates: Blockade oder Neuformulierung?' in Hermann-Josef Blanke and others (eds), Verfassungsentwicklungen im Vergleich: Italien 1947 – Deutschland 1949 – Spanien 1978 (Duncker&Humblot 2021) 273.

[15] ibid.

[16] ibid, 273.

[17] Regarding South Tyrol's autonomy in general see Francesco Palermo, 'Südtirol als eine autonome Region Italiens' in Beiträge zum Kolloquium vom 17. Januar 2019 im Parlament der Deutschprachigen gemeinschaft in Eupen, 100 Jahre nach den Pariser Friedensverträgen – vier regionen im Vergleich: Åland-Inseln – Elsass – Südtirol – Deutschsprachige gemeinschaft Belgiens (Parlament der Deutschsprachigen Gemeinschaft 2020), 29 et seq.

(Italian: *Trentino-Alto Adige*). The regions, in turn, are divided into provinces.[18] The Trentino-Alto Adige/South Tyrol region is politically divided into the Provinces of Trento (Trentino) and Bolzano (Alto Adige). These are the only Italian provinces with legislative powers.

After World War I and following the transfer of South Tyrol from Austria to Italy, sanctioned under the Treaty of Saint-Germain in 1919, there were calls for the autonomy of provinces. In December 1919, the German Association presented an 18-point catalogue of demands, which was followed in August 1920 by an alternative project for social democracy in South Tyrol. Both proposals were rejected by the Italian governments. The rise of fascism thwarted all attempts at self-governance and ended in a massive campaign of Italianisation.

After World War II, the winning states did not dispute that South Tyrol was part of Italy, although discussions began about giving the German and Ladin population of this territory has special rights to protect its language and cultural identity. To this end, the Paris Agreement on the protection and equal rights of the German-speaking group was signed between Italian Prime Minister *De Gasperi* and Austrian Foreign Minister *Gruber*. It provided for primary and secondary school education in the mother tongue, the equality of the German and the Italian languages in public institutions and official documents, as well as bilingual denominations in certain places, the equality of employment in public offices to achieve a more equitable distribution of posts between the two communities, and the granting of autonomous legislative and executive powers.

The regulation of the region's status involved several stages. These stages were: the signing of the *Gruber-de Gasperi* Agreement (1946), in which autonomy rights were first documented (under international law); the entry into force of the Constitution of Italy with the first Statute of Autonomy of Trentino-South Tyrol (1948); the entry into force of the second statute on the expansion of autonomy already for the provinces of Trento and Bozen (1972) and its implementation by 1992.

The special (second) statute of the region of Trentino-Alto Adige (Italian: *Statuto speciale per il Trentino-Alto Adige*), colloquially called "the statute", forms the core of local autonomy. It implies the statute after significant amendments to it in 1971 and 1972. It continues to exist in the form of the 1948 constitutional act, amended by the incorporation into this package of other constitutional acts in 1971 and 1972.

The existence of the region is ensured both legally and politically. On the one hand, the statute of the region is approved by constitutional law and, in addition, the Constitution of Italy states that the provinces of Trentino and South Tyrol form a region (Article 116, paragraph 2).

[18] As of 2010, there are 110 provinces in the country. A subdivision of a lower level than a province is a "comune", which is equivalent to a municipality. There are 8 047 "comunes" in Italy.

The Regional Council of Trentino-Alto Adige/South Tyrol (Italian: *Consiglio Regional del Trentino-Alto Adigee*) is a unicameral legislative body of the Autonomous Region of Trentino-Alto Adige/South Tyrol[19] of Italy. It has been functioning since 1948, when the region of Trentino-Alto Adige/South Tyrol was established and has representation in Trentino and South Tyrol. During the first half of the legislature period (two and a half years), the meetings of the Regional Council are held in Trento, the official seat of the Autonomous Region of Trentino-South Tyrol, and during the remainder of the legislature period, in Bolzano. The main tasks of this regional parliament are to enact regional laws and elect the regional government of Trentino-Alto Adige/South Tyrol.

The Regional Council has 70 members and is composed of the representatives of the Supreme Council of South Tyrol (a legislative body, in English: the Council of South Tyrol or the Provincial Council; in German: *Südtiroler Landtag*; in Italian: *Consiglio della Provincia autonoma di Bolzano*) and the Supreme Council of Trentino (a legislative body, in English: the Provincial Council of Trento, in German: *Der Landtag des Trentino*, in Italian: *Consiglio della Provincia autonoma di Trento*), each consisting of 35 representatives. The regional legislature period lasts for five years.

The Regional Council is headed by a president, who is elected for a term of two and a half years, interchangeably from the German and the Italian language groups. Alternatively, after the entry into force of Constitutional Law No 2/2001, a representative of the Ladin language group can also hold the office.

With the adoption of the first statute of the Autonomous Region in 1948, the region of Trentino-Alto Adige region acquired the status of an autonomous region with expanded powers. The Regional Council, which was then elected every four years, exercised the relevant legislative powers.

After the adoption of the second Statute of Autonomy (1971) and its entry into force (1972), most of the powers shifted to the level of the provinces of Trentino and South Tyrol. The Regional Council, which was virtually devoid of power and is now elected every five years, lost its political significance as a result. Following the constitutional reform in 2001, the Regional Council is no longer elected directly.

The Regional Council is responsible for adopting regional laws and is therefore the legislative body of the region of Trentino-Alto Adige/South Tyrol. In addition, within the framework of the institutional division of powers, it elects the Regional Government of Trentino-South Tyrol from among its members by an absolute majority and secret ballot, and supervises its activities. The members of the Regional Council elected to the Regional Government retain the mandate of the Regional Council, which means that the members of the Regional Government have a dual role in the legislative and executive branches of government.

[19] See the official web page: Regione Autonoma Trentino-Alto dige/Südtirol <www.regione.taa.it> [last accessed on 10 May 2022].

The Regional Council is governed by a bureau consisting of a president, two vice-presidents and secretaries to the president. The term of office of the president of the Regional Council is two and a half years, so a representative of both the German and the Italian language groups can preside within a 5-year legislature period. Electing a representative of the Ladin language group to the office of President or Vice-President of the Regional Council only became possible after the adoption of Constitutional Law No 2/2001. Earlier, these posts were only available to representatives of the German and Italian language groups.

The Regional Government of Trentino-Alto Adige/South Tyrol (in Italian: *Giunta Regionale deli Trentino-Alto Adige*) is the executive body of the Autonomous Region of Trentino-Alto Adige/South Tyrol (sometimes referred to as the Regional Committee). Through orders and administrative decrees, it ensures the actual implementation of regional laws adopted by the Regional Council of Trentino-Alto Adige. Following the adoption of the second statute of the Autonomous Region (1971) and its entry into force (1972), whereby most powers were transferred to the two autonomous provinces of South Tyrol and Trentino, the Regional Government retained only minor executive powers. It is based in Trento, the official seat of the autonomous region of Trentino-Alto Adige/South Tyrol.

The Regional Council elects the Regional Government from among its members by secret ballot and by an absolute majority. The members of the Regional Council who are elected to the Regional Government retain the mandate of the Regional Council.

The Regional Government is composed of a president, two vice-presidents and several ministers. In any case (at this stage, as a rule, the government is composed of five to six people), the composition of the Regional Government must reflect the proportional distribution of the German and the Italian language groups in the Regional Council. According to the 1972 Statute, each of the two language groups has a vice-president. The representation of the Ladin language group in the Regional Government has been made compulsory under constitutional law No 2/2001: Article 36 provides that representation in the Regional Government is ensured for the Ladin language group, irrespective of the proportional representation of the German and the Italian language groups.

In accordance with the Statute of Trentino-Alto Adige/South Tyrol, the official languages of the region are Italian and German.

The representation of the Autonomous Regions of Italy at the central level, in the Parliament of Italy, is of interest.

The Parliament of Italy *(della Republique Italiana)* is the national representative body of the citizens of the Italian Republic and functions as a constitutional body exercising legislative power in accordance with the 1948 Constitution of Italy. It consists of two chambers: the Senate *(Senato della Repubblica)* and the Chamber of Deputies *(Cam*

dei MP). The Parliament plays an important role in the political system of Italian parliamentary democracy (Italy is a parliamentary republic). Permanent confidence in each chamber is essential for the activities of the government.

Both chambers enjoy equal rights in all respects. The only difference is in matters of protocol. This so-called "perfect" bicameralism is a classical feature of the Italian constitutional order.

The chambers differ in the number of members, their composition, the procedure for electing their members, and the standards of age limits on active and passive suffrage.

The Chamber of Deputies (the lower house of the Parliament of Italy) is more numerous and, according to the Constitution, consists of a fixed number of 630 deputies. Twelve of them are representatives of Italians living abroad. Elections are held by constituencies. To be elected as a deputy, an Italian citizen must be at least 25 years old. All Italian citizens who have attained the age of 18 have the right to vote.

The Senate of the Republic (the upper house of the Parliament of Italy) consists of 315 senators and is elected on a regional basis. Only Italian citizens who are at least 25 years old have the right to vote. An Italian citizen who has reached the age of 40 is entitled to be elected as a senator. The twenty Italian regions send a fixed number of senators to the Senate, which varies according to the population of the region. However, each region has at least seven senators. The only exceptions are the particularly small regions of Molise (two senators) and Valle d'Aosta (one senator), as well as the constituencies abroad (six senators). In addition, the number of senators appointed for life by the President of Italy is a maximum of five senators. At the same time, after the expiry of their term of office, Italian presidents become *ex officio* senators appointed for life. The Constitution of Italy does not provide for an exact number of members of the Senate.

As an exception, both chambers of the Parliament of Italy meet at a joint sitting at the *Palazzo Montecitorio*. A joint sitting of the Parliament is chaired by the President of the Chamber of Deputies. The Constitution of Italy determines when a joint sitting of the two Chamber of Deputies is convened:

- election of the President of the Republic. In this case, the constitutional body is expanded to include the representatives of the regions;
- election of five of fifteen constitutional judges;
- election of one-third of the members of the High Council of Justice;
- election of the jury for the impeachment of the President of the Republic;
- swearing-in ceremony of the President of the Republic;
- impeachment of the President of the Republic.

The types of autonomous legislative powers of the region are:

- primary powers: involve exclusive functions to regulate certain matters;
- secondary powers: involve the regulation of certain matters within the limited legislative framework defined by the central government;
- tertiary powers: involve only functions to supplement the central government's legislation;
- delegated powers: involve the possibility to exercise powers delegated by the central government of the state.

In addition to the several deputies represented in the central parliament, there is also a so-called "parity commission" which seeks to ensure and implement the provisions of autonomy. The commission consists of so-called sub-commissions.[20] Proposals adopted by the commission are often turned into legislation that serves the idea of strengthening autonomy.

In addition, judges are represented in courts according to minorities, under a quota system.[21]

3. ISSUE OF THE CONSTITUTIONALITY OF THE 2006 STATUTE OF CATALONIA (DECISION OF THE CONSTITUTIONAL COURT OF SPAIN OF 2010)

Separatist aspirations were always evident in Catalonia, but separatism within this autonomous region particularly intensified following the 2010 decision of the Constitutional Court of Spain, whereby certain sensitive provisions of the Statute of Catalonia were declared unconstitutional from 2006.[22]

Until 2006, Catalan political institutions were based on the 1979 statute. On 30 September 2005, the Parliament of Catalonia adopted "a draft of a new Statute of Autonomy of Catalonia", also known as "the Statute of Miravet", because of the place where it was negotiated.

On 2 November 2005, the Statute of Miravet was presented to the *Cortes Generales* (the Parliament of Spain). The speakers of the Catalan parties CiU, FCC and ERC justified the need to reform the statute, which had existed since 1979, by the fact that the latter was adopted in the parliament of the centralised state *(Cortes)* during Franco's regime. The following changes were also to be taken into account: firstly, the fact that Spain

[20] Palermo, supra note 27, 29 et seq.

[21] Christoph Perathoner, 'Die Südtirol-Autonomie als internationales Referenzmodell? – Die internationale Absicherung und die Verallgemeinerungsfähigkeit der Südtiroler Errungenschaften' in Peter Hilpold (Hrsg.), Autonomie und Selbstbestimmung – in Europa im internationalen Vergleich (Nomos 2016) 135 et seq.

[22] Morales, supra note 40, 275.

joined the European Union 26 years ago, and secondly, the fact that Catalonia is a single nation.

After long and emotional negotiations between the parties represented in the Cortes, about half of the articles of the draft law were changed. On 30 March 2006, the Congress of Deputies of Spain voted for the text. In the final referendum held on 18 June of 2006, 73.9% of Catalans voted for the new statute, but the participation of around 49% of voters (low voter turnout) was a major disappointment.

After *King Juan Carlos I* signed the statute on 19 July 2006, it entered into force on 9 August 2006.

On 31 July 2006, a political party called the *PP (Partido Popular)* filed a constitutional claim with the Constitutional Court *(Tribunal Constitucional)*, in which it criticised 114 out of 223 articles of the Statute of Autonomy as unconstitutional. Among them were about thirty similar or even identical articles which, as a result of influence of the PP, had been incorporated in the provisions of Andalusia and the Balearic Islands (government under the PP). After almost four years of deliberation, the court announced the judgment on 28 June 2010.[23] According to it, 14 articles were declared wholly or partly unconstitutional. In the case of other 27 articles, it was determined how the latter should be constitutionally interpreted. As regards the highly controversial designation of Catalonia as a "nation" in the preamble of the Statute of Autonomy, the Constitutional Court ruled that this had no legal effect when interpreting other norms (in particular, this clause means nothing to other regions which, unlike Catalonia, do not refer to themselves as a "nation").

Accordingly, in 2010, the Constitutional Court declared the provisions of the Statute of Autonomy of Catalonia (comparable to the regional constitution) unconstitutional. These provisions regulated very sensitive aspects and were of particular importance for Catalonia: including, for example, the designation of the Catalan people as a nation in the preamble of the Statute of Catalonia, the question of the preferential use of Catalan as a school language in public administration and the same model in the Catalan media, as well as the formation of a financial system similar to the Basque model.

As for certain legal standards defined by the decision, the following components are generally important and essential for Georgian reality:

- The decision pointed out and established that the people who founded the Constitution were "the Spanish people" and the people of Catalonia were part of this legal concept. "Catalan people", as an independent and separate legal term/ phenomenon/concept, was rejected by the decision.[24]

[23] See Decision STC 31/2010 of the Constitutional Court of Spain.
[24] ibid, para 9.

- At the same time, the terms "nation" and "national reality" used in the preamble to refer to Catalonia were found to lack any legal effect.[25]
- The decision pointed out that only Spain was regarded as a state and that the Generalitat was only an autonomous unit rather than a type of state formation.[26]
- The decision determined that there should be no preference between Spanish and Catalan and that these two official languages should be equally compulsory in the territory of Catalan autonomy.[27]
- The powers that could involve the legislative capacity to set and regulate taxes of local autonomy were declared unconstitutional.[28]

4. ARTICLE 155 OF THE 1978 CONSTITUTION OF SPAIN AS THE "NUCLEAR OPTION"[29] AND THE CATALAN CRISIS IN 2017-2018

On 27 October 2017, the central government of Spain invoked Article 155 of the Constitution of Spain against Catalonia. This provision corresponds to Article 37 of the Federal Constitution of Germany, which is commonly known as "federal coercion/intervention" *(Bundeszwang)*. This is the first time in its history that Article 155 of the Constitution of Spain has been applied. In general, the constitutions of the territorial states formed according to the principles of regionalism and federalism contain similar coercive provisions, but they are rarely used or not used at all. In the case of Spain, this was due to the attempted secession of the Catalonia region. The legal situation established under Article 155 of the Constitution of Spain lasted 281 days. However, the Catalan conflict could not be resolved.[30]

In 2017, Catalonia attempted to secede from Spain, triggering the most important constitutional crisis in the history of Spain, the likes of which had not been seen since the Constitution of 1978. For this reason, the central government of Spain invoked Article 155 of the Constitution (the so-called "federal coercion/intervention" article), under which the established legal situation lasted from 27 October 2017 to June 2018. The purpose of the so-called "federal coercion/intervention" is to resolve the conflict

[25] ibid, para 12.
[26] ibid, para 13.
[27] ibid, paras 23, 24.
[28] ibid, para 142.
[29] Raphael Minder, 'Article 155: The 'Nuclear Option' That Could Let Spain Seize Catalonia' (New York Times, 20 October 2017) <https://www.nytimes.com/2017/10/20/world/europe/catalonia-article-155.html> [last accessed on 4 March 2022].
[30] For more information, see María Jesús García Morales, „Bundeszwang und Sezession in Spanien: Der Fall Katalonien" (2019) 1 (Januar) Die Öffentliche Verwaltung, Zeitschrift für Öffentliches Recht und Verwaltungswissenschaften.

between the central government and the government of the regional/federal unit.[31] In addition to the possibility of resolving disputes through judicial procedural instruments, the constitutions of the federal/regional territorial states contain instruments that can be used as *ultima ratio* in the case of a political conflict between the regions/federal unit and the central government. Article 155 of the Constitution of Spain is based on the model provided for by Article 37 of the Federal Constitution of Germany. In Spain, this article is usually referred to as "Article 155" rather than the rule providing for "federal coercion/intervention" as the German counterpart. The Constitution of Spain, in the case of Article 155, provides for a rule that is an instrument to resolve a political conflict in a decentralised state where powers are devolved from the central government to the autonomous regions.

The application of Article 155 of the Constitution by Spanish authorities was the most important political and legal decision in the history of the state of autonomies of Spain.[32] The application of this provision was not in vain from a legal point of view, but it did not resolve the complex political conflict surrounding the secession of Catalonia from Spain.[33]

The Constitution of Spain is the only normative act[34] in Europe that literally borrowed Article 37 from the Constitution of the Federal Republic of Germany (Basic Law) and defined its content in the form of a new article – Article 155. An analysis of these two provisions shows the extent to which the German model influenced the Spanish counterpart.

According to Article 37[35] of the Constitution of Germany:

"(1) If a Land[36] fails to comply with its obligations under this Basic Law or other federal laws, the Federal Government, with the consent of the Bundesrat, may take the necessary steps to compel the Land to comply with its duties.

[31] For more information regarding the German model of the so-called "federal coercion/intervention" (Bundeszwang), see Hans H. Klein, 'GG Art. 37' in Günter Dürig and others (Hrsg.), Grundgesetz-Kommentar, Werkstand: 95. EL Juli (Beck 2021); Hans D. Jarass, 'GG Art. 37 [Bundeszwang]' in Hans D. Jarass and others (Hrsg.), Grundgesetz für die Bundesrepublik Deutschland (16. Auflage, Beck 2020). Notably, this provision has not yet been applied by the central government of the Federal Republic of Germany. No legal grounds for this have yet emerged.

[32] Spain is sometimes referred to as a state of autonomies, given the legal standard of its territorial organisation.

[33] Morales, supra note 40.

[34] ibid.

[35] The same provision in the German language: "Art. 37: (1) Wenn ein Land die ihm nach dem Grundgesetze oder einem anderen Bundesgesetze obliegenden Bundespflichten nicht erfüllt, kann die Bundesregierung mit Zustimmung des Bundesrates die notwendigen Maßnahmen treffen, um das Land im Wege des Bundeszwanges zur Erfüllung seiner Pflichten anzuhalten. (2) Zur Durchführung des Bundeszwanges hat die Bundesregierung oder ihr Beauftragter das Weisungsrecht gegenüber allen Ländern und ihren Behörden."

[36] A federal unit is meant. The German Federation consists of 16 Lands, or federal units.

(2) For the purpose of implementing such coercive measures, the Federal Government or its representative shall have the right to issue instructions to all Länder and their authorities."

According to Article 155[37] of the Constitution of Spain:

"1. If an Autonomous Community does not fulfil the obligations imposed upon it by the Constitution or other laws, or acts in a way seriously prejudicing the general interests of Spain, the Government, after complaining with the President of the Autonomous Community and failing to receive satisfaction therefore, may, following the approval granted by an absolute majority of the Senate, take the measures necessary to compel the latter forcibly to meet said obligations, or in order to protect the above-mentioned general interests.

2. With a view to implementing the measures provided in the foregoing clause, the Government may issue instructions to all the authorities of the Autonomous Communities."

The 1978 Constitution of Spain was strongly influenced by the 1949 Constitution of the German Federation. Although the federal model of territorial organisation was not taken into account in the case of Spain, the "federal coercion/intervention" clause was nonetheless incorporated into the 1978 Constitution. This may be explained by historical experience:[38] during the existence of the second Spanish Republic in 1934, there was a conflict between the central government and Catalonia, which ended with Catalonia demanding secession from Spain. The Spanish Republican Constitution of 1931, in this sense, did not provide for any coercive legal mechanisms. Under the law adopted on 2 January 1935, the central government of Spain overthrew the government of Catalonia and took over the governance at the level of this region. The Constitutional Court of Spain later declared the said law unconstitutional.[39] According to the Court, the Constitution of Spain did not provide for such a legal mechanism, and the 1935 law was unconstitutional in this context.

Consequently, the reason for incorporating Article 37 of the German Federal Constitution into the Constitution of Spain was, taking into account Spain's historical experience, to

[37] The same provision in the Spanish language:
"Artículo 155: 1. Si una Comunidad Autónoma no cumpliere las obligaciones que la Constitución u otras leyes le impongan, o actuare de forma que atente gravemente al interés general de España, el Gobierno, previo requerimiento al Presidente de la Comunidad Autónoma y, en el caso de no ser atendido, con la aprobación por mayoría absoluta del Senado, podrá adoptar las medidas necesarias para obligar a aquélla al cumplimiento forzoso de dichas obligaciones o para la protección del mencionado interés general. 2. Para la ejecución de las medidas previstas en el apartado anterior, el Gobierno podrá dar instrucciones a todas las autoridades de las Comunidades Autónomas."
[38] Morales, supra note 40.
[39] See Decision STC 5.3.1936 of the Constitutional Court of Spain.

overcome a similar political conflict in a case similar to Catalan resistance. Nevertheless, Article 155 of the Constitution of Spain is not exactly analogous to Article 37 of the Constitution of the German Federal Constitution and has its own procedural and substantive background.[40]

First of all, Article 155 of the Constitution of Spain, unlike its German counterpart (Article 37 of the German Federal Constitution), provides for less stringent preconditions for "federal intervention": According to Spain's Article 155(1), there need to be two preconditions – a violation of the Constitution of Spain, as well as a violation of a law adopted by the central government or the autonomous unit, an act contrary to the public interest of Spain. Article 37 of the German Federal Constitution is stricter in this respect, and the precondition for the "federal intervention" procedure envisaged by it is a breach of an obligation under the German Federal Constitution or another federal law. Accordingly, in the case of Spain, a violation of a law of the autonomous unit and a "serious violation" of the public interest of Spain may be grounds for applying Article 155, in contrast to its German counterpart, whose preconditions are much stricter.

In the case of Article 155 of the Constitution of Spain, the precondition of a "serious violation" of the public interest of Spain is especially disputed. The background of the incorporation of this precondition in the Constitution remains shrouded in obscurity and cannot be determined.[41]

Furthermore, the composition of the concept of "a serious violation of the public interest of Spain" is vague and indefinite.[42] It is perhaps difficult to imagine that these interests would be violated without the constitutional order being violated.

In addition to the above, Article 155 of the Constitution of Spain, if the preconditions for its application are confirmed, provides for a two-stage procedure: the action of the Government and the action of the Senate. First of all, the Spanish government notifies the autonomous unit that it intends to invoke the procedure under Article 155. This kind of request *(requerimiento)* by the central government to the autonomous unit is not provided for in the German Federal Constitution. It was incorporated in Spain's Article 155 upon the proposal of the Catalan left-wing coalition (nationalist and pro-independence parties) to ensure that the autonomous unit is warned before Article 155 is applied.[43]

This so-called *"requerimiento"* addressed to the head of government of the autonomous unit must be made by the central government of Spain on a collegiate basis. It aims to give an opportunity to the autonomous unit to eliminate the preconditions for the application of Article 155.

[40] Morales, supra note 40.
[41] ibid.
[42] ibid.
[43] ibid.

The main difference between the German and Spanish models is also the following: in the case of Spain, an absolute majority of the Senate is required. In the case of Germany, only the consent of the Bundesrat (the upper house of the German federal parliament) is required.

The governments of the autonomous units are not represented in the Spanish Senate (the upper house of the Parliament). Only the parties which are also represented in the Congress of Deputies of Spain (the lower house) are represented in the Senate. The lower house of the Parliament of Spain is elected based on a proportional electoral system, and the upper house is based on a majoritarian electoral system. Accordingly, it is generally accepted that, in practice, the lower house, given its functions, plays a more important political role than the upper house.[44] One of the few functions assigned to the Spanish Senate is the consent procedure provided for by Article 155. But since the Senate does not represent the governments of the territorial units, unlike the German Bundesrat, its consent to the application of Article 155 cannot be equated with that given by the German Bundesrat.[45]

Unlike the Federal Republic of Germany, the Kingdom of Spain has strong separatist aspirations in the Basque Country and Catalonia. The Basques and Catalans, as well as the parties in power in the region, refer to peoples' right to political self-determination and demand independence. The sense of identity in these two regions is very strong. The most powerful autonomies, as is often noted,[46] are in the Basque Country and Navarre, which have their own financial system.

The financial relations between the autonomous regions and the state are divided into two models in Spain: of the 17 regions, 15 use a common system in which most of the tax legislation and tax collection powers belong to the state. In the common system, the autonomous regions receive a share of the relevant taxes levied in their territory – for example, 50% of revenues from VAT and income tax and 100% of revenues from inheritance tax. The Basque Country and Navarre use a so-called foral system which grants the regions much broader fiscal autonomy, implying that the formation of tax legislation and the collection of taxes in the regions is essentially carried out by them. The common financial system of the autonomous regions (with the exception of the Basque Country and Navarre) provides for an equalisation mechanism (horizontal level) that involves above all, a distribution of tax revenues. In addition, these regions receive direct transfers from the central government of Spain (vertical level).[47]

[44] ibid.
[45] ibid.
[46] ibid.
[47] The Spanish financial equalisation system consists of three funds: (1) the Guarantee Fund for Fundamental Public Services Transfer. This is the largest fund, which aims at the equal provision of basic public services in the regions; (2) the Global Sufficiency Fund, which includes additional transfer payments from the state that are linked to the income of the respective region; (3) the Convergence Funds, which include the

Consequently, autonomy granted to the regions in the state of Spain is not of equal degree. Catalonia, for example, enjoys special powers in the context of the protection of the Catalan language and the formation of civil law. In this sense, Catalonia has its own education system, which provides for teaching in the Catalan language. There is also a civil code drafted and in force in the Catalan language.

Catalonia also demands such a financial system as the Basque country has, which, for its part, is guaranteed by the Constitution of Spain. The Basque financial system implies a high degree of financial autonomy, in particular the freedom to collect taxes (except for value-added tax). The Basque Country also has the power to decide what it will use these funds for in the exercise of its powers. In this respect, Catalonia, unlike the Basque Country, has a financial system similar to that of other regions: the central government receives taxes and distributes them according to the regions itself.

Catalonia's demand for financial autonomy, similar to that of the Basque country, failed. This further fuelled separatist demands: the political process in Catalonia began with the need for a referendum on independence (2012).

It should be noted that the right to political self-determination is not enshrined in the Constitution of Spain. A formal decision to hold a referendum is taken by the King, while the head of government is responsible for submitting a proposal for a referendum and taking a substantive decision on the matter once the latter has been approved by the Congress (see Article 92 of the Constitution of Spain). The autonomous regions can only hold a plebiscite, but cannot hold a referendum without the consent of the central government (Constitution of Spain, Article 149, paragraph 1).

For example, like in Scotland, the basis for autonomy in Catalonia is the historical and cultural identity of the region and its inhabitants, and also particular linguistic identity, unlike in Scotland.

Unlike the UK authorities, the Spanish authorities reject Catalonia's demand for independence and the procedure under which Catalonia seeks to put the issue to a referendum. This negative attitude of the authorities was also upheld by the Constitutional Court of Spain,[48] which in 2014 declared unconstitutional the provisions of the Catalan resolution[49] that enabled the Catalan people to decide their future through a referendum.

Despite this, the regional authorities of Catalonia ordered that the question of Catalan independence be discussed in a plebiscite *(„consulta popular no refrendaria")* on 9

Competitiveness Fund to support the regions with below average funding and the Cooperation Fund for the regions with below average GDP per capita.

[48] See Decision STC 42/2014, 25 of the Constitutional Court of Spain.

[49] Versions de resolucions <https://www.parlament.cat/web/documentacio/altres-versions/resolucions-versions/index.html> [last accessed on 16 April 2022].

November 2014.[50] However, the Spanish government brought the decree ordering a referendum[51] and certain provisions of Catalan law[52] that serves as its legal basis before the Constitutional Court of Spain, which led to their suspension. The Constitutional Court subsequently declared these legal acts unconstitutional.[53] Meanwhile, the regional authorities in Catalonia announced on 14 October 2014, via a website, that they would conduct an "alternative" poll on Catalan independence. The poll was held on 9 November 2014 and, as stressed by the Catalan authorities, the majority turned out to be in favour of Catalan independence. However, this unofficial plebiscite, or rather the actions of the Catalan authorities in relation to this unofficial poll, were challenged by the Spanish government, and the Constitutional Court found them unconstitutional as well.[54]

Following the 2015 parliamentary elections, the Parliament of Catalonia adopted a "resolution on the beginning of the political process in Catalonia as a result of the 27 September 2015 elections",[55] which aimed to pave the way to an independent republican Catalonia. Once again, the Constitutional Court declared the decree "invalid and unconstitutional", stressing the sovereignty and unity of the (entire) nation.[56] The court also observed that the decree violated the principle of fidelity to the Constitution and ruled out the possibility of a full review, which is subject to an extremely complex and completely different procedure. According to Article 168 of the Constitution of Spain, constitutional review requires a complex procedure. Finally, on 7 July 2016, the Constitutional Court of Spain declared several legal provisions of Catalonia unconstitutional and once again referred to the concepts of national sovereignty (with which, according to the court, regional autonomy should not be equated) and the supremacy of the Constitution.[57]

Accordingly, the central government of Spain follows the so-called "denial model": the secession of Catalonia from Spain is completely excluded *de constitutione lata* because the current constitution provides for the indivisibility of the state and the sovereignty of the Spanish nation, but not for the political rights of the Catalan nation.[58] This denial is not only politically but also constitutionally justified, hence not only by the Spanish

[50] Gamper, supra note 5, 89 et seq.
[51] Decreto 129/2014, de 27 de septiembre, de convocatoria de la consulta popular no refrendaria sobre el futuro político de Cataluña.
[52] Llei 10/2014, del 26 de setembre, de consultes populars no referendàries i d'altres formes de participació ciutadana.
[53] See Decisions STC 31/2015, STC 32/2015, 25 of the Constitutional Court of Spain.
[54] See Decision STC 138/2015 of the Constitutional Court of Spain.
[55] Resolució 1/XI del Parlament de Catalunya, sobre l'inici del procés polític a Catalunya com a conseqüència dels resultats electorals del 27 de setembre de 2015.
[56] See Decision STC 259/2015 of the Constitutional Court of Spain.
[57] See Decision STC 128/2016 of the Constitutional Court of Spain.
[58] Gamper, supra note 5, 91-92.

authorities but also by the Constitutional Court of Spain, which should be considered centrist-minded, both in terms of the procedure for appointing judges and the style of its judicial activities. According to Article 1(2) of the Constitution of Spain, only the Spanish people, from whom all state power emanates, are the bearers of sovereignty. According to Article 2, the Constitution is based on the indivisible unity of the Spanish nation as the idea of a common and indivisible homeland for all Spaniards. The same provision recognises and guarantees the right of all nationalities to autonomy and regional organisation, including the principle of solidarity. In this context, the central government of Spain and the Constitutional Court of Spain do not in fact recognise the political rights and sovereignty of the Catalan nation as "people".

Overall, as Spanish legal experts agree[59] and as the Constitutional Court of Spain noted, without an amendment to the Constitution of Spain, no region, including Catalonia, can hold a referendum unilaterally, demanding independence and referring to the right to political self-determination. All this contravenes the 1978 constitutional framework of Spain (see Article 92 of the Constitution).[60] As the Constitutional Court of Spain observed, such a unilateral referendum also contravenes Article 2 of the Constitution of Spain (the principle of popular sovereignty as well as the principle of the unity and indivisibility of Spain). In this context, the Constitutional Court of Spain also relied on the 1998 decision of the Supreme Court of Canada on the matter of Quebec[61] and pointed out that Catalonia could not decide independently the issue of territorial integrity within the framework the current Constitution of Spain of 1978 and that only the central government of Spain was competent to regulate this matter. The Court also observed that, without constitutional amendments, the *status quo* remained unchanged.[62] Consequently, the laws of the Parliament of Catalonia and the actions of the government in organising the referendum were declared unconstitutional by the Constitutional Court of Spain.

The Catalan conflict reached a particular intensity in 2017, when the Parliament of Catalonia adopted two laws:[63] the first on the referendum on political self-determination and the second on declaring Catalonia a republic. As is known, both laws were passed

[59] ibid.

[60] According to this article, the so-called right to hold an advisory referendum is conferred on the King of Spain, on the recommendation of the head of government, after the lower house of the parliament gives its consent.

[61] Reference Re Secession of Quebec, [1998] 2 SCR 217.

[62] See relevant important decisions SSTC 42/2014 and 259/2015 of the Constitutional Court of Spain.

[63] Catalan Law 19/2017 on the Referendum on Self-determination, published on the same day in the Official Gazette of Catalonia (Diari Oficial de la Generalitat de Catalunya) and coming into force upon its publication; Catalan Law 20/2017 on Legal Transition and Founding of the Republic, published the following day in the Official Gazette of Catalonia. Regarding this issue, see María Jesús García Morales, "Federal execution, Article 155 of the Spanish Constitution and the crisis in Catalonia" (2018) 73 Zeitschrift für öffentliches Recht 791–830.

in a single reading and without the participation of deputies from the parties that did not support the referendum. The first law set 1 October 2017 as the date of the referendum on self-determination[64] and did not provide for a minimum limit on the participation of the Catalans in the referendum, nor did it provide for any majority on which the declaration of independence should be based. Consequently, even with a regular majority, Catalonia would be empowered to declare its independence and, already in accordance with the second law, a transitional phase to adopt a new constitution.

Nevertheless, a referendum was held in Catalonia on 1 October 2017. The question asked in the referendum was as follows: "Should Catalonia become an independent state in the form of a republic?" The referendum was held with significant irregularities. The result was that only 43% of eligible voters took part in the elections, of which 90.2% voted for independence.

There is no specific law in Spain which would further define Article 155 of the 1978 Constitution of Spain. The Constitutional Court of Spain, through its own jurisprudence, indicates only in the form of *obiter dicta*[65] that this instrument can only be used as *ultima ratio*, for the negligent or deliberate violation of the regional autonomy standard.

On 10 October 2017, following the referendum, the head of the Government of Catalonia *(Carles Puigdemont)*[66] decided to declare independence. On 11 October of the same year, the central government of Spain submitted to the latter a *"requerimiento"* in accordance with Article 155 of the Constitution of Spain. This request described in detail the basis and regulations for its application. As the response of the head of the Government of Catalonia on the basis of this request (16 October 2017) proved vague, the central government of Spain considered independence to have been declared and on 26 October 2017 submitted a package of measures under Article 155 of the Constitution of Spain to the upper house of the Parliament (Senate) for approval. On 17 October of the same year, after a series of procedures, the Senate approved the package of measures by an absolute majority. On the same day, a few minutes earlier, the Parliament of Catalonia had formally declared independence. The package envisaged the removal of the main actors in the secession process from the political process: the dissolution of the Parliament of Catalonia and the resignation of the Government. The central government undertook the respective functions. On 21 December 2017, it was

[64] Before 2017, a plebiscite was held in Catalonia on 9 November 2014, which was annulled by the Constitutional Court of Spain in 2015 and declared unconstitutional: see SSTC 138/2015 and 259/2015.

[65] See Decisions SSTC 215/2014, 76/1983, 49/1988, 41/2016 of the Constitutional Court of Spain.

[66] Carles Puigdemont is a Spanish politician who belongs to the Catalan separatist party "Together for Catalonia" (Junts per Catalunya (Junts)). He was elected President of the Catalan Generalitat in 2016. After the illegal referendum in 2017 on the declaration of independence, he was overthrown along with the government he ran on the basis of Article 155 of the Constitution of Spain. He was handed over to Spanish law enforcement authorities for "rebellion". Puigdemont eventually fled from Spain and took refuge abroad, where he leads separatist movements in exile.

announced that elections for the Parliament of Catalonia would take place within the next 6 months.

Whether the standard of application of Article 155 of the Constitution of Spain (rather than the application *per se*) was constitutional became the subject of debate by the Constitutional Court.

In general, the application of Article 155 was criticised by lawyers using the example of Catalonia.[67] The criticism related in particular to the fact that the Government of Catalonia, being presented with the *"requerimiento"*, was provided with information on the application and grounds for the application of Article 155 only, rather than the information on the package of measures that the central government ultimately used.

In general, the measures that the Spanish authorities used in applying Article 155 are widely regarded as controversial, but dogmatically, in most cases, are still considered constitutional in the scholarly literature. Measures, such as the abolition of autonomy or the use of the armed forces, would be entirely unacceptable measures. Germany also lacks dogmatic certainty as to what measures of "federal intervention/coercion" Article 37 of the Federal Constitution may include. In this context, it is significant and clear that the principle of proportionality is used. What is relevant to the argumentation of the constitutionality of the measures applied under Article 155 in Spain is the fact that these measures were provisional in nature. It is interesting to see what clarifications the Constitutional Court of Spain will give to this effect.

Article 126 of the Constitution of Italy[68], Article 234 of the Constitution of Portugal[69]

[67] Morales, supra note 40.

[68] Article 126 (Dissolution of the Regional Council and Dismissal of the President)
(1) By means of a decree of the President of the Republic stating the reasons for it, the dissolution of the regional Council and the dismissal of the President of the regional Cabinet may be ordered when they have acted against the Constitution or when they have committed serious violations of the law. The dissolution and the dismissal may also be ordered for reasons of national security. The decree is adopted having consulted a Commission for regional affairs composed of Senators and Deputies and formed according to the law of the Republic. (2) The regional Council may express its no confidence in the President of the Cabinet by a motion for which reasons must be stated, which shall be undersigned by at least one fifth of its members, voted by roll-call and approved by a majority of its members. The motion shall not be debated before three days after it has been moved. (3) The approval of a no confidence motion against the President of the regional Cabinet elected by universal and direct suffrage, as well as the removal, the permanent impediment, the death or the resignation of the President entail the resignation of the Cabinet and the dissolution of the Council. In every case the same effects follow when a majority of the members of the Council simultaneously resign.

[69] Article 234: Dissolution and removal of self-government bodies
1. After first consulting the Council of State and the parties with seats in the Legislative Assembly in question, the President of the Republic may dissolve the Legislative Assembly of an autonomous region.
2. Dissolution of a Legislative Assembly of an autonomous region shall cause the removal of the Regional Government, whereupon and until such time as a new Regional Government takes office following elections, the Regional Government shall be limited to undertaking such acts as are strictly necessary in

and Article 100 of the Constitution of Austria[70] provide in similar cases for an obligation of collaboration among various constitutional bodies. In particular, the dissolution of the parliament and the resignation of the government requires, for example, the consent of the parliament, or the matter is regulated by a special decree (law).

However, these provisions have not yet been applied in practice in these countries.

Regarding the application of Article 155 of the Constitution of Spain in the context of resolving the Catalan crisis, the scholarly literature often points out that this does not resolve the conflict and that Catalan autonomy needs to be strengthened.[71] In this respect, it refers to the possibility of revising Spain's territorial structure towards federalisation. Accordingly, it is often noted that the Catalan statute needs to be reformed in the context of further strengthening the autonomy of the region, otherwise the problems of the autonomous state may become more and more acute.

It should be noted that in general, if a strong autonomy as Catalonia's is envisaged for Abkhazia, a provision similar to Article 155 of the Constitution of Spain should be integrated into the Constitution of Georgia, but with more specific procedures than in the Spanish or the German counterpart (for example, Article 126 of the Constitution of Italy, Article 234 of the Constitution of Portugal and Article 100 of the Constitution of Austria, which include similar provisions on "federal intervention/coercion", may be useful). In particular, the constitution should explicitly provide for the possibility of exercising powers to dissolve the regional parliament and remove the government, as well as other powers, to restore constitutional order. In addition, a certain scope of action should be left to the central government: From a constitutional point of view, in order to respond adequately to certain cases, it is possible that appropriate coercive measures during "federal intervention" be presented in the Constitution in a non-exhaustive manner.

order to ensure the management of public affairs. 3. Dissolution of a Legislative Assembly of an autonomous region shall not prejudice the continuation of its members' term of office, or the responsibilities of its Standing Committee, until the Assembly's first sitting following the subsequent elections.

[70] Article 100

(1) Every Land legislature can be dissolved by the Federal President on the motion of the Federal Government [and] with the assent of the Federal Council. The assent of the Federal Council [is] decided in the presence of one-half of the members and with a majority of two thirds of the votes cast. The representatives of the Land, whose Land legislature is to be dissolved, may not take part in the voting. (2) In the case of dissolution, new elections must be scheduled within three weeks, in accordance with the provisions of the Land Constitution; the convocation of the newly elected Land legislature must ensue within four weeks after the election.

[71] Morales, supra note 24, 277 et seq.

IV. CONCLUSION

In general, in identifying the models of Catalonia and South Tyrol, it is clear that the identification of the rights-related standard for ethnic minorities and the prevention of ethnic conflicts within this model cannot be fully attained within a unified state. On their own, both models are interesting and can be implemented in Georgia with some modifications, but it is necessary to take into account the political discourse that will exist in Georgia during the de-occupation process and after the end of this process.

In general, the autonomy of Catalonia is of a higher degree than that of South Tyrol. But there is a higher rights-related standard for ethnic minorities and their political rights than in the Autonomous Republic of Abkhazia today. In this context, the constitutional status of the autonomy of South Tyrol and the prospects of its introduction in Georgia should be further elaborated. In addition, we can also think of the Catalan model to regulate the constitutional status of Abkhazia, because in the latter case the concept of ethnic minorities and the Catalan nation (Catalan ethnicity as an ethnic minority but not as "people" by international legal standards) is more developed than in Southern Tyrol of Italy.

In general, federalism is seen in Georgia as too high a quality for the type of political autonomy that the Abkhazians, as an ethnic minority, should have. The recognition of the Abkhazian ethnos as "people/nation" in the context defined by modern international law may not be relevant for the following reason: the founding people/nation of the Georgian state is the unity of citizens of Georgia with its ethnic minorities, and in that context "Georgian" means a citizen of Georgia. Abkhazians, like Ossetians, are only an ethnic minority. As part of the right of peoples and nations to political self-determination, only the Georgian nation/people can be considered a state-founding political actor in the international legal context, but respecting the principle of solidarity with ethnic minorities and recognition of their political rights.

Notwithstanding the above, everything depends on a political decision to be taken by the Georgian state, taking into account the political rights of Abkhazians as an ethnic minority (or people), and this path may end up in the process of federalisation of the country. From this perspective, the concrete prospect of federalisation of Georgia is among the topics to be explored[72] and is the subject of further research.

As a result of the constitutional reform in 2017-2018, it was clarified that the territorial structure in Georgia would be reconsidered once jurisdiction over the entire territory was fully restored, and it should be emphasised that the de-occupation process should start with defining legal benchmarks and identifying a specific model of a territorial structure. The political process cannot outpace the legal process and vice versa.

[72] In general, the rudiments of federalism and the normative framework are fundamentally elaborated by Prof. Giorgi Khubua – Giorgi Khubua, Federalism as a Normative Principle and Political Order (ABA 2000).

Eva Gotsiridze[*]

ADVISORY JURISDICTION OF THE STRASBOURG COURT – EFFECTIVENESS AND CHALLENGES

ABSTRACT

The article concerns the practice of the Strasbourg Court in exercising advisory opinion jurisdiction, which has developed since the entry into force of Protocol No. 16 to the European Convention on Human Rights. The purpose of the article is to draw initial conclusions about the effectiveness and the strengths and weaknesses of this new jurisdiction of the European Court. The article reviews not only the cases in which the Grand Chamber of the Court has already issued advisory opinions but also those in which only decisions on admissibility have been made.

The author will look at problematic issues and challenges that have already been identified in practice or are logically expected. These include requests by national courts for advisory opinions on issues already answered in the Strasbourg Court's case-law and which they could have dealt with themselves; difficulties in adequately formulating their questions in accordance with the requirements of Protocol No. 16; the risk of change of the substance of questions asked as a result of reformulating of the questions by the Grand Chamber; the conditionality of the non-binding nature of the opinions of the Grand Chamber and the challenges that may arise from different interpretations of those opinions by national courts and parties to a case. The article critically discusses whether the new jurisdiction directly or indirectly threatens the independence of national courts, particularly in terms of the appearance of independence, as it concerns a kind of interference in the review of cases pending before domestic courts by a Grand Chamber giving guidance. The author also considers the perceived attitude of parties to a case to be problematic, which may arise if the Grand Chamber's opinion is taken or not taken into account by the national court. The question is also raised as to whether the existence of the Grand Chamber's preliminary opinion will have a negative impact on the admissibility of an application filed under Article 34 of the Convention in the same cases, and whether the content of the opinions will predetermine the fate of the application. Attention is also paid to procedural issues. The article contains some scepticism about the necessity and effectiveness of Protocol No. 16.

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I. INTRODUCTION

Immediately after the adoption of Protocol No. 16 of the European Convention on Human Rights, a number of questions arose regarding the advisory opinion jurisdiction of the European Court of Human Rights, including its necessity, effectiveness and whether such a jurisdiction, whose declared aim was to promote the principle of subsidiarity and enhance dialogue with national courts, would interfere with the administration of national justice, even indirectly, by giving guidance to them in concrete pending cases. We therefore observed with great interest how the Strasbourg Court would use these powers in practice. Equally interesting was how frequently the national courts of highest instance would use the possibility of requesting an advisory opinion from the Grand Chamber of the European Court, what questions they would ask, how and in what form, and whether the Strasbourg Court would safely walk on thin ice.

Although there have been only 6 requests[1] for advisory opinions since 2018, some experience has been accumulated, the review of which will hopefully answer at least some of the questions.

II. LEGAL AND HISTORIC BACKGROUND

Protocol No. 16 was opened for signature for the High Contracting Parties on 2 October 2013. On 1 August 2018, the protocol came into force in respect of the 10 countries that have ratified it.[2] The President of the European Court of Human Rights, *Guido Raimondi*, stated: *"The entry into force of Protocol No. 16 will strengthen dialogue between the European Court of Human Rights and the highest national courts. This is a fundamental step in the history of the European Convention on Human Rights and a major development in human rights protection in Europe. It also represents a new challenge for our Court."*[3]

The Protocol has since come into force for six more countries.[4] It is thus in force today for 16 Contracting States out of a total of 46 Contracting States to the Convention. Nine countries have signed the Protocol but have yet to ratify it.[5] Notably, Montenegro

[1] Such statistics existed at the time of writing the article.

[2] These countries are: Albania, Armenia, Estonia, Finland, France, Georgia, Lithuania, San Marino, Slovenia, and Ukraine.

[3] Entry into Force of Protocol No. 16 to the European Convention on Human Rights (Council of Europe, 2018), <https://www.coe.int/en/web/tbilisi/-/entry-into-force-of-protocol-no-16-to-the-european-conven tion-on-human-rights#:~:text=Slovenia%20and%20Ukraine> [last accessed on 1 April 2022].

[4] These countries are: Andorra, Bosnia and Herzegovina, Greece, Netherlands, Luxembourg, and the Slovak Republic.

[5] These countries are: Azerbaijan, Belgium, Northern Macedonia, Moldova, Montenegro, Turkey, Romania, Norway, and Italy.

and Turkey signed the Protocol in 2013, while Romania, Norway and Italy in 2014, but despite the long period of time, they have not ratified the Protocol yet and it is not known whether they will ever do. Twenty-one countries have not signed the protocol at all.[6]

These statistics and figures suggest that the Contracting States have shown little enthusiasm for the new possibility for their highest courts to request advisory opinions from the Grand Chamber on cases pending before them. However, what has prompted this, we can surmise much about it. Several academic and judicial comments[7] have already been devoted to Protocol No. 16 to the Convention, but there will definitely be more as precedents accumulate.

As far as the exercise of this jurisdiction in practice is concerned, there is also little activity in this respect. As already mentioned, so far only six such requests have been made. These were from the Court of Cassation of France and the Council of State of France *(Conseil d'État)*, the Constitutional Court of Armenia and the Court of Cassation of Armenia, the Supreme Administrative Court of Lithuania and the Supreme Court of Slovakia. The Grand Chamber has so far issued only two advisory opinions in response to the requests from the Court of Cassation of France and the Constitutional Court of Armenia. Decisions on admissibility in respect of the requests of the *Conseil d'Etat*, the Supreme Administrative Court of Lithuania and the Court of Cassation of Armenia were made by the Panel of the Grand Chamber.[8] By its decision, the request of the Supreme Court of Slovakia was not accepted.[9]

[6] These countries are: Austria, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Germany, Hungary, Iceland, Ireland, Latvia, Liechtenstein, Malta, Monaco, Poland, Portugal, Russia, Spain, Sweden, Switzerland, and the United Kingdom. For updated information, please visit the official website of the European Court of Human Rights.

[7] See, for example, Paul Gragl, "(Judicial) love is not a One-Way Street: The EU Preliminary Reference Procedure as a Model for ECtHR Advisory Opinions under Draft Protocol No. 16" (2013) 38 European Law Review 229-247; Linos-Alexandre Sicilianos, "L'élargissement de la compétence consultative de la Cour européenne des droits de l'homme – A propos du Protocole No. 16 à la Convention européenne des droits de l'homme" (2014) 97 Revue trimestrielle des droits de l'homme 9-29.

[8] The Press Releases of 28 January 2021 (ECHR 033 (2021)) and 12 May 2021 (ECHR 146 (2021)). Press Release 177 (European Court of Human Rights, 3 June 2021) <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-7134761> [last accessed on 1 May 2022]; Press Release 033 (European Court of Human Rights, 3 June 2021) <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-7020362-9470289> [last accessed on 1 May 2022].

[9] Decision on a Request for an Advisory Opinion under Protocol No. 16 Concerning the Interpretation of Articles 2, 3 and 6 of the Convention Request by the Supreme Court of the Slovak Republic of 14 December 2020 (P16-2020-001) <https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22003-6951456-9350980%22]}> [last accessed on 18 April 2022].

III. SUBSTANTIVE AND PROCEDURAL FRAMEWORK

Protocol No. 16 allows the highest courts of Contracting States that have ratified Protocol No. 16 to make requests for advisory opinions on questions of principle relating to the interpretation and application of the rights under the Convention and its Protocols.[10] Such requests can only be made in relation to cases pending before the highest courts. The Court has the discretion of whether to accept a request or not. A panel of five judges of the Grand Chamber decides whether to accept the request, and if the panel refuses to accept the request, it gives reasons for such refusal. An advisory opinion is issued by the Grand Chamber. An advisory opinion is reasoned and non-binding. An advisory opinion is published and sent to the requesting court as well as to the High Contracting Party concerned. An individual judge may have a separate opinion. The panel and the Grand Chamber include *ex officio* the judge elected in respect of the country from which the request is made. Prior to the entry into force of the Protocol, the Plenary Court amended the Rules of Court regarding the new procedure. According to the Rules of Court (Rule 93(2)), requests for advisory opinions are examined as a matter of priority. An advisory opinion is an integral part of the Court's case-law. Although it is not binding upon the requesting court, it is beyond dispute that it has a high precedential value.

1. BASIC PRINCIPLES

In the section of an advisory opinion, called "Preliminary considerations", the Grand Chamber explains the scope of its jurisdiction and the purpose of delivering the advisory opinion. It generally identifies the following principles that derive from the text of Protocol No. 16 to the Convention and its Explanatory Report, and which must at this stage be regarded as the Court's basic principles in the area of advisory opinions. In particular, the Grand Chamber pointed out the following in both advisory opinions:

- As stated in the Preamble to Protocol No. 16, the purpose of an advisory opinion is to improve the interaction between the Court and national authorities and reinforce the implementation of the Convention in accordance with the principle of subsidiarity by allowing national courts and tribunals to seek advisory opinions "on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto".[11]

[10] The idea belongs to the Group of Wise Persons, set up by the Committee of Ministers, who proposed in 2006 the introduction of a procedure similar to that of the Court of Justice of the European Union (the Luxembourg Court), a jurisdiction to issue preliminary opinions, that would strengthen dialogue between the courts and the constitutional role of the (European) Court. See Report of the Group of Wise Persons to the Committee of Ministers (Do(2006)203), para 80 <https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805d7893> [last accessed on 18 April 2022].

[11] Article 1, paragraph 1, Protocol No. 16 to the Convention on the Protection of Human Rights and

- Arising "in the context of a case pending before them".[12] The Court relies on paragraphs 1 and 2 of Article 16 of the Protocol to the effect that an advisory opinion given by the Court must be confined to points that are directly connected to the proceedings pending at domestic level.

- According to paragraph 11 of the Explanatory Report, the aim of the procedure is not to transfer the dispute to the (European) Court, but rather to give the requesting court or tribunal guidance on Convention issues when determining the case before it.

- The Court has no jurisdiction either to assess the facts of a case or to evaluate the merits of the parties' observations concerning the interpretation of domestic law in the light of the Convention, or to rule on the outcome of the proceedings. Its role is limited to furnishing an opinion in relation to the questions submitted to it.

- The Court may reformulate questions asked by the requesting court, having regard to the specific factual and legal circumstances in the domestic proceedings, as well as it may combine them.

- It is for the requesting court or tribunal to resolve the issues raised by the case and to draw, as appropriate, the conclusions on the provisions of national law and the outcome of the case, which flow from the opinion prepared by the Court.

- The value of advisory opinions also lies in providing the national courts with guidance on questions of principle relating to the Convention that are applicable in similar cases.[13]

According to the judges of the European Court of Human Rights, advisory opinions are intended to help member States in avoiding future violations, and facilitate the correct interpretation of the Convention within national legal orders.[14]

Fundamental Freedoms (hereinafter referred to as "Protocol No. 16 to the European Convention") <https://matsne.gov.ge/ka/document/view/4287254?publication=0> [last accessed on 18 April 2022].

[12] ibid, Article 1, paragraph 2.

[13] Advisory Opinion Concerning the Recognition in Domestic Law of a Legal Parent-Child Relationship between a Child Born through a Gestational Surrogacy Arrangement Abroad and the Intended Mother Requested by the French Court of Cassation of 10 April 2019 (P16-2018-001), para 25 <https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22003-6380464-8364383%22]}> [last accessed on 18 April 2022]; Advisory Opinion Concerning the Use of the "Blanket Reference" or "Legislation by Reference" Technique in the Definition of an Offence and the Standards of Comparison between the Criminal Law in Force at the Time of the Commission of the Offence and the Amended Criminal Law Requested by the Armenian Constitutional Court of 29 May 2020 (P16-2019-001), paras 42-43 <https://hudoc.echr.coe.int/fre#{%22respondent%22:[%22ARM%22],%22documentcollectionid2%22:[%22PROTOCOL16%22],%22itemid%22:[%22003-6708535-9909864%22]}> [last accessed on 18 April 2022].

[14] Siofra O'Leary and Tim Eicke, 'Judges Elected in Respect of Ireland and the United Kingdom, Some Reflections on Protocol No. 16, an Extended Version of the Presentation at the Opening of the Judicial Year on 25 January 2019', 4 <https://www.echr.coe.int/Documents/Speech_20190125_O_Leary_Eicke_JY_ENG.pdf> [last accessed on 18 April 2022].

2. ISSUES TO BE EXAMINED DURING THE ADMISSIBILITY

A panel of five judges of the Grand Chamber, which decides on the admissibility of a request, examines whether the issue has been raised by the national court which had the power to seek an advisory opinion from the Grand Chamber. This is done by verifying whether that court is listed in the relevant ratification document. The Panel examines whether the question asked concerns "the principles relating to the interpretation or application of the rights defined in the Convention or the protocols thereto" and whether they are directly related to "the context of cases pending before them". Questions with very general wording or a high degree of abstraction as well as the verification of national law *in abstracto* are not allowed. If the requirements of admissibility are not met, the panel decides not to accept the request, as in the case of the Supreme Court of Slovakia.

Furthermore, the Court makes it strictly clear that its task is not to reply to all the grounds and arguments submitted to it; that its role is not to rule in adversarial proceedings by means of a binding judicial act but rather, within as short a time frame as possible, to provide the requesting court with guidance enabling it to ensure respect for Convention rights when determining the case before it.[15]

3. EXCLUDING CERTAIN QUESTIONS DESPITE THE ADMISSIBILITY OF A REQUEST BY THE PANEL OF THE GRAND CHAMBER

The Grand Chamber ruled that it was possible to exclude certain questions asked and to refuse to give a reply to them after the panel accepts a request. This was confirmed in the advisory opinion. Four questions were asked in the request from the Constitutional Court of Armenia, and the Panel of the Grand Chamber accepted the request as a whole. However, the Grand Chamber, in its own advisory opinion, considered that two questions did not fulfil the requirements of Protocol No. 16 and did not answer them. However, the Court first proved that it had the relevant power. In particular, it pointed out that:

"A related but separate issue is whether, once a request for an advisory opinion has been brought before it, the Grand Chamber may decide not to answer one or more questions; Article 2 § 1 of Protocol No. 16 specifies that "[the] panel ... shall decide whether to accept a request for an advisory opinion, having regard to Article 1". Article 2 § 2 of Protocol No. 16 provides that "[i]f the panel accepts the request, the Grand Chamber shall deliver the advisory opinion". However, while the panel accepts the request for

[15] See supra note 8, para 34.

an advisory opinion as a whole if it considers at that stage, and without the benefit of written and oral observations, that the request appears to fulfil the requirements of Article 1 of Protocol No. 16, this does not mean that all the questions that make up the request will necessarily fulfil these requirements.[16]

While the decision to accept the request for an advisory opinion lies with the panel, this cannot deprive the Grand Chamber of the possibility of employing the full range of powers conferred on the Court, including its power in relation to the Court's jurisdiction (Articles 19 and 32 of the Convention and, by analogy, Article 48). Nor can the panel's decision preclude the Grand Chamber from assessing whether each of the questions composing the request fulfils the requirements of Article 1 of Protocol No. 16, in particular: whether each question concerns "questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the Protocols thereto" (paragraph 1); whether the opinion has been sought "in the context of a case pending before" the requesting court (paragraph 2); and whether the requesting court has "give[n] reasons for its request and" has "provid[ed] the relevant legal and factual background of the pending case" (paragraph 3).

Also, as already stated above, it follows from paragraphs 1 and 2 of Article 1 of Protocol No. 16 that the Grand Chamber's opinion must be confined to the points that are directly connected to the proceedings pending at domestic level. It thus remains open to the Grand Chamber to verify whether the questions that are the subject of a request fulfil the requirements set out in Article 1 of Protocol No. 16 on the basis of the original request, the observations received and all other material before it. Should it come to the conclusion, taking due account of the factual and legal context of the case, that certain questions do not fulfil these requirements, it will not examine these questions and will make a statement to this effect in its advisory opinion."[17]

Thus, the Grand Chamber reserves the right to reassess the relevance of certain questions to the Convention and not to answer them where appropriate. Leaving this possibility open should of course be considered reasonable.

4. ASSESSMENT ONLY IN RELATION TO ESTABLISHED FACTS, AND TIME LIMITS

According to Protocol No. 16, advisory opinions are only delivered on the basis of the concrete facts of a case and, as explained, this includes established facts, which are considered established by the national courts in at least one instance. This is natural and correct. However, it should be noted that in the second case involving a request from the

[16] See supra note 12, para 46.
[17] ibid, para 47.

Constitutional Court of Armenia, the Grand Chamber had to check the link between the questions submitted and the facts that had not yet been established by the first-instance court. The reason for this was that the first-instance court, which was hearing the case, had suspended the proceedings and applied to the national constitutional court, which in turn exercised its power to request an advisory opinion. In this connection, the Court pointed out the following in its advisory opinion:

"The Constitutional Court has availed itself of the advisory-opinion procedure, which is by its nature preliminary, in the context of proceedings for the review of constitutionality. By their nature these proceedings are also preliminary, in that they are intended to determine a question of domestic law that is relevant for the main proceedings that gave rise to them, namely the criminal proceedings against Mr Kocharyan, pending before the First-Instance Court.[18]

While this double referral does not constitute an obstacle to dealing with the present advisory-opinion request, it nevertheless frames the Court's approach in giving its advisory opinion, in particular where, as in the present case, the main proceedings are pending at a very early stage and the relevant facts have not yet been the subject of any judicial determination (compare and contrast with Advisory opinion P16-2018-001, cited above, §§ 27-33, in which information as to the precise factual circumstances underlying the legal questions raised in the advisory-opinion request was available to the Court). The Court's advisory opinion will proceed on the basis of the facts as provided by the Constitutional Court, although those facts may be subject to subsequent review by the First-Instance Court. It should enable the Constitutional Court to resolve the issues before it, that is, to assess the constitutionality (of respective article of the Criminal Coder) in the light of the requirements flowing from Article 7 of the Convention. In turn, it will be for the First-Instance Court to apply the answer given by the Constitutional Court to the concrete facts of the case against Mr Kocharyan. In the Court's view, such an approach is in line with the principle of subsidiarity on which Protocol No. 16, like the Convention itself, is based."[19]

In this respect, it should be noted that such a problem may often arise in the future, since in all countries where a form of concentrated constitutional review has been established and, consequently, the common courts do not have the power to assess the constitutionality of the applicable norm themselves, there may often be cases before constitutional courts that have not yet been decided on the merits. Accordingly, if the national constitutional court also uses the right to seek an advisory opinion, as happened in the case of Armenia, it turns out that the Grand Chamber of the European Court and its panel will often have to first confirm or reject the link to facts that have not been established yet.

[18] ibid, para 48.
[19] ibid, para 49.

In addition to the fact that it is unknown what effect the advisory opinion will have in the future if these facts have not been confirmed, we should not lose sight of the threat that the advisory opinion procedure may become a reason for the delay of hearings on the merits in national courts, and sometimes even an excuse. Therefore, it is inappropriate for constitutional courts to make requests on cases in which the national court has not delivered a decision on the merits yet.

As regards time limits and the risk of delay, it appears that the Grand Chamber tries to deal with requests from national courts in a timely manner. Both advisory opinions were delivered within less than 1 year of the receipt of the request, and the questions of whether to accept the request or not were decided within a shorter period,[20] but it is unknown whether advisory opinions and panel decisions are published immediately. However, we should not forget that cases are suspended in national courts during that period, including even in first-instance courts, as it happened in the case within which the Constitutional Court of Armenia requested an advisory opinion. Accordingly, it may not always be justified to extend the proceedings even for 1 year in domestic courts, taking into account the interests of the parties. It is the responsibility of domestic courts to assess the relevance and reasonableness of the request for an advisory opinion.

5. WHETHER THE INVOLVEMENT OF THE PARTIES IS ENSURED

This issue has attracted attention from the outset as it was uncertain which path the Grand Chamber would pursue. On the one hand, the advisory opinion procedure, as has been repeatedly explained, is a dialogue between national and international courts, and the Grand Chamber considers the legal question of interest to the national court according to how it sees the problem (if it certainly fulfils other requirements) and on the basis of the facts that it considered established, as well as according to how it brought those facts before the Grant Chamber. However, on the other hand, given that the answers to the questions asked may have a significant impact on the outcomes of the case in domestic proceedings and, then again, bearing in mind that the existence of the advisory opinion of the Grand Chamber in a particular case may subsequently become grounds for the inadmissibility of an individual application under Article 34 of the Convention (at least in the part to which the opinion refers), the involvement of the parties in the advisory opinion procedure has become particularly important.

[20] For example, the Court of Cassation of France requested an advisory opinion on 12 October 2018. The opinion was delivered on 10 April 2019. The Constitutional Court of Armenia requested an advisory opinion on 2 August 2019. The opinion was delivered on 29 May 2020. The Supreme Court of Slovakia requested an advisory opinion on 25 September 2020, and the decision of the Panel of the Grand Chamber was delivered on 14 December 2020. The Supreme Administrative Court of Lithuania requested an advisory opinion on 5 November 2020, and its request, in respect of whether to accept it or not, was granted on 25 January 2021.

The Grand Chamber has already established a practice whereby it gives parties an opportunity to submit written observations. While parties to a case are the parties to the dispute to be handled by the requesting highest court. The practice has shown that the parties mostly make use of this opportunity. The right to submit observations is given to a respondent government and other interested parties.[21] It is indeed important that the Grand Chamber of the Strasbourg Court have the opportunity to examine alternative observations before delivering an opinion. In this regard, it is encouraging that practice has gone in this direction. However, two questions still need to be addressed in this context:

The first is what effect the Grand Chamber's opinion will have on the full enjoyment in the future of the right to submit an individual application, and the second is that while the parties' involvement is helpful in giving an adequate advisory opinion, it must be said that at the same time it practically implies developing the right (in terms of the Convention) position on the legal question, according to which the domestic court has to decide the particular case. The Grand Chamber stressed that "*the Court has no jurisdiction either to assess the facts of a case or to evaluate the merits of the parties' views on the interpretation of domestic law in the light of Convention law*",[22] although the role assigned to it by Protocol No. 16 actually implies interpreting for the national court which legislation would be right or wrong in the light of the Convention.

IV. DIRECT CONNECTION TO THE CASE AT HAND, FORMULATION OF QUESTIONS AND POSSIBILITY OF REFORMULATION

As it turned out, it was also important to reserve to the Grand Chamber the right to reformulate the questions asked to it, as well as to combine them. Already in the first French case, the Grand Chamber needed to reformulate the questions asked by the national court. In the case of the request made by the Constitutional Court of Armenia, the Court considered two of the four questions general, which had no direct connection

[21] As part of the request made by the Court of Cassation of France in the very first case, the Court informed the parties to the domestic proceedings that the President of the Grand Chamber was inviting them to submit to the Court written observations on the request for an advisory opinion. However, within that time limit, written observations were submitted jointly by the defenders of the child's rights (Dominique Mennesson, Fiorella Mennesson, Sylvie Mennesson and Valentine Mennesson). The Principal Public Prosecutor at the Paris Court of Appeal did not submit written observations. The French Government also submitted its written observations to the Grand Chamber. See supra note 12, paras 4-5. In the first Armenian case, since the request was made by the Constitutional Court of Armenia, the Armenian National Assembly and Robert Kocharyan, who submitted their written observations, were considered parties to the case. Written observations were also received from the Armenian Government, the Helsinki Association for Human Rights and the defender of the family members of the victims of the events of 2008. The Constitutional Court of Armenia did not submit and written observations. See supra note 12, paras 6-9.

[22] See supra note 12, para 25.

to the particular case, while in the third case, which concerned the request from the Supreme Court of Slovakia, did not accept the request at all because of the general nature of the question. More specifically:

In the first case, the Court of Cassation of France raised two questions, which were worded as follows:

1. By refusing to enter in the register of births, marriages and deaths the details of the birth certificate of a child born abroad as the result of a gestational surrogacy arrangement, in so far as the certificate designates the "intended mother" as the "legal mother", while accepting registration in so far as the certificate designates the "intended father", who is the child's biological father, is a State Party overstepping its margin of appreciation under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms? In this connection should a distinction be drawn according to whether or not the child was conceived using the eggs of the "intended mother"?

2. In the event of an answer in the affirmative to either of the two questions above, would the possibility for the intended mother to adopt the child of her spouse, the biological father, this being a means of establishing the legal mother-child relationship, ensure compliance with the requirements of Article 8 of the Convention?"[23]

The Grand Chamber reformulated the raised questions, which it would answer, in the following way:

1. Whether the right to respect for private life, within the meaning of Article 8 of the Convention, of a child born abroad through a gestational surrogacy arrangement, which requires the legal relationship between the child and the intended father, where he is the biological father, to be recognised in domestic law, also requires that domestic law provide a possibility of recognition of a legal parent-child relationship with the "intended mother", who is designated in the birth certificate legally established abroad as the "legal mother", in a situation where the child was conceived using the eggs of a third-party donor and where the legal parent-child relationship with the intended father has been recognised in domestic law.

2. If the first question is answered in the affirmative, it will address the question whether the child's right to respect for his or her private life within the meaning of Article 8 of the Convention requires such recognition to take the form of entry in the register of births, marriages and deaths of the details of the birth certificate legally established abroad, or whether it might allow other means to be used, such as adoption of the child by the intended mother.[24]

[23] ibid, para 9.
[24] ibid, paras 32-33.

The Grand Chamber thus combined certain aspects of the first and second questions and, on the contrary, separated some and eventually changed their focus. Furthermore, a significant difference is noticeable: the national court asked whether the non-recognition in domestic law of certain legal facts and circumstances in the context of the child's right to respect for private life fell outside the margin of appreciation of the national authorities; whereas, following the reformulation by the Court, the question took a different form – whether the child's right to respect for private life guaranteed by the Convention required the recognition of the legal event in question.[25] With such reformulation, the Grand Chamber placed the question into the context of the Convention right of the child to respect for private life and clarified whether this Convention right included the fulfilment of a concrete requirement. It is worth noting that both formulations would lead to the same result, because if a certain requirement derives from the Convention and the state does not make provision for its fulfilment, then it means that it violates the Convention requirement. Just as if by failing to make provision for the fulfilment of a relevant requirement, the State oversteps the limits of the margin of appreciation, this constitutes a violation of the Convention. But to answer the question – why such reformulation was needed then – it is necessary to clarify the nuances of the case, which we will try to do below. We can only say at this point that an international court is usually required to be more cautious in assertions as to when a contracting party violates the limits of the national margin of appreciation, than in assertions as to what a certain article of the Convention requires.

As to the second question: The quintessence of the second question asked by the Court of Cassation of France is as follows: if the failure to recognise the requirement in question fell outside the limits of the national margin of appreciation, perhaps another possibility under domestic law (that is the possibility for the "intended mother" to adopt her husband's child) could fill this gap. However, such formulation was not provided, and thus no direct answer was given to the question asked.

Obviously, the possibility of reformulation serves the purpose of bringing the question asked in line with Protocol No. 16, so as not to refuse to give an advisory opinion. However, there is a risk that the national court requesting an advisory opinion on the questions will not always agree to their reformulation and therefore its interest will remain, at least in part, unsatisfied.

In the second advisory opinion, which was prepared on the basis of a request from the Constitutional Court of Armenia, the Court considered that the first two questions of four had no direct connection to the pending case and could not be reformulated in such a way as to enable the Court to exercise its advisory jurisdiction over them. In particular, the Constitutional Court of Armenia raised the following questions:

[25] ibid. The Court's answer to the first question was in the affirmative, and to the second question in the negative.

- Does the concept of "law" under Article 7 of the Convention and referred to in other Articles of the Convention, for instance, in Articles 8-11, have the same degree of qualitative requirements (certainty, foreseeability and stability)?

- If not, what are the standards of delineation?[26]

The Court clarified in its advisory opinion that from the charges brought against *Robert Kocharyan*, the former President of Armenia, could be seen that there was nothing in the factual context of the case that could be perceived as the application of Articles 8 to 11 of the Convention (§ 54); and it found difficult to see which questions the Constitutional Court wished to determine with the help of the Court's advisory opinion. In the Court's opinion, the first and second questions were of an abstract and general nature, thus going beyond the scope of an advisory opinion. Besides, it did not appear possible to reformulate the questions so as to allow the Court to confine its advisory opinion to points that were directly connected to the proceedings pending at domestic level. If the first and second questions asked by the Constitutional Court could be understood as addressing questions of legal certainty and foreseeability, including the limits of interpretation in the context of Article 7, these could be addressed sufficiently in the Court's answer to the third question.[27] Hence, the Court considered that the first and second questions did not fulfil the requirements of Article 1 of Protocol No. 16 and could not be reformulated so as to enable it to discharge its advisory function effectively and in accordance with its purpose. It therefore could not answer the first and second questions.[28]

Here the Grand Chamber failed to understand the Constitutional Court of Armenia, which cited Articles 8-11 only for comparison, because in the case established concerning those Articles, the Court had well elaborated the content of foreseeability of the law and its requirements. The Constitutional Court of Armenia asked a question whether the same criteria (which apply in relation to Articles 8-11) should also be applied in the context of Article 7, and if different criteria were needed, what those criteria were. Nor should the Grand Chamber have excluded out of hand the direct connection with the case, as the main problematic issue for the national court was to assess, in the context of the Convention, which criminal law to apply to the case of *Robert Kocharyan* – the law in force at the time of committing the act or adopted subsequently, as it was difficult to determine whether the old law would be considered more lenient or that adopted subsequently. Therefore, the issue of the foreseeability of the norm and the criteria for assessing it in the context of Article 7 of the Convention could obviously have been of significant importance to the case, and the court's interest was understandable.[29]

[26] ibid, para 11.
[27] See supra note 12, para 55.
[28] ibid, para 56.
[29] The Grand Chamber then clarified that if the Constitutional Court was referring to the context of Article 7, it would find the answer in the answers to questions 3 and 4.

However, the error of the Constitutional Court of Armenia must be considered to have been that it did not adequately explain the direct connection between the first two questions and the determination of the pending case. We may therefore conclude that it is not the Grand Chamber's role to look for these connections and logical links between the questions raised and the outcome of the particular case, and that this is the obligation of the requesting court, the improper performance of which would render the questions raised incompatible with Protocol No. 16. In addition to failure to show a direct connection, an additional reason for rejecting the two questions was their overly broad and general wording, which ultimately led the Grand Chamber to state that it "*finds it difficult to see which questions the Constitutional Court wishes to determine with the help of the Court's opinion*".[30]

As to the third case from Slovakia,[31] as already mentioned, the request for an advisory opinion was not accepted as a whole. Apparently, the Supreme Court of Slovakia raised questions even less skilfully. In particular, it asked a question worded as follows:

"*Do procedural actions in criminal proceedings and evidence gathered by agents of the Inspection Service of the Ministry of the Interior, who are directly subordinate in personal and functional terms to the Minister of the Interior, provide evidence and a basis for the lawful, independent and impartial prosecution of officers of the Police Force who are likewise subordinate to him (the Minister of the Interior), in particular for lawful and fair proceedings before a court, including the court's decisions as such, in the light of the guarantees provided by Articles 2 § 1, 3 and/or 6 § 1 of the Convention?*" [32] The case concerned the conviction of the defendant (a police officer) in the domestic proceedings by a first-instance court and the failure of his appeal in the second instance. As for the question, it seems that the national court wanted to understand the procedures carried out against the state agent in the light of a fair trial, by assessing their independence, but it failed to demonstrate the problematic nature of the issue for the particular case and failed to correctly highlight the key points, leading to the request being not accepted.

The Panel of the Grand Chamber did not see any connection. In its decision, it pointed out that although the question raised in the request concerned the fairness of the defendant's trial from the angle of Article 6 of the Convention, it was based on and formulated on the basis of Articles 2 and 3, with reference to the Court's case-law, as well as the question raised concerned an effective investigation under those Articles. No procedural background or the arguments of the parties to the domestic proceedings, or any reliance on Articles 2 and 3 on the part of the defendant or any other person, were presented. Therefore, in so far as the request concerned the interpretation of Articles

[30] See supra note 12, para 55.
[31] See supra note 8.
[32] ibid, para 2.

2 and 3, it did not appear related to points that were directly connected to pending proceedings (§19). However, the Panel of the Grand Chamber tried to give an answer at least in part and show a general framework. As it explained, although a fair trial guaranteed by Article 6 essentially meant the proceedings before a tribunal, Article 6 was also relevant during pre-trial proceedings, in so far as the fairness of the trial was likely to be seriously prejudiced at the initial stage. The question to be answered was whether the proceedings as a whole were fair.[33] The Panel eventually ruled that the questions raised in the request, *"on account of their nature, degree of novelty and/or complexity or otherwise, do not concern an issue on which the requesting court would need the Court's guidance by way of an advisory opinion to be able to ensure respect for Convention rights when determining the case before it"*.[34]

The above precedents show that the national courts have not been entirely successful in framing questions in a way that directly satisfies the requirements of Protocol No. 16 – that the questions of principle should relate to the interpretation and application of Convention rights and should be directly connected to the determination of the particular case. The issues seen from the perspective of national courts do not always adequately reflect the precise legal context in the light of the Convention and Protocol No. 16. This difficulty can be easily overcome over time, but it is legitimate to ask whether the national courts have a certain margin of discretion in assessing whether the interpretation requested concerns the pending case and whether it is necessary for the determination of the case. Since a national court raises a certain legal question in the context of a particular case, isn't it reasonable to give it more weight in assessing whether that question is directly connected to the determination of the pending case?

We have to pay attention to another factor: it also seems to be difficult for the highest national courts to avoid generalising and broadly formulating legal questions arising in particular cases, which may be due to a kind of caution on their part, so that asking questions in the context of a particular case is not perceived as direct questions as to what kind of decisions to take in the pending cases during domestic proceedings, which may undermine the idea of judicial independence, as well as the lack of practice and the habit among national judges to have discussed with other judges legal issues related to cases pending before them, including by sharing with other judges the facts of a particular case.

[33] The Grand Chamber clarified that Article 6 required that the court called upon to determine the merits of a charge be independent of the legislature and the executive. The requesting court itself made a distinction between the fair trial aspects from the point of view of the defendant and from the point of view of the victim, thereby emphasising in particular that the guarantee of independence provided to the defendant was unavailable to the victim if the case did not reach the stage of a judicial examination on the merits. ibid, paras 20-22.

[34] ibid, para 23.

V. QUESTIONS TO WHICH THE GRAND CHAMBER HAS GIVEN ANSWERS ON THE MERITS

In this part, our interest is to examine whether it was necessary to apply with respective questions to the Grand Chamber and whether the highest national courts could have answered them themselves, based on the already established case-law of the Strasbourg Court.

1. THE FIRST CASE – REQUEST FROM THE COURT OF CASSATION OF FRANCE[35]

Questions raised

The questions raised by the Court of Cassation of France concern a rare, specific and interesting issue – whether the right to respect for private life of a child born abroad through surrogacy includes the rights to the legal relationship with the "intended father", who is the child's biological father, and with the "intended mother", who has the status of "legal mother" in the birth certificate, in a situation where the child was conceived using the eggs of a donor, and legal relationship with the intended father has been recognised in domestic law. Also, whether a positive answer to the above questions should be understood to imply changes to birth, marriage and death certificates regarding the birth details in a birth certificate legally issued abroad (the Grand Chamber's formulation).

Grand Chambers' answer and substantiation

The Grand Chamber answered the first question in the affirmative and the second question in the negative.

It becomes clear from the advisory opinion[36] that the European Court has already dealt with a number of issues relating to the questions raised by the Court of Cassation of France in the specific case that the request for an advisory opinion concerned. Furthermore, the approaches developed in the relevant judgment and the case-law cited therein already constituted significant jurisprudence on the basis of which the Court of Cassation itself could foresee what opinion the Grand Chamber would deliver. This is also borne out by the fact that the advisory opinion itself used it in answering the questions asked. The case *Mennesson v. France*,[37] is meant here. The Court examined the case of two children

[35] See supra note 12.
[36] ibid.
[37] Judgment of the European Court of Human Rights, Mennesson v. France, no. 65192/11, 26 June 2014, para 40.

born in California (the USA) through a gestational surrogacy arrangement, where their intended parents were unable to obtain the recognition in France of the parent-child relationship legally established between them abroad. According to the European Court, the failure to recognise such a relationship did not violate the right of the children and the parents to respect for their family life, but violated the children's right to respect for their private life. The advisory opinion also shows that the approaches it presented were largely based on the judgment in *Mennesson v. France* and other precedents cited there. Already from this judgment, one could easily guess the likely answer of the Grand Chamber, but let us follow the reasoning behind the advisory opinion.

In addition to the above case, the Grand Chamber used the UN Convention on the Rights of the Child of 20 November 1898, its Optional Protocol on the sale of children, child prostitution and child pornography, the Report of the Special Rapporteur of 15 January 2018 on the above-mentioned issues, and materials. The Court undertook and took into consideration a comparative-law survey covering forty-three member States of the Council of Europe on artificial insemination and surrogacy,[38] materials that were equally available to the Court of Cassation of France for examination or processing.

The Grand Chamber presented in its advisory opinion the approaches well developed in its precedents, which included answers to the questions to be discussed and which were also available to the Court of Cassation of France. In particular, the Court made clear that according to the Court's case-law, Article 8 of the Convention required that domestic law provided a possibility of the recognition of the legality of the relationship between a child born through surrogacy abroad and the intended father where he was the biological father, and that in *Mennesson* it expressly found that the lack of such a possibility constituted a violation of the child's right to respect for his or her private life as guaranteed by Article 8. In addition to the above case, the Court also referred to other cases.[39] In other precedents, it had placed some emphasis on the existence of a biological link with at least one of the parents,[40] referring to the respective case-law, and observed that the present case explicitly included the factual element of a father with a biological link to the child.

The Grand Chamber presented in its advisory opinion the approaches established by its case-law in regard to the issue at hand, in particular, the approach established in *Mennesson* according to *"respect for private life requires that everyone should be able*

[38] ibid, paras 19, 21.

[39] In particular, the Court referred to the following cases: ibid, paras 100-101; Judgment of the European Court of Human Rights, Labassee v. France, no. 65941/11, 26 June 2014; Judgments of the European Court of Human Rights, Foulon and Bouvet v. France, no. 9063/14 and no. 10410/14, 21 July 2016; Judgment of the European Court of Human Rights, Laborie v. France, no. 44024/13, 19 January 2017; Advisory opinion, para 35.

[40] Judgment of the European Court of Human Rights, Paradiso and Campanelli v. Italy, no. 25358/12, 24 January 2017; Advisory opinion, paras 24, 195; Advisory opinion, para 36.

to establish details of their identity as individual human beings, which includes the legal parent-child relationship".[41] Moreover, the Court found that the rights of those children had been substantially affected in France by the non-recognition of the legal parent-child relationship between them and the intended parents.[42] The Grand Chamber then explained that there were two driving issues – the best interests of the child and the margin of appreciation.

As regards the first factor, the Grand Chamber certainly pointed out that it relied on the essential principle, according to which, whenever the situation of a child was in issue, the best interests of that child were paramount, and presented its precedents.[43] The Court observed in *Mennesson* that France wished to deter its nationals from going abroad to take advantage of methods of assisted reproduction that were prohibited on its own territory. However, it stressed that the effects of the non-recognition in French law of the relationship between children and the intended parents concerned not only the parents but also the children whose right to respect for their private life was affected, "*... as it places him or her in a position of legal uncertainty regarding his or her identity within society*".[44] Accordingly, the Court considered that the child's best interests also entailed the identification of the persons responsible for raising him or her, meeting his or her needs and ensuring his or her welfare, as well as the possibility for the child to live in a stable environment. The Court therefore considered that the general and absolute impossibility of obtaining legal recognition of the relationship between a child born through surrogacy abroad and the intended mother was incompatible with the child's best interests, which required at a minimum that each situation be examined in the light of the specific circumstances of the case.[45]

As regards the second factor, the Court observed in *Mennesson* that where there was no European consensus in this respect, and where there was no consensus, particularly where the case raised sensitive moral or ethical issues, the national margin of appreciation would be wide (paragrpah 43). However, the Court also observed in the same judgment that, where a particularly important facet of an individual's identity was at stake, such as

[41] See supra note 36, para 96.

[42] After the judgment in Mennesson, it was already possible to register the particulars of birth in the child's birth certificate for the intended father at the time, as he was, at the same time, their biological father, but in the case of the intended mother the problem remained. The case was brought back before the European Court because the domestic justice system allowed in that case the re-examination of the appeal on points of law. The Court of Cassation resorted to the advisory opinion procedure. Thus, the request concerned the intended mother in relation to whom the issue persisted in domestic law.

[43] In particular, the following cases: supra note 36, para 208; supra note 36, paras 81, 99; supra note 38, paras 60, 78; Judgment of the European Court of Human Rights, X v. Latvia, no. 27853/09, 26 November 2013, para 95; Judgment of the European Court of Human Rights, Wagner and J.M.W.L. v. Luxembourg, no. 65941/11, 28 June 2017, para 133.

[44] See supra note 36, para 40.

[45] ibid, para 42.

the legal parent-child relationship, the margin of appreciation allowed to the State was restricted (paragraph 44). In sum, the requirements of the child's best interests reduced the margin of appreciation and, in a situation such as that referred to by the Court of Cassation and as reformulated by the Grand Chamber, the right to respect for private life, within the meaning of Article 8 of the Convention, of a child born abroad through surrogacy required that domestic law provided a possibility of recognition of a legal parent-child relationship between the child and the intended mother, designated in the birth certificate legally issued abroad as the "legal mother". The Court also observed that although the domestic proceedings did not concern the case of a child born through surrogacy abroad and conceived using the eggs of a third person, where the situation was otherwise similar to that in issue in the present proceedings, the need for recognition applied with even greater force.[46] Thus, as we can see, the Grand Chamber relied almost entirely on the judgment in *Mennesson* and its other precedents in relation to the first question.

As regards the second question (according to its reformulation), the Grand Chamber left it within the limits of the national margin of appreciation. The Court considered that Article 8 of the Convention did not impose a general obligation on States to recognise *ab initio* a parent-child relationship between the child and the intended mother. What the child's best interests (which must be assessed primarily *in concreto* rather than *in abstracto*) required was the recognition of the relationship legally established abroad when it has become a practical reality, and it was not for the Court but for the national courts to assess whether the said relationship has become a practical reality. The child's best interests and his or her right to respect for private life could not be construed in such a way as to entail an obligation for States to register in other documents the details of the birth certificate issued abroad in so far as it designates the "intended mother" as the "legal mother". Depending on the circumstances of each case, other means, including adoption, produced effects similar to the registration of foreign birth certificates.[47]

The Court pointed out that it could not express a view in the context of its advisory opinion on whether French adoption law satisfied the criteria set forth in the opinion, and that it was for the domestic courts to decide, taking into account the vulnerable position of the children concerned while the adoption proceedings were pending.[48]

Lastly, the Court rules that:

- the child's right to respect for private life within the meaning of Article 8 of the Convention required that domestic law provided a possibility of the recognition of the legality of the parent-child relationship with the "intended mother", designated in the birth certificate legally issued abroad as the "legal mother";

[46] ibid, para 47.
[47] ibid, paras 52, 53.
[48] ibid, para 58.

- the child's right to respect for private life within the meaning of Article 8 of the Convention did not require such recognition to take the form of entry in the register of births, marriages and deaths of the details of the birth certificate legally issued abroad. Another means, such as adoption of the child by the "intended mother", might be used provided that the procedure laid down by domestic law ensured that it can be implemented promptly and effectively, in accordance with the child's best interests (Operative provisions of the opinion, delivered unanimously).

Assessment

Proceeding from the above, the Grand Chamber's answers to the questions raised by the Court of Cassation of France, although reformulated, were fairly foreseeable, drawing on the case of *Mennesson* and other precedents of the Court, and there was no need to address the Grand Chamber with the relevant questions. The case left the impression that the Court of Cassation of France was not seeking more detailed considerations from the Grand Chamber regarding the content limits of the right to respect for private life of a child born through surrogacy abroad, but rather needed a well-reasoned response as to why deciding this issue fell outside the scope of this case, and the refusal to legalise the results of surrogacy carried out abroad outside the limits of the national margin of appreciation, especially as this was an issue on which, as observed in the judgment in *Mennesson*, there was no general European consensus that would determine the limits of the national margin of appreciation. And if such non-recognition was outside the limits of the national margin of appreciation, perhaps there were alternative means of recognition of such relationship, offered by domestic law, which could remedy this deficiency, in particular, the right of the "intended mother" to adopt her husband's biological child. This very context was important for the Court of Cassation of France. This should explain the way the Court of Cassation of France worded the questions in its request for an advisory opinion (whether or not the State was overstepping the margin of appreciation by refusing to recognise the legality of the relationship in question).

This was indeed the most favourable context, where it was more likely that the Grand Chamber would answer that it was not overstepping the limits and, thus, the Convention, than in the case of an answer to the question reformulated in the context of the right, as the first question concerned sensitive moral or ethical issues, on which there was no general European consensus and, supposedly, the margin of appreciation was wide. I believe that the Court of Cassation used the advisory opinion procedure in this case to once again make the subject of discussion whether a Contracting State had the right not to legalise the results of surrogacy arrangements abroad in a situation where surrogacy was prohibited in France; and, if it did not have that right, maybe having alternatives for legalising those results would suffice – for example, adoption, in order to fulfil the

requirements of Article 8 of the Convention to ensure the right to respect for private life of a child born through surrogacy. The Court of Cassation of France seems to have tried to ensure that the determination of this issue was left within the limits of the national margin of appreciation, although this attempt proved unsuccessful.

2. THE SECOND CASE – REQUEST FROM THE CONSTITUTIONAL COURT OF ARMENIA[49]

Questions raised

In its second advisory opinion,[50] the Grand Chamber answered the following two questions raised by the Constitutional Court of Armenia:

- Does the criminal law that defines a crime and contains a reference to certain legal provisions of a legal act with supreme legal force and higher level of abstraction meet the requirements of certainty, accessibility, foreseeability and stability?

- In the light of the principle of non-retroactivity of criminal law (Article 7 § 1 of the Convention), what standards are established for comparing the criminal law in force at the time of committal of the crime and the amended criminal law, in order to identify their contextual (essential) similarities or differences?

Before discussing what and how the Grand Chamber answered, it should be noted that these questions were also formulated in general terms, although the Grand Chamber did not reformulate them, seeing their direct connection to the pending case.

First question

The Grand Chamber's answer and substantiation:

The part of the advisory opinion dealing with the first question reveals that the Grand Chamber's answer is based on a comparative-law survey and the Court's case-law.

In answering the question raised, the Grand Chamber pointed out in its advisory opinion that it primarily undertook and took into consideration a comparative-law survey covering forty-one member States of the Council of Europe and clarified that it used the terminology "blanket reference" and "legislation by reference" technique. It further observed that a large majority of the forty-one member States (namely all except Malta and the Netherlands) made use of the "blanket reference" or "legislation by reference" technique in their criminal law.[51] In two of forty-one legal systems, the use of the

[49] See supra note 19.
[50] See supra note 12.
[51] Inter alia, twenty-one member States used this technique in respect of criminal offences against the

"blanket reference" or "legislation by reference" technique was accompanied by the requirement that referenced legislation outside criminal law met the same standards of accessibility, clarity, certainty and foreseeability as the provisions of criminal law. In addition, some legal systems required that references be explicit, and some required that the referencing provision set out the penalty and the essential elements of the offence. In addition, however the referenced provisions were interpreted, they must not extend the scope of criminalisation as set out in the referencing provision and, most importantly, both provisions taken together must enable the foreseeing of the constituent elements of the offence and what acts or omissions would make the individual criminally liable. There was no consensus regarding the question whether the referenced provisions had to be of a certain nature or hierarchical level.[52]

The Grand Chamber then outlined in detail the principles developed in its case-law as regards legal certainty and foreseeability under Article 7; including that only the law could define a crime and prescribe a penalty; that Article 7 not only prohibited the application of existing provisions to the facts that occurred in the past but also required that the criminal law not be extensively construed to an accused's detriment, for example, by applying a penalty by analogy; that the requirement of certainty was satisfied where it was possible to foresee based on the relevant provision, if need be with the help of appropriate legal advice, what acts would make the individual criminally liable.[53] Then again, it clarified by means of its case-law that "law" comprised the qualitative requirements of accessibility and foreseeability, which referred to both the "offence" and the "penalty", although there had always been more or less vague concepts whose clarification was the subject of judicial interpretation. Although certainty was highly desirable but could entail excessive rigidity, the law had to be able to keep pace with changing circumstances. Article 7 of the Convention could not be read as outlawing the gradual clarification of the provisions of criminal law through judicial interpretation from case to case, provided that the resultant development was consistent with the essence of the offence and could reasonably be foreseen, although the lack of an accessible and reasonably foreseeable judicial interpretation could lead to a finding of a violation.[54] The Court then delved further into these issues by analysing the relevant precedents in detail.

By referring to the relevant cases, the Court clarified that although it had not yet explicitly ruled on referencing provisions or blanket references, there were similar cases that it had

constitutional order. Among those member States making use of this technique in the definition of offences, eleven member States did so by referring either to general principles or to notions of constitutional law and three by making reference to specific rules of constitutional law. References to provisions outside constitutional law could be found in four member States.

[52] See supra note 12, paras 31-35.

[53] ibid, para 60.

[54] ibid.

dealt with in the context of Article 7, which concerned the setting out of the constituent elements of an offence by referring to provisions or principles of constitutional law or to other areas of law.[55] The Court also mentioned that none of those cases had explicitly raised the question whether the referencing technique as such was incompatible with Article 7. They rather concerned the question whether the referencing and referenced provisions, taken together, were sufficiently clear in their application.[56] The Court also held that a reference to the provision of constitutional law of a broad and general nature raised the issue of Article 7 in itself.[57] The Court further observed that in the present case the referenced constitutional provisions might indeed be formulated in a general and very abstract manner. Owing to their high level of abstraction, such provisions were often developed further at lower hierarchical levels, including through non-codified constitutional customs and through the Court's jurisprudence. In the context of fundamental constitutional principles ensuring the separation of powers, the Court had held in *Haarde* that Article 7 of the Convention had not excluded the possibility that evidence of existing constitutional practice could form part of the national court's assessment of the foreseeability of an offence based on a provision of a constitutional nature, and the Court did not see any reason to depart from that finding.[58]

As the Court stated in its advisory opinion, its case-law thus indicated that the use of the "blanket reference" or "legislation by reference" technique in criminal law was not incompatible with Article 7. It accepted the use of this technique, whereas the main issue of foreseeability had to be decided based on the particular case.[59] Moreover, the comparative law analysis showed that most Contracting States used this technique in criminal law in defining offences against the constitutional order.[60] However, in order to comply with Article 7, this technique must fulfil the "quality of law" requirements (precision, accessibility and foreseeability in its application), and both provisions, taken together, had to clarify, if need be with the help of appropriate legal advice, what acts would make the individual criminally liable.[61] Furthermore, the Court considered that the most effective way of ensuring foreseeability was for the referencing provision to set out the constituent elements of the offence, and for the referenced provision to be explicit and not to extend the scope of criminalisation as set out by the referencing provision. In any event, it was up to the national court to assess, on the basis of both provisions taken together, whether criminal liability was foreseeable.[62]

[55] ibid, paras 64-65.
[56] ibid, para 67.
[57] ibid, para 68.
[58] ibid, para 69.
[59] ibid, para 70.
[60] ibid, paras 70-71.
[61] ibid, para 72.
[62] ibid, paras 73-74.

Assessment

The Grand Chamber thus did not give a direct answer to the question of the national court – whether the criminal law that defined a crime and contained a reference to certain legal provisions of a legal act with supreme legal force and higher level of abstraction met the requirements of certainty, accessibility, foreseeability and stability. The Grand Chamber said that a reference to such a provision was not in principle incompatible with Article 7, but it could say nothing whether or not it met the requirements of certainty and foreseeability because that was up to the national court to answer this question and only based on the specific disputed provisions. However, in its advisory opinion, it presented to the national court all its jurisprudence which dealt with the question raised. These precedents were available to the Constitutional Court of Armenia and it could have analysed them itself, as well as conducted a comparative law survey in this field within the Council of Europe and drawn its own conclusions.

The Grand Chamber did indeed walk on thin ice here and did not interfere with the assessment of what the national court was supposed to do, although it is another matter whether or not it has satisfied the national court's interest. This circumstance, at the same time, indicates that the Constitutional Court of Armenia asked a question to which no specific answer could be given. It did not take into account that the foreseeability and certainty of a provision could only be assessed based on specific circumstances, and as regards the criteria to be applied in this respect, the rich case-law of the European Court had already been available to it, which the Grand Chamber presented to it consistently in its advisory opinion.

This and the earlier case raised an important issue: whether the questions submitted by the highest national courts, which, although formulated in accordance with the requirements of Protocol No. 16, relate to issues to which there are already direct answers in the relevant case-law or to which the answers logically follow from it, should be accepted for examination and giving an answer.

Second question

As regards the second question from the Constitutional Court of Armenia, I think it should not have been asked at all, and the European Court should not have accepted it for examination. The question asked and accepted was worded as follows:

In the light of the principle of non-retroactivity of criminal law (Article 7 § 1 of the Convention), what standards are established for comparing the criminal law in force at the time of committal of the crime and the amended criminal law, in order to identify their contextual (essential) similarities or differences?[63]

[63] See supra note 12, para 11.

The factual and legal context of the case: The domestic courts of Armenia had to decide which law (the Criminal Code) to apply to the former President of Armenia *Robert Kocharyan* who was charged with overthrowing the constitutional order – the Criminal Code in force at the time of the commission of the act or the one adopted subsequently, as it became problematic to assess whether the relevant provision of the new criminal code reduced liability for the alleged crime. In turn, this difficulty stemmed from the fact that the provision of the criminal code in force at the time of the commission of the act was broader in that any action aimed at overthrowing the constitutional order was punishable, whereas under the provision adopted later only the *de facto* elimination of the fundamental constitutional principles laid down in the Constitution was punishable. However, the assessment was complicated by the fact that in other respects the provision of the former code was narrower, as it contained an element of violence which was no longer a necessary element for the crime defined in the relevant provision of the new code. Thus, the former code was broader in one respect while it was narrower in another, making it difficult to compare the degrees of the gravity of crimes described on their basis. For this reason, the common court of first instance hearing the case of *Robert Kocharyan* addressed the Constitutional Court, and the latter addressed the Grand Chamber, with a question as to what criteria should be applied in such a case to fulfil the requirements of Article 7 of the Convention, which generally prohibited the retrospective application of the criminal law, but required the retrospective application of the more lenient law.

The Grand Chamber's answer and substantiation: The Grand Chamber noted in its advisory opinion that the law more favourable to the defendant should have been applied and the assessment should have been made on the basis of the principle of concretisation when comparing laws, and that it had already established this rules in its case-law. Although the Court's case-law did not offer a comprehensive set of criteria, it was possible to draw the conclusion based on the approaches established by the Court and the facts considered established by the national courts.[64] The Court further clarified that formal classifications of offences did not matter[65] and that the comparison had to be made not between the definitions of the offence *in abstracto*, but *in concreto*, based on the specific circumstances of the case.[66] In the advisory opinion, the Court presented its precedents in detail where, as a result of an assessment *in concreto,* the Court ruled that the relevant applicant could not benefit from the privilege of a lighter sentence,[67] and further explained that the principle of concretisation, in addition to sentences, equally applied to a comparison between the definitions of the crimes (§ 90). Finally, the Grand Chamber again pointed out that it was for the national courts

[64] ibid, paras 79-80, 86.
[65] ibid, para 87.
[66] ibid, para 88.
[67] ibid, para 89.

to assess which norm they would apply and that this should be done by applying the principle of concretisation, which in this case meant that they had to compare the legal consequences that the application of the old and new criminal codes may entail for the defendant *Robert Kocharyan*. The Grand Chamber further simplified the answer and explained to the national court that if the application of the old code attracted more serious consequences for the accused, then the new code would have to be applied, and if the application of the new code was associated with more serious consequences, the old code would have to be applied.[68]

Assessment

This question and the answer to it is also a prime example of the kind of questions that should not be raised before the Grand Chamber. General questions as to what criteria are used in comparing provisions to identify the lighter one is formally admissible, but, first of all, the basic criteria established by the case-law have been served on a silver platter, and reading and understanding them properly would be quite sufficient to draw conclusions. Second, how the judge of a common court should compare two provisions of criminal law to identify the lighter one is an ordinary theoretical and practical criminal law issue that serves to determine which law should be applied to protect the right of the accused rather than to clarify what the obligation to apply the lighter law generally means and what the requirements of Article 7 of the Convention in this regard are. Even without the case-law of the European Court, it was not difficult to find that such a comparison could only be made on the basis of specific circumstances, and thus to foresee that the Grand Chamber would once again have to present in the advisory opinion its already developed general approaches.

VI. QUESTIONS RAISED IN THE FOURTH, FIFTH AND SIXTH REQUESTS

The fourth request for an advisory opinion was made by the Supreme Administrative Court of Lithuania. It requested guidance to assess the compatibility of impeachment legislation with Article 3 of Protocol No. 1 to the Convention (in particular the right to stand in parliamentary elections). The request was accepted for examination. The exact wording of the question is not available, but the context of the case is known. It concerned the refusal to register the former member of the Lithuanian Seimas (parliament) as a candidate in the 2020 parliamentary elections on the grounds of her impeachment in 2014. This matter was challenged by the former Member of Parliament in the context that the CEC's decision refusing registration did not take into account the impeachment

[68] ibid, paras 90-91.

legislation, which was amended following the judgment of the European Court in 2011 in *Paksas v. Lithuania*, which assessed the permanent and irreversible nature of the disqualification of the former President of Lithuania from holding parliamentary office as a disproportionate restriction and a violation of Article 3 of Protocol No. 1 to the Convention. However, the Constitutional Court found this amendment to be unconstitutional.[69]

Since the exact wording of the questions asked is unknown, we can make assumptions. The first assumption is that the requesting court will raise a question in the light of a conflict of values between the national margin of appreciation, the protection of constitutional values and individual rights, and this context will be used by the requesting court to show the appropriateness of leaving the issue within the limits of the national margin of appreciation, while the Grand Chamber will advise it to apply the principle of proportionality in the issue of deprivation of the right to stand in elections, taking into account the nature and gravity of the violation underlying the impeachment of the official, as well as whether the violations were of criminal nature and whether the person was convicted. It is likely that the Grand Chamber will favour an approach of considering permanent disqualification a disproportionate interference with the right to elections, but will not exclude its compatibility in the case of particularly serious crimes, such as war crimes and crimes against humanity. It will also consider as factors to be taken into account that the impeachment charges and the removal from office are the results of a political process, meaning that the relevant facts have not been established to be reliable and as a result of due process by a court; that impeachment charges in this respect cannot be equated with the facts established in the Court's decision and its legal effects. It will also point to one of the orientations that the matter concerns an elected rather than an appointed position, where the will of the people is decisive. Obviously, it will represent its relevant case-law, including the judgment in *Paksas v. Lithuania*. Therefore, this case will also not be the one for which sufficient criteria cannot be found in the Court's case-law to give an answer.

The fifth request was submitted by the *Conseil d'État*, where it asked the Court regarding the criteria for assessing the compatibility with the Convention of the provisions of the domestic law (the Environmental Code) which the party – the Federation of Private Foresters (Federation Forestiers privés de France) – considered discriminatory in domestic proceedings, in the Council of State, as far as this legislation limited the right of landowners' associations to withdraw their land from the territory of an officially approved hunting association (ACCA), whereas one part of landowners' associations established before their creation could withdraw their land at any time.[70]

[69] See supra note 11.

[70] In particular, the case concerns the approved municipal hunters' association (the ACCA) which is established under the Law of 10 July 1964 and aims at encouraging the rational management of hunting and

Concerning the question of when a legally established difference in treatment constitutes discrimination within the meaning of Article 14 of the Convention, the Strasbourg Court has extensive practice, as well as established assessment criteria and the stages of assessment. It must first be determined whether the difference in treatment does indeed exist, then, if the answer is in the affirmative, it must be determined whether comparable persons are in an analogous or a similar situation, which requires the use of uniform approaches. Then again, if the answer is in the affirmative, it must be determined whether there was an objective and reasonable justification for such difference in treatment in the light of the legitimate aims that the provision establishing a difference in treatment had. It is obscure what else the Grand Chamber could advise the *Conseil d'Etat* without delving into the merits of the case and refraining from assessing national law, regarding which the Court has repeatedly stated that this is not its role. The most that can be offered theoretically is the showing of value preferences, or what is more important – the full realisation of landowners' ownership rights to land and, where applicable, the right to withdraw it from hunters' associations or the public legitimate aims of the restriction of the right, presumably, environmental and resource management aims, which need to be justified in the context of proportionality, and it is clear that the Grand Chamber will not do this in place of the national court. However, it is possible that the Court may develop specific, thematic criteria, which cannot be primary and decisive.

This request has also been accepted for examination and gives rise to questions:

- Why is it better for the highest national courts to seek ready-made guidelines in specific cases instead of conducting adequate research and thus contributing to the development and enrichment of domestic law?

game stocks, in particular by promoting hunting over a fairly extensive area. Landowners were required to join the ACCA in their respective municipalities and to contribute funds with a view to creating a municipal hunting territory. Nevertheless, the Environmental Code (Article L 420-10) stated that when an ACCA was set up, landowners who had strong personal anti-hunting convictions and landlords and associations of holders of hunting rights over areas larger than the minimum areas provided for in the same Code (Article L 422-13) could object to contribute funds. According to the provisions of the version of the same code (Article L 422-18), unlike landowners who could withdraw their land at any time – provided that their land attained the minimum dimensions – only landowners' associations which officially existed on the date of the setting up of the ACCA and whose land attained the said threshold were entitled to withdraw their land, whereby similar associations set up subsequently to that date were not so entitled. The Federation Forestiers privés de France (Fransylva) appealed before the Conseil d'Etat and submitted its observations against abuse of authority, stating that the provision of the current version of the Environmental Code adopted on 24 July 2019 (Article L 422-18) established discrimination incompatible with Article 14 of the Convention and Article 1 of Protocol No. 1 to the Convention by depriving landlords' associations established after the creation of the ACCA of the right to withdraw their land, even where the area of their land satisfied the criterion laid down in the Environmental Code (Article L 422-13). See supra note 7; Request for an Advisory Opinion (no. P16-2021-002) submitted by the Conseil d'Etat by its Decision of 15 April 2021 <https://www.echr.coe.int/Pages/home.aspx?p=ECHRRSSfeeds&c=> [last accessed on 1 May 2022];

- By accepting such requests, is the Court trying not to prevent national courts from losing their enthusiasm and using an opportunity afforded by Protocol No. 16 to request advisory opinions?

The last, sixth request was received from the Court of Cassation of Armenia. The Court of Cassation of Armenia had asked the Court whether the non-application of limitation periods for imposing criminal responsibility in respect of torture or equivalent criminal offences with reliance on international law was compatible with Article 7 of the Convention, if domestic law did not require such non-application of those limitation periods.[71] Having agreed with the prosecutor in the case, the Court of Cassation considered that it was necessary to determine whether the case-law of the European Court and the Convention against Torture fully prohibited limitation periods in respect of torture or other acts of ill-treatment, which was followed by filing a request for an advisory opinion with the Grand Chamber.

While the answer to this question on the part of the Grand Chamber can be regarded as foreseeable because of the *jus cogens* nature of the prohibition of torture and ill-treatment, juxtaposing them in relation to the requirements of Article 7 would be interesting indeed.

VII. ADVISORY OPINION AS GUIDANCE FOR A NATIONAL COURT IN A SPECIFIC CASE

Two issues need to be highlighted in this section of the Article: (1) whether it is justified in general for national courts to seek guidance from the European Court in respect of the pending case and, in particular, issues important for the determination of the case; (2) how conditional is the non-binding character of the Grand Chamber's advisory opinion and how the parties to domestic proceedings will perceive the acceptance or rejection of this opinion by the national court.

[71] The issue was raised in connection with the need to execute the judgment delivered by the Strasbourg Court in 2012 inVirabyan v. Armenia. In that case, the Court qualified the ill-treatment of the applicant by two police officers as "torture". To execute the judgment, a criminal case was instituted against two police officers but terminated in 2012 on the grounds that the limitation period had expired. The prosecutor found that the investigator had failed to examine the acceptability of terminating prosecution in the context of international law, including on the basis of Article 3 of the Convention. The Court of Appeal upheld the judgment of the first-instance court, finding both police officers guilty, but refused to impose criminal liability because of the expiry of the limitation period provided for in the Criminal Code. In his appeal on points of law, the prosecutor argued that the application of limitation periods in respect of acts of torture was prohibited under Article 3 of the Convention, but there was a need to determine whether that was an absolute prohibition. See supra note 7.

The first question concerns the doubts as to whether this violates the fundamental principles of judicial independence, including those guaranteed by Article 6 of the Convention. The concept of judicial independence undoubtedly implies that the judge decides in accordance with the law, the circumstances of the case and his or her inner conviction. Therefore, the question naturally arises whether the fundamental principles of judicial independence are violated in a situation where a judge/judges hearing the case discusses/discuss with other judges, who are not involved in the examination of the case, legal issues important for the determination of the case pending before him/her/them, including by providing the specific legal and factual context of the case. If this is admissible in the format of requesting an advisory opinion from the international court, why cannot we allow the same in the national legal system and give first-instance judges the right to suspend the examination of the case and request an advisory opinion from the court of appeal or the court of cassation on the application and interpretation of the applicable law, and in the case of appellate judges, from the court of cassation?

Less important in this context is that the Grand Chamber's advisory opinion is not binding on the court seeking an advisory opinion, as addressing with a question and the existence of such a possibility is already problematic.

A separate issue is the perception by parties to proceedings of the consideration and non-consideration of the advisory opinion, as both cases – acceptance and rejection – are equally problematic, since it will be sometimes in favour of one party and sometimes of another. In one case, the party affected by the acceptance of the opinion may accuse the court of acting under someone else's dictates, and the principle of appearance of the independence of justice *(Justice must not only be done, it must also be seen to be done)* will be jeopardised. In contrast, when the requesting court rejects the position of the advisory opinion, the party affected by such rejection may complain that the decision delivered in the case does not meet international standards and question the legitimacy of the decision.

A separate issue is whether national judges themselves will easily refuse to accept an advisory opinion if it turns out to be in conflict with their inner convictions, legal views or values. And in such a situation, it does not matter whether they are wrong or not, and if they still take a step contrary to their internal convictions or legal views in such cases, this might be seen as a voluntary denial of the principles of judicial independence. It should also be noted that some judges at the Strasbourg Court themselves see great danger and challenge in a situation where national courts methodically and in principle do not follow the approaches suggested by the advisory opinion, which they consider undoubtedly problematic.[72] This would indeed undermine the credibility of advisory opinions.

[72] See supra note 13, 9.

The jurisprudence established by the European Court of Human Rights is already guidance for national courts, regardless of whether the supremacy of the Constitution or international law has been established and regardless of whether the Convention has been fully incorporated into domestic law. However, this jurisprudence has been established on the basis of the examination of individual applications, where the European Court acts as a court, which, with the involvement of the parties, determines whether the requirements of the Convention have been violated in a particular case, rather than merely as an authoritative interpreter of the Convention in answering questions raised (sometimes incompetently) by national courts, where it acts within the jurisdiction of an advisory opinion. Therefore, this is not problematic in the light of judicial independence, and the application of the European Court's case-law is as common and binding as the application of national law, as opposed to cases where a national court seeks an authoritative position of an authoritative court on a legal issue "directly connected" to the case before it, which it might not even consider.

The fact that the Grand Chamber's advisory opinion is not formally binding on the requesting national court does not detract from the conflict with the principles of judicial independence, which derives from the possibility provided by Protocol No. 16. and the use of this possibility.

There is another issue: whether an advisory opinion will be adequately perceived and interpreted by national courts and whether the parties will have the right to appeal against their interpretations in individual applications under Article 34, and what is expected to be the outcome.

VIII. CONCLUSION

The questions on which the highest national courts have requested an advisory opinion, the answers given or not given, and, on the whole, the content and scope of the advisory jurisdiction set out in Protocol No. 16, show that:

- In most cases, national courts raise questions to which there are direct answers in the Court's case-law or from which those answers logically follow; among them are the questions that the Grand Chamber has accepted for examination and already answered, or has not answered yet. The answers given by the Grand Chamber also show that most of them should not have been raised and that the national courts themselves should have looked for the answers in the Court's rich jurisprudence. Thus, the necessity and effectiveness of the jurisdiction established by Protocol No. 16 are not yet fully apparent.

- It certainly should be taken into account that the Protocol has not been signed or ratified by most of the Contracting States. It is also noteworthy that even in the countries where

the Protocol has been ratified, the new possibility has not generated much enthusiasm among the national courts.

- It can be observed that national courts ask questions in a very generalised way, without showing a direct connection to the determination of the case pending before them, thus leading to a refusal to accept the questions. It does not yet appear that the Grand Chamber leaves any margin of discretion to the court requesting an advisory opinion in finding that the question is directly connected to the pending case.

- The Grand Chamber has established the right to reformulate the questions raised, thus making it possible to exercise advisory jurisdiction; however, sometimes this may also serve the purpose of placing a certain issue into a favourable legal context. Cases, where the court requesting an advisory opinion does not agree with the reformulated questions, may become problematic because it is unknown whether or not the answers given to them will satisfy its interests.

- Practice has confirmed the need for the Grand Chamber to retain the right not to answer one or more questions from the request already accepted, after a panel of the Grand Chamber has found the request admissible, because of the incompatibility of those questions with the requirements of Protocol No. 16, which we consider reasonable.

- The clarifications of the Court concerning its role and scope in accordance with the jurisdiction under Protocol No. 16, in particular the clarification that its aim is not to transfer the dispute to the international court, assess national law in the context of the Convention and to answer questions instead of national authorities, are very important.

- The Grand Chamber examines cases expeditiously and delivers advisory opinions within less than 1 year of receiving the request, and decisions on admissibility in an even shorter period of time.

- The introduction of advisory jurisdiction raises suspicion concerning its conflict with the fundamental principles of judicial independence, as well as the fact that it is problematic for national courts to see an advisory opinion as guidance. It legalises or legitimises the situation where the judge hearing the case discusses with other judges, who are not involved in the examination of the case, legal issues of the pending case and consults with others – the upper court or just competent judges.

- The fact that an advisory opinion is not binding on the requesting court does not dispel doubts about independence; on the contrary, it creates additional difficulties in terms of the principle of appearance of independence, on the one hand, and the perception of this fact by parties to domestic proceedings, on the other. Furthermore, in the case of the acceptance and rejection of the advisory opinion by the national court, the aim of enhancing dialogue between national and international courts or the principle of subsidiarity cannot exclude the legitimacy of such doubts. After the delivery of advisory

opinions, their interpretations, and the parties' refusal to agree with those interpretations, might become problematic for national courts. There is no answer yet to the question of whether the parties will have an opportunity to challenge these interpretations on the basis of Article 34, by filing individual applications.

- The highest national courts should either not use the possibility of requesting an advisory opinion at all or resort to it only in rare, special cases involving such an uncommon question to which the European Court's rich case-law has no answer or regarding which no conclusions can be drawn from its case-law, or where the case involves an important systemic problem that requires a particularly complex approach. The right to request an advisory opinion should not have a negative impact in terms of the development of national law which ultimately feeds the case-law of the European Court and from which a general European consensus emerges.

It is indeed too early to draw definitive conclusions, and the practice accumulated over the next few years will provide more material for reflection for a more comprehensive study to examine the effectiveness and efficiency of Protocol No. 16.

Giorgi Nakashidze[*]

CONSTITUTION OF GEORGIA, PRIMACY OF INTERNATIONAL LAW AND EX POST CONSTITUTIONAL REVIEW OF TREATIES

ABSTRACT

Georgia belongs to a small group of states where it is permitted to contest the constitutionality of a treaty in force (*ex post* constitutional review). According to the primacy of international law, a state is not in a position to refuse to fulfil a treaty by referring to its national law, including the unconstitutionality of a treaty. On the other hand, based on the principle of the supremacy of the constitution, the primacy of international law in Georgia is not absolute at the national level, one of the manifestations of which is the *ex post* constitutional review of treaties. This Article analyses the relationship between the Constitution of Georgia and international law, and it is argued that the Georgian model of the *ex post* constitutional review of treaties, which may lead to the invalidity of a treaty in force or its norm at the national level, is incompatible with the primacy of international law and requires to modify the *ex post* review model in a manner that, instead of automatic invalidation, would defer to the executive or legislative branch of the government to eliminate the unconstitutionality.

I. INTRODUCTION

According to the Constitution of Georgia (hereinafter referred to as "the Constitution"), justice in Georgia is administered by the common courts. The establishment of specialised or military courts is permissible only within the system of the common courts, whereas the setting up of extraordinary courts is prohibited.[1] At the same time, the International Criminal Court (ICC) is also entitled to administer criminal justice in Georgia, due to the fact that Georgia has ratified the ICC's founding treaty – the Rome Statute. The Constitution does not contain any provision in this regard.[2] Is Georgia

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[1] Article 59, Constitution of Georgia (as amended in 2018) <https://matsne.gov.ge/en/document/view/30346?publication=36> [last accessed on 30 September 2022].

[2] The issue of the constitutionality of the ratification of the Rome Statute emerged in a number of states and was examined by the relevant national bodies of constitutional review. Consequently, some states amended their constitutions to allow the ratification of the Rome Statute. See International Committee of the Red Cross. Issues Raised with Regard to the Rome Statute of the International Criminal Court by National Constitutional Courts (Supreme Courts and Councils of State, 2003) <https://www.icrc.org/data/rx/en/assets/files/other/issues_raised_with_regard_to_the_icc_statute.pdf> [last accessed on 30 September 2022].

entitled to refuse to comply with the obligations arising from the Rome Statute on the ground that the Rome Statute is *prima facie* inconsistent with the Constitution?[3]

Pursuant to Article 4(5) of the Constitution,[4] "[t]he legislation of Georgia complies with the universally recognised principles and norms of international law. A treaty of Georgia shall take precedence over domestic normative act unless it comes into conflict with the Constitution or the Constitutional Agreement of Georgia." This provision ensures the supremacy of the constitution. It follows that under the constitutional law of Georgia, the question raised above could be answered in the affirmative, because a treaty of Georgia shall not come into conflict with the Constitution. On the other hand, the answer under international law is negative. The primacy of international law requires states to give preference to international law when their international obligations collide with their domestic legislation. Otherwise, an issue of state responsibility may arise.

In 2002, the Constitutional Court of Georgia (hereinafter referred to as "the Constitutional Court") adjudicated the only case to date, which *directly* concerned the constitutionality of the provision of a treaty that had entered into force for Georgia. However, the Constitutional Court ruled that the contested provision was in conformity with the Constitution.[5] Georgia belongs to a group of those few states[6] where the treaties may be subject to both *ex ante*[7] review of treaties which are not in force yet and *ex post*[8] review of treaties which entered into force for Georgia.[9] The relationship between the constitution, international law and a treaty is a specific part of the wider complex issue of the relationship between international and domestic law. While the latter is intensively researched and commented on both in theory and practice,[10] insufficient

[3] This outcome seems highly unlikely since, according to the complementarity principle of the Rome Statute, the ICC exercises its jurisdiction when the national judiciary is unwilling or unable to administer justice.
[4] Former Article 6(2) of the Constitution of Georgia before the amendments entered into force in 2018 <https://matsne.gov.ge/en/documetnt/view/30346?publication=34> [last accessed on 30 September 2022].
[5] Judgment of the Constitutional Court of Georgia on the Constitutional Submission of the Didube-Chughureti District Court, Case No 8/177/2, 21 May 2002 <https://www.constcourt.ge/ka/judicial-acts?legal=235> (in Georgian) [last accessed on 16 April 2022]. For details, see infra Part IV, Section 3 of the present Article.
[6] At the constitutional level, the possibility of ex post constitutional review of treaties is enshrined in the constitutions of Brazil, Mexico, Poland, Portugal, Serbia and Angola. In the case-law, this possibility exists in Belgium, Chile, Germany, Italy, Japan and the United States of America. See Mario Mendez, "Constitutional Review of Treaties: Lessons for Comparative Constitutional Design and Practice" (2017) 15 International Journal of Constitutional Law 84, 96.
[7] Ex ante constitutional review is also known as preliminary, preventive or a priori review.
[8] Ex post constitutional review is synonymous with subsequent, repressive or a posteriori review.
[9] Article 60(4)(e), Constitution of Georgia (as amended in 2018); Articles 19(1)(f), 23(5) and 38, Organic Law of Georgia on the Constitutional Court of Georgia <https://matsne.gov.ge/ka/document/view/32944?publication=31> [last accessed on 30 September 2022].
[10] See e.g. Davíd T Björgvinsson, The Intersection of International Law and Domestic Law: A Theoretical and Practical Analysis (Elgar Publishing 2015); Dinah Shelton (ed), International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion (Oxford University Press 2011). On

attention is paid to the interaction of the constitution and international law, in particular in light of *ex post* review of treaties.

Against this backdrop, drawing on the Constitution of Georgia, the present Article investigates the relationship between *ex post* constitutional review of treaties, the supremacy of the constitution and the primacy of international law. The Article consists of four main parts. In the first part, the main aspects of the relationship between international and domestic law are briefly reviewed, such as the content and scope of the primacy of international law, monistic and dualistic theories and the doctrine of direct effect of international legal norms. The second part, on the basis of Article 4(5) of the Constitution, explores the relationship of the Constitution of Georgia with international law, the scope of the primacy of international law in the legal system of Georgia, the content and effect of "universally recognised principles and norms of international law" and their application in the jurisprudence of the Constitutional Court. The third part, based on the analysis of Articles 27 and 46 of the Vienna Convention on the Law of Treaties, shows that, from the perspective of international law, declaring a treaty or its provision unconstitutional following the *ex post* constitutional review cannot justify the non-fulfilment of obligations arising from the treaty. In the fourth part, it is argued that the existing model of the *ex post* constitutional review of treaties in Georgia is rigid because, in the case of unconstitutionality, the treaty or its provision is automatically declared null and void and leaves no room for manoeuvring for the state as a subject of international law. Therefore, it is submitted that, instead of automatic invalidation, the *ex post* model of constitutional review should give some discretion to the executive and/or legislative authorities to eliminate the unconstitutionality of a treaty in force.

II. KEY ASPECTS OF THE RELATIONSHIP BETWEEN INTERNATIONAL AND DOMESTIC LAW

1. SUPREMACY OF THE CONSTITUTION VS. PRIMACY OF INTERNATIONAL LAW

A state has to strike balance between the two competing claims of legal superiority, which are simultaneously imposed on it by the constitution and international law.[11]

the relationship between international and domestic law in specific states, see Fulvio Maria Palombino (ed), Duelling for Supremacy: International Law vs. National Fundamental Principles (Cambridge University Press 2019). For case-law on the application of international law by national courts, see André Nollkaemper and others (eds), International Law in Domestic Courts: A Casebook (Oxford University Press 2018). On the interaction of the principle of the rule of law at the national and international levels, see Machiko Kanetake and André Nollkaemper (eds), The Rule of Law at the National and International Levels: Contestations and Deference (Hart Publishing 2016).

[11] For a detailed analysis of the compatibility of constitutional democracy with international legal obligations, see Carmen E. Pavel, Law beyond the State: Dynamic Coordination, State Consent, and Binding International Law (Oxford University Press 2021) 111-139.

As a starting point, it should be noted that the primacy of international law asserts its absolute inviolability only at the international level because at the national level it is constrained by the supremacy of the constitution.[12]

According to the fundamental principle of international law, international law takes precedence over domestic law.[13] This postulate, which is considered "a generally accepted principle of international law", dictates that "in the relations between Powers who are contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty."[14] Moreover, this principle is equally applicable to the constitution. As the Permanent Court of International Justice (PCIJ) found, "[...] a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force."[15] Therefore, a state is deprived of the legal possibility to refuse to fulfil an international obligation by referring to its own domestic law, including the constitution.

Although the likelihood of conflict between the constitution and international law, including treaties, is low,[16] there is a natural struggle between domestic and international law. This does not mean that these competing claims are mutually exclusive and that the state must make a choice in favour of one of them. International law requires the acceptance of its primacy only to the extent that a state is not allowed to violate the rule of international law, even with actions that are in full compliance with its constitution.[17] Such a conciliatory position of international law is reasonable because, due to sovereignty, each state establishes *ipso jure* the legal primacy of the constitution at the domestic level and international law would always yield to it. Since international law exists independently of the constitution, a state is compelled, to some extent, to accept the primacy of international law over domestic law, including the constitution, in matters that are regulated by domestic and international law at the same time. The

[12] Anne Peters, "Supremacy Lost: International Law Meets Domestic Constitutional Law" (2009) 3 The Vienna Journal on International Constitutional Law, 170; André Nollkaemper, "Rethinking the Supremacy of International Law" (2010) 65 Zeitschrift für öffentliches Recht, 67-71.

[13] Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, ICJ Reports 1988, para 57.

[14] Greco-Bulgarian Communities, Advisory Opinion, 1930 PCIJ (ser. B) No. 17 (July 31), 32.

[15] Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in Danzig Territory, Advisory Opinion, 1932 P.C.I.J. (ser. A/B) No. 44 (Feb. 4), 24.

[16] For details, see infra Part IV, Section 1.

[17] In this regard, a controversial position is brought forward by the Tagliavini Report. Without any convincing justification, the Report states that "domestic constitutional law could be invoked as a defence against obligations imposed on a state by international law if those obligations contradict core elements of the national constitution". See Independent International Fact-Finding Mission on the Conflict in Georgia, Report, Volume II, 288. This finding has been rightly criticised. See André de Hoogh, "The Relationship between National Law and International Law in the Report of the Georgia Fact-Finding Mission" (EJIL: Talk! 4 January 2010) <https://www.ejiltalk.org/the-relationship-between-national-law-and-international-law-in-the-report-of-the-georgia-fact-finding-mission/> [last accessed on 30 September 2022].

competition between the constitution and international law is of a constantly growing nature due to the expansionism of modern international law, which is gradually penetrating in those areas that were traditionally perceived as the exclusive domestic jurisdiction of the state.

In the event of a conflict between domestic and international law, the state must give priority to international law. The state, as a subject of international law, is obliged to protect the primacy of international law. This obligation is reflected in Article 27 of the Vienna Convention on the Law of Treaties[18] (hereinafter referred to as "the Vienna Convention"), which stipulates that a state may not refer to its national law to justify the non-fulfilment of a treaty.[19] The law of the international responsibility of a state mirrors the same approach.[20] Otherwise, the effectiveness of international law would be at risk.

2. MONISM AND DUALISM

Traditionally, the relationship between domestic law and international law is analysed in light of the theories of monism and dualism.[21] According to the monist theory, domestic and international law are part of the same legal system. As a result, a binding norm of international law automatically becomes a part of domestic law (*principle of incorporation*), and in the case of a normative conflict between them, priority is given to international law. In contrast, the dualistic theory takes as its point of departure the qualitative distinctions between domestic and international law, treating them as two distinct legal systems.[22] Unlike the principle of automatic incorporation, dualism does not treat the norms of international law as part of domestic law *per se* and requires additional action by the state (for example, the promulgation of a legislative act), by which a norm of international law becomes a part of domestic law (*method of transformation*).[23] In short, both theories attempt to describe in oversimplified terms how international law, including a treaty, takes effect in domestic law.

[18] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (Vienna Convention).

[19] Save for Article 46 of the Vienna Convention, referred to by Article 27. For details, see infra Part III, Section 2.

[20] Responsibility of States for Internationally Wrongful Acts, UNGA Res 56/83, 12 December 2001, UN Doc A/RES/56/83, Annex (RSIWA). Pursuant to Article 3 of RSIWA, the characterisation of an act of a State as internationally wrongful is governed by international law. Such characterisation is not affected by the characterisation of the same act as lawful by internal law. According to Article 32, the responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations.

[21] See, inter alia, Alexander Orakhelashvili, Akehurst's Modern Introduction to International Law (8th edn, Routledge 2019) 57-58; James Crawford, Brownlie's Principles of Public International Law (9th edn, Oxford University Press 2019) 45-47; Malcolm N Shaw, International Law (8th edn, Cambridge University Press 2017) 97-100.

[22] For details, see Björgvinsson, supra note 10, 19-39, 55-88.

[23] ibid.

In practice, states validate treaties in domestic legal order by different methods, which makes it virtually impossible to identify purely monistic or dualistic states.[24] For example, monist states establish certain prerequisites, which shall be observed to enable the incorporation of norms (incorporation is not automatic). In some of the dualist states, the courts use treaties that have not been transformed into domestic law.[25] Although the dichotomy between monistic and dualistic theories is no longer relevant today, they may be relied on as a starting point for analysing the complex relationship between domestic and international law.

3. DIRECT EFFECT AND SELF-EXECUTING CHARACTER

Not every domesticated international law norm gives rise to enforceable rights and duties. Bringing an international legal norm into domestic law does not *ipso facto* transform it into the valid basis of a legal claim at the national level. It is necessary that a norm has a *direct effect.* In a broad sense, the doctrine of direct effect means that the norm of international law becomes operational at the national level and natural and legal persons can apply them.[26] Unlike incorporation and transformation, which determine *how* a norm of international law becomes part of domestic law, the doctrine of direct effect determines *when* such norm can be applied in domestic law.[27] Both a provision of a treaty and a norm of customary international law may have a direct effect.

The direct effect of a treaty norm is often equated with the concept of a self-executing norm.[28] While US courts employ the concept of self-executing norm, European courts apply the concept of direct applicability or direct effect with the same meaning.[29] In practice, the direct effect of a norm is usually contingent upon the self-executing character of a norm. In principle, this implies that the norm of a treaty shall be the source of rights,[30] i.e. a norm shall regulate the legal rights and obligations of natural or legal persons.

Based on state practice, several criteria are distinguished, which give a norm a direct effect in domestic law: validity, intent and completeness.[31] Validity refers to the extent

[24] Shelton, supra note 10, 11-12.

[25] Eleni Methymaki and Antonios Tzanakopoulos, "Sources and the Enforcement of International Law Domestic Courts — Another Brick in the Wall?" in Samantha Besson and Jean d'Aspremont (eds), The Oxford Handbook on the Sources of International Law (Oxford University Press 2017) 825-826.

[26] Björgvinsson, supra note 10, 89.

[27] For details, see Thomas Buergenthal, "Self-Executing and Non-Self-Executing Treaties in National and International Law" (1992), 235 Recueil des Cours 303, 317.

[28] André Nollkaemper, National Courts and the International Rule of Law (Oxford University Press 2011) 118; Konstantin Korkelia and Irine Kurdadze, International Human Rights Law according to the European Convention on Human Rights (2004) 28-34 (in Georgian).

[29] Shelton, supra note 10, 11-13.

[30] See e.g. Stefan A Riesenfeld, "The Doctrine of Self- Executing Treaties and US v. Postal: Win at Any Price?" (1980) 74 American Journal of International Law 892, 896-897.

[31] Nollkaemper (2011), supra note 28, 130-138.

to which the norm has become part of domestic law. In considering the element of intention, it must be determined whether the parties to the treaty intended the treaty to have a direct effect at the national level. The completeness of the norm is present when the content of a treaty norm is clear, specific and unconditional. In the absence of the mentioned conditions, a national court may not consider the norm of international law as having a direct effect or self-executing character.[32] It is always appropriate to determine the direct effect of a treaty norm on a case-by-case basis and not *in abstracto*.

The legal system of Georgia adopts the principle of incorporation, as it does not require the implementation of additional legislative action to make a treaty norm a part of domestic law.[33] In this sense, Georgia largely leans towards the monistic approach. As for the direct effect and self-executing character of the treaty norm, Georgian legislation introduces the synonymous concept of these terms – direct applicability.[34] In Georgia, a treaty norm has a direct effect, i.e. it applies directly if: a) a treaty is officially published; b) a treaty determines the specific rights and obligations, and c) it does not require transposition in domestic legislation by adopting clarifying legislative acts.[35] By this provision, the legislation of Georgia, with minor changes, reflects the criteria that give a direct effect to a treaty norm. Based on these prerequisites, it may be argued that the legal system of Georgia distinguishes between "self-executing" and "non-self-executing" norms,[36] although it does not stipulate such terms. The legislation of Georgia, first of all, requires that a treaty be officially published. This requirement is intended to provide individuals with information, availability and predictability of a treaty norm.[37] As for the specific content of the norm and the absence of the need to adopt a clarifying normative act, these prerequisites almost invariably reflect the criteria established by the widespread state practice for the direct effect of a treaty.

[32] See e.g. A and B v. Government of the Canton of Zurich, Appeal against the Regulation of 15 September 1999 adopted by the Canton of Zurich on the Tuition at Schools of Higher Education, Case No 2P.273/1999, BGE 126 I 242, ILDC 350 (CH 2000), 22 September 2000, Switzerland; Federal Supreme Court [BGer], cited in Nollkaemper and others, supra note 10, 205. The Federal Supreme Court of Switzerland examined if Article 13(2) of the International Covenant on Economic, Social and Cultural Rights (ICESR) on the availability of education was directly applicable. It found that Article 13(2) of the ICESR did not create enforceable rights, since, in the court's view, provisions of a program nature or catalogue of rights could not be invoked by the plaintiff to reason its own claim and needed additional clarification in the national legislation.

[33] Pursuant to Article 6 of the Law of Georgia on Treaties of Georgia, "[t]reaties shall be an integral part of the legislation of Georgia." This provision confirms that no additional legislative procedure is required to make a treaty a part of domestic legislation.

[34] ibid, Article 6(3).

[35] ibid.

[36] Korkelia, Kurdadze, supra note 28, 30.

[37] ibid, 70.

III. RELATIONSHIP BETWEEN THE CONSTITUTION OF GEORGIA AND INTERNATIONAL LAW

1. GENERAL OVERVIEW

The Constitution of Georgia belongs to a group of "entirely new or radically modified constitutions", which unites the constitutions adopted after the collapse of the Soviet Union in the 1990s, as well as of some European states.[38] One of the common features of this new wave of constitutions is the regulation of the relationship between international law and national law at the constitutional level.[39] In general, such constitutions are described as "international law friendly".[40] The positive attitude of the Constitution of Georgia towards international law is by its acceptance of the primacy of universally recognised principles and norms of international law and treaties over the national legislation.

In terms of relationship towards (customary) international law, the Constitution of Georgia can fall under the first group of the typology proposed by *Antonio Cassese*, who described the four types of constitutions:[41] a) constitutions that explicitly refer to "generally recognised rules of international law", declaring them as part of domestic law and, in some cases, give them precedence over "ordinary" domestic legislation; b) constitutions that ignore the status of international law at the national level; c) constitutions that profess "qualified recognition of international law" in the sense that they selectively refer only to generally recognised rules or international custom; and d) constitutions that refer to the UN Charter or the principles contained therein instead of international law. The components of the constitutions that correspond to the first group are fully included in Article 4(5) of the Constitution of Georgia.

The primacy of international law reflected in the new constitutions is not absolute as it does not apply to the constitution.[42] In those states (including Georgia), whose constitutions require the compliance of national law with international law, international law is superior to national law but is situated on a lower hierarchal level than the constitution.[43] Therefore, the primacy of international law is qualified. That is the reason

[38] Vladlen S Vereshetin, "New Constitutions and the Old Problem of the Relationship between International Law and National Law" (1996) 7 European Journal of International Law 29, 31-32.
[39] Eric Stein, "International Law in Internal Law: Toward Internationalization of Central-Eastern European Constitutions?" (1994) 88 American Journal of International Law, 427.
[40] Konstantin Korkelia, "New Trends Regarding the Relationship Between International and National Law (With a Special View Towards the States of Eastern Europe)" (1997) 23(3-4) Review of Central and East European Law, 227, 233-235.
[41] Antonio Cassese, Modern Constitutions and International Law, 192 Recueil des Cours 368 et seq (1985).
[42] Vereshetin, supra note 38, 41.
[43] Korkelia, supra note 40, 239. According to a different opinion, in the case of inconsistency between the Constitution and universally recognised international legal norms, priority should be given to the norm of international law. See Irine Kurdadze, "Stages of Development of Scientific Concepts on Correlation

why the Constitution of Georgia is considered a constitution that directly establishes the supremacy of constitutional law over international law or its part.[44] International law's claim to absolute primacy, especially over the state's constitutional law or basic constitutional principles, has always been contested at the national level and has never been upheld by states.[45] The Constitution of Georgia affirms this tendency, for it requires not only the compliance of treaties with the Constitution but also allows the *ex post* constitutional review of treaties in force.

2. ARTICLE 4(5) OF THE CONSTITUTION OF GEORGIA: PRESUMPTION OF COMPLIANCE

The position of the Constitution of Georgia towards international law is not unequivocal. Article 4(5) of the Constitution does not directly establish the primacy of international law in relation to national legislation, as it does not use such terms as: "primacy", "supremacy", "precedence", etc. A different approach was introduced in the Act on the Restoration of State Independence of Georgia, adopted in 1991 (hereinafter referred to as "the Act of Independence"), which accepted "[t]he primacy of international law" over the domestic legislation of Georgia and "the direct effect of its norms" declared "as one of the basic constitutional principles" of Georgia.[46] The Constitution of Georgia refrained from using similar wording. On the one hand, the Act of Independence established that only the Constitution of Georgia is the supreme law on the territory of Georgia. On the other hand, it accepted the primacy of international law over Georgian legislation. In addition, it declared the direct applicability of international legal norms as one of the main constitutional principles of Georgia.

The Act of Independence is qualitatively a document of a political nature and the acceptance of the primacy of international law in this manner could not be of fully normative character. Therefore, it is plausible to assume that by accepting the primacy of international law in the Act of Independence, Georgia, as a newly formed sovereign subject of international law, determined the value principle of international relations and foreign policy and did not intend to produce normative results as such. It is also interesting to note that in the Act of Independence the direct applicability of international legal norms in Georgia was declared as one of the main constitutional principles of Georgia. This provision once again confirms that Georgia interacts with international law through a monistic approach.

between International and Domestic Law and Contemporary Events" (2008) 1 Journal of International Law (TSU), 29.

[44] Peters, supra note 12, 187.

[45] Nollkaemper, supra note 12, 67-71.

[46] Act of Restoration of State Independence of Georgia, Gazette of the Supreme Council of the Republic of Georgia, 1991, No 4, Article 291 <https://matsne.gov.ge/en/document/view/32362?publication=0> [last accessed on 16 April 2022].

Article 4(5) of the Constitution reiterated the bottom line of the supremacy of international law established by the Act of Independence.[47] However, the Constitution refused to accept the primacy of international law in similar bold terms. Unlike the Act of Independence, the Constitution focused on *compliance* of Georgian legislation with international law. The Constitution's emphasis on compliance, rather than accepting the primacy, implies that national legislation *depends on* those principles.[48] Putting emphasis on the requirement of compliance with international law rather than an unequivocal acceptance of the primacy of international law may intend to reinforce the supremacy of the Constitution at the domestic level. Accordingly, the Constitution established through the presumption that the legislation of Georgia complies with the universally recognised principles and norms of international law – the Constitution does not use the wording "shall comply".[49] This approach, formulated in Article 4(5) of the Constitution of Georgia, may be referred as the acceptance of the primacy of international law in the form of *the presumption of compliance*. At the same time, the Constitution circumscribed the concept of international law and specified that Georgian legislation shall comply not with general international law but with universally recognised principles and norms of international law.

What is the relationship between the Constitution of Georgia and international law? Does the "Legislation of Georgia" include the Constitution itself, i.e. shall the Constitution comply with the universally recognised principles and norms of international law? Although the constitution is the supreme domestic law, the reference to "national legislation" usually excludes constitutions, as the constitution asserts its own supremacy and, therefore, requires all legislative acts to comply with it.[50] On the other hand, grammatical interpretation of Article 4(5) of the Constitution leads to the conclusion that the presumption of compliance with international law applies to the Constitution as well because the Constitution of Georgia is part of the "legislation of Georgia".[51] This observation is also supported by the fact that the Constitution places only treaties of Georgia on a lower hierarchical level, and not the universally recognised principles and norms of international law. As a result, it seems reasonable to conclude

[47] Irine Kurdadze, "The Primacy of Universal and Regional International Law and Georgia" in Konstantin Korkelia and Irakli Sesiashvili (eds.), Georgia and International Law (Collection of Articles) (Georgian Young Lawyers' Association 2001) 44 (in Georgian).

[48] Korkelia, supra note 40, 237.

[49] Cf. According to Article 8 of the Constitution of Georgia (as amended in 2018), a constitutional agreement relationship between the State of Georgia and the Apostolic Autocephalous Orthodox Church of Georgia "shall be in full compliance with the universally recognised principles and norms of international law in the area of human rights and freedoms" (emphasis added).

[50] Korkelia, supra note 40, 236.

[51] According to Article 7(1) of the Organic Law of Georgia on Normative Acts, normative acts of Georgia are divided into legislative and subordinate normative acts, which make up the legislation of Georgia. Article 7(2)(a) of the same Act states that the Constitution of Georgia belongs to the legislative acts of Georgia. Hence, it is part of the legislation of Georgia.

that international law is above the Constitution of Georgia, however, in light of the supremacy of the constitution, the soundness of this conclusion is questionable.

The reason for these contradictory conclusions is the formalist understanding of the supremacy of the constitution and the primacy of international law. In fact, the supremacy of the constitution applies only to the domestic legal system. The primacy of international law actually requires that international law be the superior force at the international level. Accordingly, the primacy of international law, in principle, has a claim of superiority at the *international level* because the supremacy of the constitution does not leave space for international law to ensure its own primacy at the national level.[52] Through the supremacy of the constitution, the state itself determines the scope and content of international law at the *national level*. As *André Nollkaemper* observes, "domestic reluctance to embrace the supremacy of international law at the domestic level is as old as international law itself."[53] Nevertheless, the supremacy of the constitution takes into account the objective of the primacy of international law and, instead of blocking it *in toto*, grants international law priority usually to "ordinary" legislation at the national level.

This pattern of operation is also reflected in the presumption of compliance in the Constitution of Georgia, which establishes the compliance of "ordinary" legislation of Georgia with international law. When it comes to deciding the legal superiority between the Constitution or legislation with constitutional status and international law, the supremacy of constitution imperatively determines the superiority of the Constitution. This is further evidenced by the possibility of *ex post* constitutional review of treaties.

3. CONTENT AND EFFECT OF THE "UNIVERSALLY RECOGNISED PRINCIPLES AND NORMS OF INTERNATIONAL LAW"

Article 4(5) of the Constitution of Georgia, within the presumption of compliance, refers to "universally recognised principles and norms of international law", instead of general international law. The Constitution uses the same wording in the context of the Constitutional Agreement,[54] the right to equality[55] and, with a subtle variance, the rights of foreigners and stateless persons.[56] The purpose and content of defining international

[52] The exception is the law of the European Union, which has the ability, unlike general international law, to ensure its own higher hierarchical status in the internal law of the member states, in the areas which the member states have transferred the sovereign right to regulate to the European Union (for example, the single market, environmental protection, transport, etc.).
[53] Nollkaemper (2010), supra note 12, 68.
[54] Article 8, Constitution of Georgia (as amended in 2018).
[55] ibid, Article 11.
[56] Article 33(3) of the Constitution of Georgia (as amended in 2018) sets forth that "Georgia shall grant asylum to citizens of other states and stateless persons in compliance with universally recognised norms of

law with such a category are not obvious. At first glance, referring to a specific category of international law, instead of international law in general, creates the impression that the Constitution intends to bring more clarity. However, such concretisation not only fails to present the content of international law more clearly but also raises a logical question as to which international law Georgia's legislation complies with. In this regard, it is rightly noted that this category does not explain and vaguely conveys the concept of international law.[57] Also, it is correctly argued that the qualifying criteria of "universally recognised" refers not only to the principle of international law but also the norm of international law must be "universally recognised".[58] In practice, it is always difficult to determine whether a principle or norm is "universally recognised" or not, because this criterion does not only involve determining the number of states that accept a particular norm or principle but also requires to assess the qualitative element, in what manner and to what extent the content of a specific principle or norm is shared by the states.

"Universally recognised principles and norms of international law" is not *stricto sensu* a source of international law as established by Article 38 of the Statute of the International Court of Justice (ICJ) and does not have a strictly defined normative content. A reference to international law with such formula is typical of a new type of constitutions.[59] It is difficult to find an international legal analogue of this concept.[60] In the Georgian legal scholarship, universally recognised principles and norms of international law are interpreted to denote customary international law,[61] on the one hand, and exclusively imperative, *jus cogens* norms of international law, on the other.[62] These assertions overlap to some extent but are not identical in scope: whereas *jus*

international law, in accordance with the procedures established by law" (emphasis added). This provision refers only to "norms" and omits "principles". Presumably, this is a legislative defect and the omission of the "principles" is not intended to produce different legal consequences.

[57] Paata Tsnobiladze, "Interaction between National Legislation and International Law" in Konstantin Korkelia and Irakli Sesiashvili (eds.), Georgia and International Law (Collection of Articles) (Georgian Young Lawyers' Association 2001) 49 (in Georgian).

[58] ibid, 49-50.

[59] See e.g. Korkelia, supra note 40, 227-240.

[60] The similar wording is used in the tenth principle of the 1975 OSCE Helsinki Final Act, which refers to fulfilment in good faith of obligations under international law. According to this principle, the states will fulfil in good faith not only the obligations arising from treaties but also from "the generally recognised principles and rules of international law". See Final Act of the Conference for Security and Co-operation in Europe (Helsinki, 1 August 1975). While this instrument is not legally binding, it may be relied on in interpreting international law. See Michael Wood and Daniel Purisch, "Helsinki Final Act (1975)" in Rüdiger Wolfrum (ed), Max Planck Encyclopedia of Public International Law (online edn, 2011) paras 19-21.

[61] Konstantin Korkelia, "Customary International Law in the Legal System of Georgia" in Konstantin Korkelia and Irakli Sesiashvili (eds.), Georgia and International Law (Collection of Articles) (Georgian Young Lawyers' Association 2001) 65 (in Georgian).

[62] Tsnobiladze, supra note 57, 49-50, 53.

cogens norms are usually, at the same time, part of customary international law, not all norms of customary international law have the *jus cogens* status. Therefore, it may be concluded that under universally recognised principles and norms of international law the Constitution of Georgia includes both "ordinary" customary international law and a specific group of customary international law norms with a special status, such as *jus cogens* norms.

Similar concepts such as "general" or "fundamental" principles of international law are known to international law. The content of the "principles of international law" is also vague. According to the *Lotus* case, the term "principles of international law" may refer to international law that is applied between all states.[63] This definition is not informative as it does not elaborate on the content of this concept and focuses only on its universal character. Traditionally, this category includes the principles that were codified in the Friendly Relations Declaration, adopted by the UN General Assembly in 1970.[64] Paragraph 2 of the Declaration states that the Declaration includes "basic principles of international law" and enumerates the seven principles.[65] Along with the Declaration, it is pointed out that the Helsinki Final Act of 1975 also codified three additional principles – the territorial integrity of states, the inviolability of borders, and respect for human rights and fundamental freedoms.[66] It is worth noting that introducing the principles of territorial integrity and the inviolability of borders as separate principles in the Helsinki Final Act was unexpected, as the former was perceived as the intrinsic concept of sovereign equality, and the latter of the prohibition of the threat or use of force.[67] As for the respect of human rights and fundamental freedoms, the reflection of this principle in the Helsinki Final Act was promoted by the Western states, advocating that the protection of human rights had a regional security dimension and was not only an internal matter of the state.[68] Although the Friendly Relations Declaration and the Helsinki Final Act set out a total of ten principles, it would be incorrect to argue that these two documents cover all the basic principles of international law, as in modern international law scholars are discussing the emergence of other principles, including the principle of human rights protection, the principles of international humanitarian law,

[63] S.S. Lotus (France v. Turkey.), 1927 PCIJ (ser. A) No. 10 (Sept. 7), 16.

[64] Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UNGA Res 2625 (XXV) (24 October 1970), Annex.

[65] These principles are the following: prohibition of the threat or use of force; settlement of international disputes by peaceful means; non-intervention in matters within the domestic jurisdiction of states; duty of states to co-operate; self-determination of peoples; sovereign equality of States; fulfilment of the international obligations in good faith.

[66] Final Act of the Conference for Security and Co-operation in Europe (Helsinki, 1 August 1975).

[67] Commentators point out that the enumeration of these principles as independent principles followed from the Soviet Union's recognition of the de facto borders in Europe. See Wood, Purisch, supra note 60, para 9.

[68] Wood, Purisch, supra note 60, para 10.

the principle of prevention of harm to the environment, the freedoms in common areas, and the principles regulating the global economy.[69] Instead, the Declaration should be seen as the culmination of a reassessment of the principles of the UN Charter,[70] and the three additional principles of the Helsinki Final Act as the specific manifestations of the foreign policy positions influenced by the Cold War.

In the international legal scholarship, general principles of international law are interpreted with alternative meanings. According to *Ian Brownlie*, this concept may consist of three groups of normative rules: a) rules of customary international law; (b) general principles of law (as set out in Article 38(1)(c) of the ICJ Statute); or c) certain logical postulates that derive from the existing practice of international law.[71] *Levan Aleksidze* averred that in international law a "principle" is a legally binding general rule, which must be complied with by the entire system of international law (fundamental principles) and the norms of individual branches of international law (branch-specific principles).[72] An international legal norm is a more specific rule of conduct, which is intended to specify the content of a general principle. Based on this assertion, *Levan Aleksidze* introduced a certain hierarchy, starting with the generally recognised basic principles at the top, followed by the principles of separate branches of international law; norms that specify the branch-specific principles; and, finally, local international legal principles and norms that are applied between states belonging to a specific group.[73] *Antonio Cassese* distinguished two groups of principles of international law. The first group includes the behaviour that is generated by the generalisation of the norms of conventional and customary international law. The second group unites the principles of separate branches of international law.[74]

Due to the vague content of principles and norms, it is often difficult to assess their applicability at the national level, especially due to the paucity of the relevant case-law. However, there are rare occasions when a constitutional court interpreted the principles of international law mentioned in the constitution. For example, the Slovenian Constitutional Court, in the course of the *ex ante* constitutional review of the treaty on cross-border cooperation between Slovenia and Croatia, determined that the "generally accepted principles of international law" mentioned in the Slovenian Constitution

[69] Jorge E Viñuales, "Introduction: The Fundamental Principles of International Law – An Enduring Ideal?" in Jorge E Viñuales (ed), The UN Friendly Relations Declaration at 50: An Assessment of the Fundamental Principles of International Law (Cambridge University Press 2020).
[70] ibid, 3.
[71] Crawford, supra note 21, 34. Under this category, Ian Brownlie suggested the following principles: consent, reciprocity, equality of states, good faith, the finality of judgments of international courts, the principle of domestic jurisdiction, etc.
[72] Levan Aleksidze, Modern International Law (ed. by Ketevan Khutsishvili, World of Lawyers 2013) 12-13 (in Georgian).
[73] ibid.
[74] Antonio Cassese, International Law (Oxford University Press 2001) 152.

included the principle of *uti possidetis*: "[t]his principle of international law which had developed during the gaining of the independence of former American and African colonies is a generally accepted principle of international law and is, as such, also binding on Slovenia."[75]

To conclude, "universally recognised principles and norms of international law" in the Constitution of Georgia refers to customary international law, including *jus cogens* norms, as these categories meet the element of "universal recognition" and derive from international law. It is therefore highly unlikely that this notion encompasses "general principles of law", as set out in Article 38(1)(c) of the ICJ Statute.[76] The element of "universal acceptance" is an important criterion because customary international law may be of a special kind (regional, local or even bilateral),[77] the incorporation of which in the presumption of compliance of the Constitution of Georgia is illogical, unless Georgia is a participant of the special custom under consideration. As for the purpose of reference by the Constitution to the "universally recognised principles and norms of international law", instead of general international law, it may intend to exclude that part of international law that does not belong to customary international law, that is, the only source of which is a treaty. This does not apply to those norms of international law that are codified in treaties but have the status of customary international norms and, independently of treaties, exist simultaneously in customary international law.

4. CASE LAW OF THE CONSTITUTIONAL COURT OF GEORGIA

In *Avtandil Chachua v. the Parliament of Georgia*, the Constitutional Court of Georgia gave a direct effect to the principles and norms of international law.[78] The case concerned

[75] Opinion No. Rm-1/00 of 19 April 2001, Off. Gaz. RS, No. 43/01 and Collection of Decisions, X/1, 78, cited in Mirjam Škrk, "The Relationship Between International Law And Internal Law in the Case-Law of the Slovene Constitutional Court" in Budislav Vukas and Trpimir Sosic (eds), International Law: New Actors, New Concepts – Continuing Dilemmas: Liber Amicorum Božidar Bakotić (Brill | Nijhoff 2010) 51-52.

[76] This is by reason of the fact that "the general principles of law" are interpreted as principles derived from national legal systems, which are different from "the general principles of international law". However, the position on this issue is not unanimous among the authors. See Imogen Saunders, General Principles as a Source of International Law: Art 38(1)(c) of the Statute of the International Court of Justice (Hart Publishing 2021) 95-96. See also Article 21 of the Rome Statute, which differentiates between "the principles and rules of international law" and "general principles of law derived by the Court from national laws of legal systems".

[77] See the conclusions of 2018 prepared by the UN International Law Commission and adopted by the UN General Assembly on the Identification of Customary International Law, UNGA, A/RES/73/203, 20 December 2018, Annex, Article 16.

[78] Judgment of the Constitutional Court of Georgia in Avtandil Chachua v. the Parliament of Georgia, No 2/80-9, 3 November 1998 <https://www.constcourt.ge/ka/judicial-acts?legal=80> (in Georgian) [last accessed on 30 September 2022].

the constitutionality of the collective dismissal of judges. The Court examined whether the article of the Organic Law on Common Courts on the collective dismissal of judges contradicted the universally recognised principles and norms of international law, which the Constitution required to be complied with. What is interesting in this decision is the methodology by which the Court identified the universally recognised principles and norms of international law regarding the removal of judges.

The Constitutional Court relied on the three non-binding documents which, by their essence, belonged to "soft law".[79] Initially, the Constitutional Court referred to the Basic Principles on the Independence of the Judiciary adopted on 6 September 1985[80] and held that "it is a universally recognised provision that elected or appointed judges have a guaranteed term of office until mandatory retirement or expiration of term. The mentioned article of the Constitution of Georgia requires the compliance of the legislation with this principle".[81] To strengthen the reasoning, the Court also referred to two documents of the Council of Europe: the Memorandum of the Committee of Ministers of the Council of Europe of 13 October 1994[82] and the European Statute of Judges adopted in Strasbourg on 8-10 July 1998.[83] Placing considerable interpretative weight on these documents, the Court determined that "international law does not provide for the possibility of the collective dismissal of judges of all systems of courts of the country."[84] Accordingly, the Court decided that the article of the Organic Law, which provided for the collective dismissal of judges, violated the universally recognised principles and norms of international law, which were required to be complied with by the Constitution of Georgia.

The methodology applied by the Court to identify principles and norms is problematic. First, the Court did not explain in a systematic and general way what content this concept carries in the Constitution of Georgia or international law. In addition, the Court did not ascertain the international legal status of those documents (binding character, soft law, reflecting customary international law). Therefore, it is unclear on what basis these documents could be considered a source of universally recognised principles and norms

[79] On the "soft law" as the source of international law, see Hugh Thirlway, The Sources of International Law (2nd edn, Oxford University Press 2019) 186-194.

[80] Basic Principles on the Independence of the Judiciary adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

[81] Avtandil Chachua v. the Parliament of Georgia, supra note 78, para 4.

[82] Rec. No. R (94) 12 of the Committee of Ministers to Member States on Independence, Efficiency and Role of Judges and Explanatory Memorandum (1994), CoE, adopted by the Committee of Ministers on 13 October 1994 at the 518th meeting of the Ministers' Deputies.

[83] European Charter on the Statute of Judges and Explanatory Memorandum, CoE, Strasbourg, 8-10 July 1998.

[84] Avtandil Chachua v. the Parliament of Georgia, supra note 78, para 4.

of international law. Finally, the Court seemed to attempt to reason the "universally recognised" nature of the ban on collective dismissal of judges, by observing that this rule "virtually has no analogues in the history of other democratic countries, if we do not consider some countries in the former Soviet Union space, in which this process was carried out in a completely different way and for the most part concerned the judges of the Soviet Union period".[85]

If the "universally recognised principles and norms of international law" in the Constitution of Georgia suggest only the rules of customary international law,[86] and if we assume that the Court implicitly used the rule of customary international law, the reasoning of the Court is still troublesome,[87] as identifying customary international law (determining state practice and *opinio juris*) is one of the most complex issues in international law.[88] Solely the non-binding documents of the UN and the Council of Europe are not a sufficient source for identifying customary international law.

Despite these shortcomings, this decision is interesting for the purposes of this article because it demonstrated that the universally recognised principles and norms of international law have a direct effect, i.e. they are directly applied in the domestic law of Georgia.

IV. UNCONSTITUTIONAL TREATIES FROM THE PERSPECTIVE OF THE VIENNA CONVENTION

Under the Vienna Convention, it is appropriate to analyse the issue of unconstitutional treaties by the systematic examination of three provisions of the Convention: Article 26 – *pacta sunt servanda*, Article 27 – a treaty must be performed regardless of the provisions of domestic law, and Article 46 – in strictly defined cases, a state may withdraw its consent to a treaty when the consent is based on a violation of domestic law on the authority to conclude a treaty. Yet, Article 27 can be considered as a particular manifestation of *pacta sunt servanda* with a clearly defined content. Therefore, Articles 27 and 46 of the Convention are sufficient for analysing the constitutionality of treaties from the perspective of the Vienna Convention.

[85] ibid, supra Part II, Section 3.

[86] For the criticism of the methodology applied by the Constitutional Court in the present case, see Korkelia (2001) supra 61, 73-78.

[87] See supra note 77.

[88] Initially, Pakistan tabled the amended article on pacta sunt servanda, which introduced wording similar to the current Article 27 in the Vienna Convention, in order not to allow states to evade international obligations by invoking the internal law. Ultimately, the Convention's drafting committee decided that the pacta sunt servanda should have remained an independent article, and Pakistan's amendment was added as a separate Article 27. See Mark E Villiger, Commentary on the 1969 Vienna Convention on the Law of Treaties (Brill | Nijhoff 2009) 371.

1. ARTICLE 27 OF THE VIENNA CONVENTION AND THE CONSTITUTION

According to the first sentence of Article 27 of the Vienna Convention, "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." This rule is not absolute as the second sentence of Article 27 states that this rule does not apply to the cases provided for in Article 46 of the Convention.[89] The purpose of Article 27 of the Vienna Convention is to ensure that the state fulfils its international obligations in good faith and to exclude the possibility of invoking a trivial argument of domestic law as a basis for the non-fulfilment of such obligation. Article 27 of the Vienna Convention does not refer directly to the constitution but – in general – to the internal law of the state. It goes without saying that the "internal law" under Article 27 also refers to the constitution, as it sits at the apex of internal law. Therefore, even if a treaty is unconstitutional, the state is obliged to continue to fulfil its obligations under it. Article 27 was adopted by 73 votes against two, confirming that this article was generally acceptable to states. On the other hand, 24 states abstained, as some of them did not want to embrace the primacy of international law over their domestic law in this fashion.

The inclusion of Article 27 in the final text of the Vienna Convention caused opposition from some states. For example, Costa Rica and Guatemala have expressly excluded the applicability of Article 27 to their constitutions. According to the interpretative declaration of Costa Rica, Article 27 does not include the provisions of Costa Rica's Constitution and refers only to legislation subordinate to the Constitution.[90] Guatemala made a reservation upon ratification that Article 27 does not refer to the Constitution of Guatemala, which takes precedence over all normative acts and treaties.[91] The "blocking" of Article 27 in respect of constitutions by those states did not go without a reaction from the other parties to the Vienna Convention. Finland[92] and Sweden[93] opposed the reservation of Guatemala, and the United Kingdom did not accept the reservation of either Guatemala or Costa Rica.[94] At the same time, these states explicitly

[89] See infra Part III, Section 2.

[90] Costa Rica, Vienna Convention on the Law of Treaties, Reservations and Declarations <https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXIII/XXIII-1.en.pdf> [last acces–sed on 30 September 2022].

[91] ibid, Guatemala.

[92] ibid, Finland. According to Finland's position, Guatemala's reservation, among other things, calls into question the fundamental point of international treaty law, especially in light of the fact that Article 27 of the Vienna Convention is a well-established rule of customary international law. Therefore, Finland considered that Guatemala's reservation is contrary to the object and purpose of the Vienna Convention and such a reservation is not permitted.

[93] ibid, Sweden. In Sweden's view, when a state gives its consent to be bound by a treaty, the state must be ready to make appropriate legislative changes to fulfil its obligations under the treaty.

[94] ibid, United Kingdom of Great Britain and Northern Ireland (13 October 1998). The United Kingdom

indicated that this fact would not preclude the entry into force of the Vienna Convention bilaterally.

2.ARTICLE 46 OF THE VIENNA CONVENTION AND THE CONSTITUTION

Article 46 of the Vienna Convention deals with the issue of the extent to which the international legal validity of a treaty can be affected by the fact that the state expressed its consent to be bound by a treaty in violation of its internal law. According to Article 46 of the Convention:

"1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith."

Article 46 is worded in a negative manner: a state cannot refer to a violation of domestic law unless strictly defined preconditions are met. The negative wording emphasises the exceptional nature of Article 46. At the same time, Article 46 reinforces the principle of Article 27 that compliance with the requirements of domestic law does not affect the validity of the treaty.[95] A state may only invoke Article 46 when it has expressed its consent to the treaty (a) in violation of a provision of its internal law (b) regarding competence to conclude treaties as invalidating its consent and (c) such violation shall be manifest and (d) shall concern a rule of its internal law of fundamental importance.

For the purposes of Article 46, "internal law" includes all the national legislative acts in force. Interestingly, in the initial draft of Article 46, reference was made only to "constitution" instead of "internal law".[96] Subsequently, however, "constitution" was replaced by "internal law" so that the latter included not only the written constitutions but also the state's constitutional practice and all rules of public law. A violated provision of internal law shall concern the competence to conclude treaties. There is a divergence of opinion as to what is meant by "competence to conclude treaties". Pursuant to the broad interpretation, this concept refers to both *procedural* and *substantive* restrictions

expressly stated that the rule of customary international law codified in Article 27 of the Vienna Convention applied both to the constitution and to other types of legislation. The same position was observed with respect to the reservation of Costa Rica.

[95] Thilo Rensmann, "Article 46" in Oliver Dörr and Kirsten Schmalenbach (eds), Vienna Convention on the Law of Treaties: A Commentary (2nd edn, Springer 2018) 845.

[96] ibid.

on concluding a treaty,[97] and according to the narrow interpretation, only procedural restrictions are included.[98] Procedural restrictions may involve the conclusion of a treaty by an unauthorised representative of the state or failure to implement the relevant constitutional procedure. A substantial limitation can be derived from fundamental human rights and freedoms.

A violation of the competence to conclude a treaty must be of "manifest" character. The Convention defines the "manifest" nature of the violation as follows: "[a] violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith."[99] The violation must be "manifest" to the other state party to a treaty. In addition, the provision of internal law shall meet the criterion of "fundamental importance". The purpose of introducing this element was to exclude by-laws and administrative acts and to limit the substance of internal law to the basic constitutional rules.[100] The latter does not denote the norm written in the constitution in a formal sense but includes the essential rules of constitutional law, which are important for the political-institutional functioning of the state and for the relationship between the state and people.

Meeting the high standard of Article 46 in practice is often difficult, as evidenced by the failure of arguments based on Article 46 in international litigation. For example, in *Cameroon v. Nigeria*, Nigeria argued before the ICJ that the international agreement between Nigeria and Cameroon, signed by the Head of State of Nigeria, was not valid as no subsequent ratification of the agreement by Nigeria took place. The ICJ, referring to Article 46 of the Vienna Convention, explained that the internal rules of the state on the conclusion of international agreements are "constitutional rules of fundamental importance".[101] Nevertheless, in the case of Heads of State, the restrictions imposed on them by domestic law are not obvious within the meaning of Article 46(2), unless such restrictions are published. The rationale behind this is that the Head of State *ex officio* represents the state. On Nigeria's alternative argument that Cameroon knew or should have known of the inability of the Nigerian Head of State to enter into a binding agreement, the Court held that "there is no general legal obligation for States to keep themselves informed of legislative and constitutional developments in other States which are or may become important for the international relations of these States."[102]

[97] ibid. See also Villiger, supra note 88, 589.

[98] E.g. the Venice Commission considers that Article 46 of the Vienna Convention refers only to national procedures for the entry into force of a treaty. See European Commission for Democracy through Law (Venice Commission), Interim Opinion on the Amendments to the Federal Constitutional Law on the Constitutional Court of the Russian Federation, CDL-AD(2016)005, 11/12 March 2016, 21, para 78.

[99] Article 46(2) of the Vienna Convention.

[100] Rensmann, supra note 95, 851.

[101] Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, ICJ Reports 2002, para 265.

[102] ibid, para 266.

Accordingly, Nigeria's consent to conclude international agreement was valid under international law, even though a Head of State alone, without further constitutional procedures, could not enter into such an agreement.

The ICJ affirmed these findings in the subsequent case. In *Somalia v. Kenya*,[103] Somalia argued that Somalia's internal law required the ratification of the Memorandum of Understanding concluded with Kenya. Referring to the judgment in *Cameroon v. Nigeria*, the ICJ found that the requirements of Somalia's domestic law would not be clear to Kenya because the Somali Minister had full powers to enter into a binding treaty on behalf of Somalia. This observation was bolstered by the fact that the obligation to ratify was not expressly mentioned either in the Minister's authorisation document or in the text of the Memorandum of Understanding. In addition, after the Somali Parliament rejected the Memorandum of Understanding, the Somali Prime Minister did not dispute the letter sent to the UN Secretary-General. Also, Somalia never informed Kenya of the insufficiency of consent expressed by the Minister. Bearing these circumstances in mind, the ICJ held that the Memorandum of Understanding, which failed to be ratified under domestic law, was nevertheless valid and binding on Somalia under international law.[104] The ICJ also found that, according to customary international law, a state, to which it became aware that its consent to the treaty was incompatible with domestic law but still did not express a protest, is presumed to have acquiesced the validity of consent.[105]

Article 46 of the Vienna Convention has to some extent alleviated the tension between state sovereignty and the fulfilment of treaties. Article 46 reinforces Article 27 and creates an additional guarantee to the fulfilment of treaty obligations. In addition, it considers the interest of the states and allows them, in exceptional cases, to request the annulment of a treaty on the basis of a violation of the national legislation on the competence to conclude treaties.

V. CONSTITUTIONAL REVIEW OF TREATIES

In practice, three models of constitutional review of treaties are distinguished: 1) a model in which both *ex ante* and *ex post* reviews are possible; 2) a model in which only *ex ante* or only *ex post* review is allowed; 3) a model in which any kind of constitutional review of treaties is prohibited.[106] As already mentioned, the first model applies to Georgia, as a treaty may be subject to both types of constitutional review.

[103] Maritime Delimitation in the Indian Ocean (Somalia v. Kenya), Preliminary Objections, Judgment, ICJ Reports 2017, paras 47-49.
[104] ibid, paras 47-49.
[105] ibid, para 49.
[106] Mendez, supra note 6, 96.

After the adoption of the Constitution of Georgia, the issue of possible contradiction of a treaty with the Constitution soon became a subject of academic interest.[107] Also, more scholarly attention is paid to the issue of constitutional review of treaties by the Constitutional Court of Georgia.[108] On the one hand, this is welcome, as the constitutional review of treaties remains one of the unstudied issues in the foreign scholarship of comparative constitutional and international law.[109] On the other hand, being cognizant of the fact that a treaty is primarily regulated by international law,[110] while the constitution determines its status in domestic legislation, it is noticeable that little consideration is given to the international legal perspective when discussing the constitutional review of treaties.

1. CONFLICT BETWEEN A TREATY AND CONSTITUTION

For the need to review the constitutionality of a treaty to arise, there must be a contradiction between a treaty and the constitution, which is the case when they regulate the same issue differently. A *prima facie* incompatibility between the wordings of provisions is not sufficient for a treaty to be considered unconstitutional since, through interpretation, the conflicting provisions in many occasions may be reconciled. In this regard, the principle of consistent interpretation plays an important role. Consistent interpretation refers to the interpretation of domestic law in such a way as not to jeopardise the fulfilment of an international obligation.[111] This principle enjoys almost universal support from national courts, as it is used both in states with a continental and a common law system, as well as in countries with a monistic and dualistic approach.[112] For that reason, it is often pointed out that the principle of consistent interpretation may even be a general rule of international law.[113]

[107] Konstantin Korkelia, International Treaty in International and National Law (Tbilisi State University Press 1998) 225-240 (in Georgian).

[108] See e.g. Besik Loladze, Zurab Macharadze, Anna Pirtskhalashvili, Constitutional Adjudication (2021) 87-88, 227-242 (in Georgian); Paata Javakhishvili, "Constitutional Review of Treaties in Georgia" in Mariam Jikia, Paata Javakhishvili, Ketevan Guguchia (eds), Current Issues of Modern International Law (Collection of Scientific Papers) (Universal 2020) 71-101 (in Georgian); Joni Khetsuriani, "Constitutional Court's Control over the International Agreements of Georgia" (2012) 4(35) Justice and Law, 16-35 (in Georgian).

[109] Mendez, supra note 6, 84–85.

[110] Being "governed by international law" is one of the essential elements of the definition of a treaty under Article 2(1)(a) of the Vienna Convention. Article 3(a) of the Law of Georgia on Treaties of Georgia defines a treaty in an identical manner.

[111] Cassese, supra note 41, 398

[112] André Nollkaemper, "The Effects of Treaties in Domestic Law" in Christian J Tams, Antonios Tzanakopoulos, Andreas Zimmermann (eds), Research Handbook on the Law of Treaties (Elgar Publishing 2014) 146-147.

[113] Björgvinsson, supra note 10, 104.

At the outset, it is worth noting that in practice the likelihood of a normative conflict between the norms of a treaty entered into by the state and the norms of the constitution is low.[114] However, such a possibility still exists, especially in the field of human rights law.[115] The low probability of conflict is due to several circumstances: first, courts usually follow the principle of consistent interpretation and interpret treaties in such a way as not to violate the state's international obligations. In addition, states have preventive mechanisms for avoiding collisions (in the case of Georgia, such a rule can be considered *ex ante* constitution review of treaties). Finally, it should be considered that most of the provisions of the constitutions do not concern the subject of treaties or are formulated so broadly that they leave room for harmonisation. However, there are normative conflicts that may not be resolved merely by interpretative devices.

2. CONSEQUENCES OF THE UNCONSTITUTIONALITY OF TREATIES

When discussing the unconstitutionality of a treaty or its provision, two cases should be distinguished. On the one hand, if a treaty that has not yet entered into force is in conflict with the constitution, the relevant party should try to get the other party to agree to make appropriate amendments to the text of the treaty and then give its consent. It is relatively difficult to take this route in the case of multilateral treaties, when the number of parties may be high. A feasible alternative for a state in this situation may be to make an appropriate reservation (if not prohibited) or an explanatory statement. One of the solutions is to amend the constitution. On the other hand, when it was determined that the treaty is unconstitutional after its entry into force, the situation becomes more complicated because the other party or parties to the treaty have a legitimate expectation that all parties to the treaty will properly fulfil their obligations under the treaty.

If declaring a treaty unconstitutional leads to refraining from its conclusion or denunciation of an already ratified treaty, international law is indifferent to this circumstance and an unconstitutional treaty is still legally valid under international law. This situation is due to the fact that for international law, a decision of a national court or national legislation is only a "fact",[116] which international law takes into account in exceptional cases.[117] Consequently, international law (of which a treaty is a part) is indifferent to the constitution, even though it has been given the status of the supreme legislative act of the state.

[114] Korkelia (1998), supra note 107, 208-209.
[115] Korkelia, Kurdadze, supra note 28, 38-39.
[116] Case concerning Certain German Interests in Polish Upper Silesia, PCIJ Ser. A No. 7, 1931, 19.
[117] Prominent examples of such cases in international law are the determination of citizenship for the purposes of diplomatic protection and the determination of the rights of shareholders of a legal entity. See Daniel Peat, Comparative Reasoning in International Courts and Tribunals (Cambridge University Press 2019) 51.

3. EX POST CONSTITUTIONAL REVIEW OF TREATIES IN GEORGIA

The issue of the constitutionality of a treaty of Georgia is adjudicated and decided by the Constitutional Court of Georgia.[118] The Constitutional Court recognises the exclusive competence of the Georgian government to conduct international relations but, at the same time, limits it by the Constitution, including human rights.[119] Checking the constitutionality of a treaty in Georgia is made possible by the fact that a treaty entered into force by Georgia is an integral part of Georgian legislation.[120] In the hierarchy of normative acts, a treaty is assigned a lower rank than the Constitution and, like all other legal acts, shall comply with it.[121] Such subordination of a treaty aims to ensure the supremacy of the Constitution. It should be noted here that the Constitution of Georgia is silent on the relationship between the Constitution itself and international law.

As mentioned in the introduction of this paper, the case-law of the Constitutional Court of Georgia is familiar with the case when the Court discussed the issue of the constitutionality of the provision of the treaty that had entered into force for Georgia.[122] The case concerned an employment dispute between a Georgian citizen and the International Committee of the Red Cross (ICRC). The ICRC refused to appear in the common court as a defendant, by virtue of relying on the article of the Headquarters Agreement between the Government of Georgia and the ICRC, which provided for the immunity of the ICRC against any form of litigation. Accordingly, the Constitutional

[118] Article 19(1)(f) of the Organic Law of Georgia on the Constitutional Court of Georgia <https://matsne.gov.ge/ka/document/view/32944?publication=31> [last accessed on 30 September 2022]. For a comprehensive overview of procedures for the constitutional review of treaties in Georgia, see Loladze and others, supra note 108, 87-88, 227-242.

[119] Judgment of the Constitutional Court of Georgia in The Public Defender of Georgia v. the Parliament of Georgia, No 1/1/468, 11 April 2012 < https://matsne.gov.ge/ka/document/view/1640006?publication=0> (in Georgian) [last accessed on 30 September 2022]: "International relations is a special privilege of the Government. However, when acting in the international arena, concluding agreements or fulfilling international obligations, the government is limited by the rights and freedoms recognised by the Constitution, including its Chapter II. Any obligation imposed by the international agreement, which will limit the rights recognised by the Constitution on the territory of Georgia, must meet the requirements established by the Constitution".

[120] Article 6, Law of Georgia on the Treaties of Georgia <https://matsne.gov.ge/ka/document/view/33442?publication=16> (in Georgian) [last accessed on 30 September 2022].

[121] Article 7(3), Organic Law of Georgian on the Normative Acts of Georgia <https://matsne.gov.ge/ka/document/view/90052?publication=34> (in Georgian) [last accessed on 30 September 2022].

[122] Judgment of the Constitutional Court of Georgia on the Constitutional Submission of the Didube-Chughureti District Court, Case No 8/177/2, 21 May 2002 <https://www.constcourt.ge/ka/judicial-acts?legal=235> (in Georgian). See also Decision of the Constitutional Court of Georgia in The Citizen of Georgia Irina Sarishvili-Chanturia v. the Parliament of Georgia, No 2/14/156, 4 October 2002 <https://www.constcourt.ge/constc/public/ka/judicial-acts?legal=181> [last accessed on 5 May 2022]. In this case, the issue of the constitutionality of the treaty that entered into force for Georgia was raised indirectly, because the plaintiff disputed not the treaty itself but the constitutionality of the resolution of the Parliament of Georgia by which the treaty was ratified.

Court had to adjudicate whether this treaty provision contradicted the right established by the Constitution of Georgia, according to which every person could apply to the court to protect their rights and freedoms. The Constitutional Court found that there was no conflict between a treaty provision and the Constitution, as the immunity of the ICRC was of a functional nature and did not extend to labour disputes with its employees. Thus, through a consistent interpretation, the Court managed to avoid invalidating the treaty provision in force.

What would happen if the Constitutional Court determined that the provision of the treaty in force was unconstitutional? In general, such conflict is sensitive because the supreme legislative act of the state is opposed to a legal norm established at the international level.[123] The answer to the question depends on the legal system. Since a provision of the ratified treaty exists simultaneously in two normative spaces – in the internal law of the state and in international law – different outcomes are produced: an unconstitutional provision ceases to be valid at the national level but maintains legal validity at the international level. Otherwise, the effectiveness of international law would be jeopardised. The state could easily refer to domestic law, including the constitution, and would no longer fulfil its treaty obligation.

In the jurisprudence of the Constitutional Court of Georgia, there has not yet been a case of declaring a treaty or its provision unconstitutional. If the Constitutional Court determines that a treaty or its provision contradicts the Constitution of Georgia, a different result is obtained depending on which type of constitutional review (*ex ante* or *ex post*) the Court carries out. In the case of *ex ante* review (when a treaty is not in force), declaring a treaty or its part unconstitutional leads to the inadmissibility of ratification.[124] In the case of *ex post* review, an unconstitutional treaty or its provision is declared null and void.[125]

If a treaty is found to be inconsistent with the Constitution in the course of *ex ante* review, giving consent to be bound by it, is allowed only after the relevant amendments are made to the Constitution according to the established procedure.[126] In state practice, there are cases when the states made amendments to their constitution before giving their consent to be bound by treaties.[127] It may be argued that in such cases,

[123] European Commission for Democracy Through Law (Venice Commission), Report on the Implementation of International Human Rights Treaties in Domestic Law and the Role of Courts, CDL-AD(2014)036, 8 December 2014, 35.

[124] Article 23(5) of the Organic Law of Georgia on the Constitutional Court of Georgia <https://matsne.gov.ge/ka/document/view/32944%23?publication=31> (in Georgian) [last accessed on 30 September 2022].

[125] ibid.

[126] Article 21(3), Law of Georgia on the Treaties of Georgia <https://matsne.gov.ge/ka/document/view/33442?publication=16> (in Georgian) [last accessed on 30 September 2022].

[127] See supra note 2 on the amendments made to the constitutions upon ratification of the Rome Statute. See also Decision of the Constitutional Court of Slovenia on the constitutionality of the Agreement Establishing

the supremacy of the constitution to some extent becomes qualified, as due to foreign political expediency, the state refuses the rigid understanding of the supremacy of the constitution and amends it due to the increased interest in ratifying a specific treaty.

On the other hand, the legislation of Georgia does not provide *expressis verbis* for the possibility of amending the constitution if the *ex post* constitutional review reveals that a treaty already in force is unconstitutional.[128] The absence of such possibility may be explained by the fact that the unconstitutionality of a treaty or its part results in declaring it null and void. The legal significance of nullity implies that a treaty or its part is invalid for Georgia not from the moment of finding them unconstitutional but from the moment of giving consent to be bound by them. Accordingly, it would be legally illogical to consider the possibility of amending the Constitution due to a treaty which had never been valid.

If the organ of constitutional review declares a treaty in force invalid on the grounds of unconstitutionality, this will create complications for the state as a subject of international law in relations with the parties to the treaty and may even lead to responsibility under international law. Therefore, declaring a treaty or its provision unconstitutional is not an optimal approach. Instead, a court should endeavour to harmonise the domestic legal order of the state (including the constitution) with international obligations,[129] including by applying the principle of consistent interpretation.

4. HARMONISATION OF EX POST CONSTITUTIONAL REVIEW OF TREATIES WITH INTERNATIONAL LAW

How appropriate is the possibility of *ex post* constitutional review of treaties, which may threaten the effectiveness of international law and give rise to the international responsibility of the state? Arguing the inappropriateness of the *ex post* constitutional review of treaties is attainable from the perspective of both constitutional law and international law.[130] The constitutional law-based argument emphasises that the state may be so constrained by the constitution as to deprive it of the ability to conduct

an Association between Slovenia and the European Communities, Constitutional Review, Official Gazette RS No 40/97, ILDC 532 (SI 1997), 5 June 1997, based on which Slovenia made the first-ever amendment to its Constitution so that individuals and legal entities from EU member states could purchase real estate in Slovenia.

[128] Article 21, Law of Georgia on the Treaties of Georgia <https://matsne.gov.ge/ka/document/view/33442?publication=16> (in Georgian) [last accessed on 30 September 2022]. This article concerns only a treaty which has not yet been entered into by Georgia.

[129] European Commission for Democracy Through Law (Venice Commission), Opinion on the Draft Law on the Constitutional Court and Corresponding Amendments of the Constitution of the Republic of Moldova, CDL-AD(2002)016, 5-6 July 2002, para 9.

[130] Mendez, supra note 6, 96 et seq.

foreign relations effectively. However, the primary objection still relates to compliance with international law. From the perspective of international law, the argument against *ex post* constitutional review is based on the opinion that *ex post* review of treaties in force is perceived as an open attack on the primacy of international law, as it produces results inconsistent with international law. In light of this, the state may completely reject the idea of *ex post* review of treaties.[131]

To overcome these contradictions, *Mario Mendez* suggests[132] that the concept developed by *Mark Tushnet* on the "strong" and "weak" forms of judicial review be utilised.[133] Introducing "strong" and "weak" forms of judicial review in the context of *ex post* constitutional review of treaties means the following: in the context of the "strong" form of constitutional review, declaring an unconstitutional treaty or its norm invalid by the court is equally mandatory for other branches of government, whereas in the case of the "weak" judicial review, the court issues only a declaratory decision on the inconsistency of the treaty with the constitution, and directs the obligation to eliminate the defect entirely to the executive or legislative authorities. In the Georgian scholarship, it is proposed that the obligation to denounce a treaty should be imposed by the Constitutional Court on the branch of the government that gave consent to be bound by it.[134] However, it should be noted that the obligation to denounce a treaty may not be the optimal solution, as it may have repercussions for the state under international law. It is more desirable to leave some discretion to the executive and/or legislative authorities to determine the form of response. This is what the "strong" and "weak" forms of judicial review allow.

If the *ex ante* review is not sufficient and the state has to withdraw from the treaty already in force due to unconstitutionality, the state can exercise *ex post* review in the form of a "weak" or non-binding declaratory decision, when the executive or legislature must decide for themselves whether or not to respond to the court's decision.[135] The state can also opt for a modified version of the "strong" form of *ex post* constitutional review of treaties, meaning that, instead of declaring the treaty or its provision null and void, it directly obliges the executive or legislative authorities to bring the treaty into conformity with the Constitution, whether it is an amendment to the treaty or the Constitution, making a reservation or starting the procedure for termination. In such a case, a treaty norm, despite its unconstitutionality, is still valid at the national level,

[131] For this reason, ex post review of treaties was rejected by Luxembourg and Colombia. See Mendez, supra note 6, 99.
[132] Mendez, supra note 6, 99-105.
[133] Mark Tushnet, Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law (Princeton University Press 2008).
[134] Joni Khetsuriani, The Authority of the Constitutional Court of Georgia (Favorite Style 2016), 187-188 (in Georgian).
[135] Mendez, supra note 6, 99-100.

provided that the state takes, in line with the court's ruling, appropriate steps within a specific time period to eliminate the deficiency.[136] Consequently, the supremacy of the constitution will not be violated, and the state will also manage to respect the primacy of international law.

It would be desirable for the Constitutional Court of Georgia to be granted similar authority in the above-described "weak" or the modified "strong" form when exercising *ex post* constitutional review of treaties. It should be noted that the Constitutional Court carries out strictly "strong" constitutional review because the result of *ex post* constitutional review of treaties (invalidity) leaves no room for the state to act as a subject of international law. Therefore, it would be more reasonable to bestow the Constitutional Court a power similar to the above-mentioned modified version of the "strong" form of review. Even in the light of the fact that the nullity gains effect only in the national law, the state loses a legal basis for the fulfilment of the international obligation at the national level, which may cause practical difficulties. Hence, it would be appropriate if the decision of the Constitutional Court of Georgia, instead of invalidation, would lead to the obligation of the executive and/or legislative authorities to determine themselves the ways of eliminating the contradiction between a treaty and the constitution. As a result, it will be possible to uphold the Constitution and international law at the same time. Granting such authority to the Constitutional Court will be only an acknowledgement of the reality that the authority of constitutional review, which exists in respect of domestic legislative acts, cannot be identically applied to treaties.

VI. CONCLUSION

According to the Constitution of Georgia, the primacy of international law at the national level is not absolute, as it does not apply to the Constitution itself. This approach, which is shared by the majority of states, intends to reaffirm the supremacy of the constitution at the national level. As a result, the primacy of international law in domestic law is qualified. This approach is reflected in Article 4(5) of the Constitution of Georgia, which, within the framework of the presumption of compliance, accepts the superiority of "universally recognised principles and norms of international law" over the "ordinary" legislation only. In addition, these principles and norms, which include international customary law, including *jus cogens* norms, have a direct effect in the legal system of Georgia as they apply directly.

Unlike the national legal system, the supremacy of the constitution cannot limit the primacy of international law in the international legal system. The principle

[136] ibid.

of international law, which is reflected in Article 27 of the Vienna Convention, unequivocally determines that the state is legally deprived of the right to justify the non-fulfilment of a treaty by invoking the internal law, including a treaty's conflict with the Constitution (except for the cases defined strictly by Article 46 of the Vienna Convention). Therefore, the non-fulfilment of a treaty declared unconstitutional in domestic law may give rise to the international responsibility of the state, because the unconstitutionality of the treaty in force does not produce legal consequences under international law.

Against this background, the Georgian model of *ex post* review of treaties may lead to declaring an unconstitutional treaty or its provision null and void. In addition, in contrast to the *ex ante* review of treaties, Georgian legislation does not envisage *expressis verbis* possibility to amend the constitution in order to eliminate unconstitutionality. Although the nullity of a treaty or its provision is valid only at the national level and does not lead to invalidity at international law, such possibility is incompatible with the primacy of international law. Therefore, it is desirable that the Constitutional Court of Georgia exercises *ex post* review of treaties in a "weak" or modified "strong" form, which instead of nullification would recommend or oblige the executive or legislative branch to bring the unconstitutional treaty into compliance with the Constitution. The rationale behind this step would be consistent with the simple truth that the authority of constitutional review in regard to domestic legislative acts cannot be simply copy-pasted in respect of treaties.

Lavrenti Maghlakelidze[*]

PROBLEM OF NON-RETROACTIVITY IN SUBSTANTIVE CRIMINAL LAW

(ANALYSIS OF THE COURT PRACTICE)

ABSTRACT

Criminal law protects, on the one hand, individual and general good from criminal infringement, and on the other hand, the rights and freedoms of accused and convicted persons, through the retroactivity of criminal law, the analogy of law, the prohibition of double punishment, and other guarantee conditions, that act in their favour. All of the above are considered to be the demonstration of general legal principles (principles of justice, legality, and humanity) in legal science.

The principle of legality, together with the principles of justice and humanity, is an essential element of the principle of legal state and is directly related to substantive criminal law. According to national or international provisions, if an act is not considered an offence at the time of its commission either under national or international law, criminal liability shall not be imposed on a person. Therefore, according to that provision, the national legislator may not adopt provisions that retroactively impose or toughen liability.

In addition to the legislator, judges shall not have the right either, when imposing liability, to retroactively apply a legal provision if it worsens a person's condition. Checking whether a certain act violates national or international law or not, is the objective and subject of discussion by domestic judicial authorities.

This article analyses whether that important principle of legality is properly exercised in the judgments made by domestic courts. This paper focuses on the problem of the application of the retroactivity of law in terms of both, a limitation period and a conditional sentence, and the issue of liability of a person if the conditional sentence is changed or mitigated. This article also analyses practical examples of the application of the principle of non-retroactivity in relation to blanket provisions. All the above-mentioned problems are analysed based on the judgments delivered by the Constitutional Court of Georgia, after which the author provides the interpretation of Article 3 of the Criminal Code of Georgia in accordance with the Constitution of Georgia.

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I. INTRODUCTION

Criminal law protects, on the one hand, individual and general good from criminal infringement, and on the other hand, the rights and freedoms of accused and convicted persons, through the retroactivity of criminal law, the analogy of law, the prohibition of double punishment, and other guarantee conditions, that act in their favour. All of the above are considered to be the demonstration of general legal principles (principles of justice, legality, and humanity) in legal science.[1]

The principle of legality, together with the principles of justice and humanity, is an essential element of the principle of legal state and is directly related to substantive criminal law.[2] Both, Article 31(9) of the Constitution of Georgia and Article 3 of the Criminal Code of Georgia, and Article 7 of the European Convention on Human Rights, clearly state that if an act is not considered an offence at the time of its commission either under national or international law, criminal liability shall not be imposed on a person. Therefore, according to that provision of the Constitution, the criminal law, and the European Convention, the national legislator may not adopt provisions that retroactively impose or toughen liability.

In addition to the legislator, judges shall not have the right either, when imposing liability, to retroactively apply a legal provision if it worsens a person's condition. Therefore, criminal law is not always retroactive, but only when it completely annuls criminal liability for an act or mitigates punishment. Checking whether a certain act violates national or international law or not, is the objective and subject of discussion by domestic judicial authorities.[3]

This article analyses whether that important principle of legality is properly exercised in the judgments delivered by domestic courts. The above-mentioned problem will also be analysed based on the judgments delivered by the Constitutional Court of Georgia, after which Article 3 of the Criminal Code of Georgia will be interpreted in accordance with the Constitution of Georgia.

[1] Cf. Tinatin Tsereteli, "Application of Criminal Law in Time" (1967), p. 2, Soviet Law 16; Otar Gamkrelidze, The Interpretation of the Criminal Code of Georgia (2008), pp. 54-61; Merab Turava, Criminal Law, Overview of the General Part (the Ninth Edition, 2013), p. 24; Levan Kharanauli, "The Guarantee Function of Criminal Law" (2008), p. 1, Justice and Law 51.

[2] Cf. Merab Turava, "The Right to a Fair Trial" in Irakli Burduli, et al., Comment on the Constitution of Georgia, Chapter Two, Georgian Citizenship, Basic Human Rights and Freedoms (2013), p. 555.

[3] Judgment of the European Court of Human Rights in Case No 36376/04 Kononov v. Latvia, 17 May 2010, para 187.

II. PRACTICE OF THE CONSTITUTIONAL COURT OF GEORGIA IN RELATION TO THE PRINCIPLE OF NON-RETROACTIVITY

The practice of the Constitutional Court of Georgia is quite broad in terms of the non-retroactivity of law. Inter alia, a judgment of 13 May 2009 is interesting and noteworthy,[4] which is related to the different aspects of the non-retroactivity of law to the detriment of a person. In particular, the main subject in the said judgment was the application of the retroactivity of criminal law with regard to a limitation period. Although the Constitutional Court did not declare the appealed provision of Article 3(1) of the Criminal Code of Georgia as unconstitutional, it interpreted the latter in accordance with the Constitution. In particular, the Court made important interpretations in terms of the application of retroactivity of law to a limitation period and a conditional sentence.

More specifically, the Constitutional Court declared the extension of the limitation period and the application of the retroactivity of law to it after the expiration of the limitation period determined for the criminal prosecution for an act committed in the past, as an indirect establishment of the criminality of the act.[5] But if a limitation period was extended before the expiration of the initial limitation period, it declared the application of the retroactivity of law to such aggravation of the situation as admissible, and did not consider it a violation of the Constitution.[6]

In the above judgment, the Constitutional Court made an interesting interpretation regarding another important legal institution, a conditional sentence.

According to the judgment of the Court, non-retroactivity of law applies not only to the provisions of the Special Part of criminal law but also to the provisions of the General Part of criminal law, including a conditional sentence.[7] The Court held that lifting a conditional sentence was the toughening of the punishment and a form of serving a sentence. In particular, according to the Court's interpretation, "the opinion that disputed provisions related to the principle of non-retroactivity cannot be applied to the relations regulated by the General Part of criminal law and, therefore, the aforementioned guarantees shall not be applied to a conditional sentence, must

[4] Judgment of the Constitutional Court of Georgia in Case No 1/1/428,477,459 the Public Defender of Georgia, a citizen of Georgia Elguja Sabauri and a citizen of Russian Federation Zviad Mania v. the Parliament of Georgia, 13 May 2019. See dissenting opinions on the above judgment: dissenting opinions of Ketevan Eremadze, Konstantine Vardzelashvili, and Vakhtang Gvaramia. See also the critical analysis of the judgment in Davit Sulakvelidze's academic article: Davit Sulakvelidze, "On the Retroactivity of Criminal Law – Comment on the Judgment of the Constitutional Court of Georgia" (2010), p. 2, the Constitutional Court Review, pp. 144-157.

[5] Cf. Merab Turava, "Criminal Law, Doctrine of Crime" (2011), pp. 107-123; Pridon Diasamidze, "Problematic Issues of the Application of Retroactivity of Law by Courts" (2021), p. 16, Law and World, pp. 79-83.

[6] Cf. Turava, supra note 2, 560.

[7] ibid.

be considered incorrect".[8] According to the Court's interpretation, "the guarantee of non-retroactivity is a guarantee provided for the entire criminal law, as an organic combination of provisions, and not just for one of its parts. When the retroactivity of law is the case, it includes the entire body of provisions of criminal law".[9]

Thus, according to the above interpretation of the Constitutional Court, the court tried to change an incorrect practice of the common courts of Georgia at that time, under which the guarantee of non-retroactivity of law applied only to the provisions of Special Part of the Criminal Code of Georgia.[10] However, whether or not that provision of the Constitutional Court was reflected in the subsequent judgments made by the domestic courts, will be discussed below.

It is worth noting that the Constitutional Court discussed the issue of non-retroactivity of law in other judgments as well.[11] In terms of a doctrine, all cases are interesting. Although, a judgment of 20 September 2019 can be emphasised in this regard.[12] It is related to the issue of the constitutionality of the law of 4 July 2007. More specifically, the law amended the Criminal Code of Georgia and, among other things, the concept of a repeated crime was formulated differently,[13] according to which the repeated crime

[8] See. supra note 4, para 33.

[9] ibid.

[10] Cf. Turava, supra note 2, 560.

[11] For example, see the judgment of the Constitutional Court of Georgia in Case No 1/4/557,571,576 "Citizens of Georgia Valerian Gelbakhiani, Mamuka Nikolaishvili, and Aleksandre Silagadze, v. the Parliament of Georgia", 13 November 2014, in which the Constitutional Court provided the following interpretation: The second sentence of Article 42(5) of the Constitution of Georgia determines the constitutional grounds for the retroactive application of law mitigating and annulling the liability. Although it is not as absolutely and unconditionally binding for the State as the non-retroactivity of law establishing or aggravating the liability envisaged by the same provision, it additionally limits the scope of the free discretion of the State by the principle of not interfering with the freedom of a person when it is not/no longer necessary and more strictly than it is objectively necessary for the protection of certain legitimate goals. See also Judgment of the Constitutional Court of Georgia in Case No 3/1/633,634 "the constitutional submission of the Supreme Court of Georgia on the constitutionality of Article 260(5)(c) of the Criminal Procedure Code of Georgia" and "the constitutional submission of the Supreme Court of Georgia on the constitutionality of Article 306(4) and Article 269(5)(c) of the Criminal Procedure Code of Georgia", 13 April 2016. In the above judgment, the Court stated: putting a person on trial, passing a judgment of conviction, and imposing a sentence, based on a repealed law, by itself constitutes the imposition of liability on a person based on the law applicable at the moment of commission of an act. According to the position of the Constitutional Court, this conclusion cannot be changed by the fact that, based on a new law decriminalising the respective act, the person is released from the imposed punishment. Finding a person guilty and at fault, which implies blaming the person for the committed unlawful act, constitutes the limitation of the person's interests by the State in response to the committed offence and, therefore, should be considered as "liability" under Article 42(5) of the Constitution of Georgia. The analysis of this judgment is provided in: Maia Kopaleishvili, "The Practice of Legal Proceedings of the Constitutional Court of Georgia in the Area of Criminal Law" in Maia Ivanidze (Editor), Nona Todua 60 (Anniversary Collection, 2021), p. 69.

[12] Cf. Judgment of the Constitutional Court of Georgia in Case No 2/4/1365, 20 September 2019.

[13] Article 15, the Law of Georgia Criminal Code of Georgia <https://matsne.gov.ge/ka/document/

was defined as the commission by a previously convicted person of the crime provided for by the same article of the Criminal Code, while the similar provision determined by the previous version of the Criminal Code did not include an element of "conviction" in the concept of the repeated crime, with such formulation.

Article 2 of the disputed law regulated the issue of application in time of the above-mentioned provision and established that the said regulation should not have been applied to acts committed before the entry into force of that law.[14]

That provision of the law became the subject of dispute at the Constitutional Court. A claimant stated that, as a result of the amendments made to the Criminal Code on 4 July 2007, a necessary condition for qualifying an act as a repeated crime was the commission by a previously convicted person of the crime provided for by the same article.[15] The incorporation of the element of conviction in the concept of a repeated crime reduced the circle of persons, whose acts might be qualified as a repeated crime. If the crime committed by the claimant[16] was to be evaluated taking into consideration the amendments made to the Criminal Code on 4 July 2007, the claimant's act could not be qualified as a repeated crime, as the claimant had not been previously convicted of the same act. That would result in the imposition of a relatively mitigated punishment on the claimant.

The Constitutional Court analysed in detail the content of both the current version of Article 15 of the Criminal Code (repeated crime) and its older version before the amendments were made, and concluded that the right to retroactive application, which is guaranteed by the second sentence of Article 31(9) of the Constitution of Georgia, applies to all legislative acts that result in the mitigation of or release from punishment and the adoption of which is "conditioned by the humanism of the society or the absence of necessity of the measure of punishment applicable before the amendments".[17]

According to the interpretation of the Constitutional Court, the constitutional right of retroactive application of the law mitigating or annulling the liability applies to the cases where, based on the decision of the legislator, a measure of punishment established for a certain crime has been mitigated or annulled.[18] "The purpose of the above constitutional right is to apply to an act committed by a person the legislative amendment mitigating the liability that is conditioned by more tolerant attitude of the society towards a certain

view/16426?publication=241> [last accessed on 15 March 2022].

[14] See supra note 12.

[15] ibid.

[16] The claimant had been convicted of intentional murder twice before the entry into force of the disputed law and, in addition, both episodes of intentional murder were qualified as an intentional murder committed repeatedly, based on a single judgment.

[17] See supra note 12.

[18] ibid.

act, or the absence of the necessity to punish people within the framework of the strict punishment applicable before the amendments".[19] The Court also states that "the aim of the right of retroactive application of the law mitigating or annulling the liability is to enable people to fully benefit from the positive results of the development of the society and law, as well as progressive and humane thinking, that are reflected in the criminal law policy and certain measures of liability".[20]

Based on the above, the Court considered that the disputed provision had illegitimately limited the retroactive application of the amended version of Article 15(1) of the Criminal Code of Georgia to the acts committed before the entry into force of the disputed law. Therefore, the Constitutional Court declared as unconstitutional the provision of Article 2 of the Law of Georgia of 4 July 2007 (repeated crime means the commission by a previously convicted person of the crime provided for by the same article of the Criminal Code of Georgia), according to which the said regulation was not applied to the acts committed before the entry into force of the law.

Thus, the practice of legal proceedings of the Constitutional Court of Georgia in relation to the problem of non-retroactivity of law is quite broad and interesting. The importance and the purpose of the principle of non-retroactivity are unequivocally recognised in a number of judgments of the Court. In particular, the main purpose of the said principle is that the legislator does not decide to severely punish persons for previous acts in the conditions where the amended legislation provides for a relatively mitigated measure of liability for the same acts in the future. The constitutional right of retroactive application of the law mitigating or annulling the liability applies to the cases where, based on the decision of the legislator, a measure of punishment established for a certain crime has been mitigated or annulled.[21] Restriction of the right, in order to violate the fundamental good protected by the same right, contradicts, according to the Constitutional Court, the concept of the right itself and, therefore, is not inherent to the constitutional legal order.[22]

[19] ibid.
[20] Cf. see supra note 11; see also supra note 12.
[21] Cf. supra note 12.
[22] ibid.

III. OVERVIEW OF THE PRACTICE OF COMMON COURTS IN RELATION TO THE PRINCIPLE OF NON-RETROACTIVITY

1. INTERPRETATION OF THE SUPREME COURT OF GEORGIA IN RELATION TO A LIMITATION PERIOD

After the judgment of the Constitutional Court of Georgia of 13 May 2009,[23] the Supreme Court of Georgia soon delivered an interesting judgment regarding a similar problem, in particular, a judgment of 28 May 2009.[24] According to the case file, two persons, who were blamed for the commission of a crime, were convicted of the neglect of duty, a crime under Article 342(2) of the Criminal Code of Georgia.

In this case, the main argument of the defence regarding a reason why the convicted persons should have been released from serving the sentence was that, under Article 71(1)(a) of the Criminal Code of Georgia[25], the limitation period for a crime which the convicted persons were accused of was two years at the time of the commission of the crime (before 1 January 2004)[26], which should have expired by the time the charges were brought against them (12 September 2006). Therefore, according to the argument of the defence, even if the convicted persons have committed a crime, they should have been released from serving the sentence due to the expiration of the limitation period determined for that crime.

The Supreme Court granted that part of the cassation appeal of the defence. In particular, the Supreme Court upheld the arguments of the defence in relation to a limitation period, by which it practically took into consideration the justification for the limitation period provided in the judgment of 13 May 2009 of the Constitutional Court of Georgia.

Namely, the Chamber of Cassation stated that sub-paragraph (c1) was added to Article 71(1) of the Criminal Code of Georgia on 25 July 2006,[27] and therefore, the two-year limitation period established by the same article for the actions committed by the above-mentioned convicted persons have been expired before the entry into force of those amendments. Therefore, the above legislative amendments could not have been retroactive in relation to the actions committed by the convicted persons.[28] As a result, the Court found the convicted persons guilty of the charges brought against them, although released them from serving the sentence due to the expiration of the limitation period for the criminal prosecution for the act committed by them.[29]

[23] See supra note 4.
[24] Judgment of the Constitutional Court of Georgia in Case No 2ბ-99ბ3-09, 28 May 2009.
[25] Releasing from criminal liability due to the expiration of the limitation period.
[26] Before 25 July 2006, the limitation period for a crime of that category was two years.
[27] According to the amendments, the limitation period for official misconduct under Articles 332-3421 was determined as 15 years.
[28] See supra note 24.
[29] ibid.

The aforementioned justification and arguments of the Supreme Court are in full compliance with the judgment of the Constitutional Court of 13 May 2009. Indeed, if a new limitation period is established by law, the new law shall be applied even if it aggravates the condition of a person, unless such aggravation takes place after the expiration of the limitation period. In that case, according to the judgment of the Constitutional Court, the new law shall not be retroactive.[30]

2. INTERPRETATION OF THE SUPREME COURT OF GEORGIA IN RELATION TO A CONDITIONAL SENTENCE

Unlike the interpretation of the Supreme Court of Georgia in relation to a limitation period, the Court did not uphold the judgment of the Constitutional Court of Georgia of 13 May 2009 in relation to a conditional sentence. In this case, a reference is made to the judgment of the Supreme Court of Georgia of 28 June 2016.[31]

Namely, according to the case file, by a decision of 4 June 2010 of Rustavi City Court, J. Z. was found guilty of committing a crime provided for by Article 143 of the Criminal Code of Georgia and was sentenced to seven years of imprisonment, which was considered a conditional sentence and J. Z. was sentenced to eight years of probation.

On 10 December 2013, the convicted person and the lawyers defending the interests of the convicted person filed a motion to the Tbilisi Court of Appeals and requested the revision of the decision and the reduction of the probation period due to newly found circumstances based on the fact that amendments were made to the criminal law, according to which the probation period was reduced to 1 to 6 years. Therefore, according to the arguments of the defence, the new law, which provided for the grace terms for convicted persons, should have been retroactive.[32]

The Chamber of Cassation did not grant the above claim and stated that a conditional sentence imposed on a convicted person under the Criminal Code of Georgia and the related probation period did not constitute punishment, but rather a special regime of serving a sentence, provided for by the legislation. Thus, such amendments to

[30] See supra note 4. Cf. See also Merab Turava and Nino Gvenetadze, Methodology of Delivering Judgments in Criminal Cases (2005), p. 17; Turava, supra note 1, 29. This position is also upheld in one of the decisions of the Supreme Court of the United States (Stogner v. California, 123 S. Ct. 2446 (2003)), according to which the California law that provided for the renewal of criminal prosecution after the expiration of the limitation period was considered a violation of Section 9 of Article 1 of the Constitution of the United States that prohibits the passing of ex post facto law. The Court stated that as the person was no longer liable due to the expiration of the limitation period, but the liability had been imposed on the person under a new law, this situation is equivalent to the situation where a specific act was not punishable, but became punishable under a new law.

[31] Judgment of the Supreme Court of Georgia in Case No 8ბგ-16, 28 June 2016.

[32] ibid.

the law could not have been a ground for reviewing a decision due to the newly found circumstances, as criminal law is retroactive only when it completely annuls criminal liability for the commission of an act or mitigates punishment. A conditional sentence, as stated by the Court, is neither a form of punishment nor a form of serving a sentence.

Thus, the Chamber of Cassation completely upheld the motives and substantiation of the Court of Appeals in relation to the motion and stated that, in this case, there were no legal grounds for annulling the appealed judgment.[33]

3. INTERPRETATION OF THE SUPREME COURT REGARDING THE BLANKET PROVISIONS PROVIDED FOR IN CRIMINAL LAW

The observance of the principle of non-retroactivity in relation to blanket provisions provided for in criminal law is one of the important issues. In this regard, certain judgments from Georgian judicial practice will be analysed. One of such judgments was delivered by the Supreme Court on 10 September 2009.[34]

The case was as follows: N. Ch. was found guilty on 9 September 2008 and was sentenced to 1 year of imprisonment as provided for by Article 273 of the Criminal Code of Georgia, which was considered a conditional sentence for the probation period of the same duration. According to the judgment it was established that N. Ch. had illegally consumed narcotic drugs, an act committed by a person on whom an administrative penalty was previously imposed for such an act. The act committed by the convicted person was as follows:

On 12 June 2007, a fine of GEL 500 was imposed on N. Ch. as an administrative penalty by the decision of Gori District Court for illegal consumption of narcotic drugs without a medical prescription. Despite the above, after the imposition of an administrative penalty N. Ch. repeatedly committed the same act, namely, on 25 June 2008, N. Ch. found a narcotic drug in Kutaisi and personally consumed it.

In the claim, N. Ch. requested the annulment of the decision of Gori District Court of 9 September 2008 due to newly found circumstances, and the termination of criminal proceedings on the grounds that, on 27 March 2009, amendments were made to the Administrative Offenses Code of Georgia, according to which a person who has not committed a new administrative offence during one year after having served the penalty, was deemed not to have been subjected to an administrative penalty. Thus, the convicted person stated in the claim that the condition of the convicted person improved based on a new legislative regulation, as one year had passed after the imposition of

[33] ibid.

[34] Judgment of the Supreme Court of Georgia in Case No 41ბა%-09, 10 September 2009.

the fine as a penalty, because for the first time, the convicted person illegally consumed narcotic drugs on 12 June 2007, and for the second time, on 25 June 2008.[35]

The Chamber of Cassation examined the substantiation of the claim and held that it should have been rejected. In this regard, the Court made the following interpretation: "The criminality of an act and the punishment is determined only by the Criminal Code of Georgia, Article 3 of which clearly states that criminal law is retroactive only if it decriminalises an act or reduces penalty. Therefore, the statement of the author of the claim regarding the termination of criminal proceedings against the convicted person due to the amendments made to the Administrative Offenses Code of Georgia is groundless."[36]

Thus, the Court rejected the claim on the grounds that the above-mentioned legislative amendment was related to the provisions of the Administrative Offenses Code of Georgia, not the amendments to criminal law.

The Supreme Court made a similar interpretation in another case as well. Namely, a judgment of the Supreme Court of Georgia of 28 May 2008.[37] In the said case, T. Dz. was convicted of a crime under Article 214 of the Criminal Code of Georgia. In particular, according to the judgment it was established that T. Dz. had violated the customs procedure, i.e. had moved large quantities of movable property, in particular stationery, across the customs border of Georgia by circumventing customs control, involving deceptive use of means of identification.

Later, by the edict of the President of Georgia of 25 July 2006, an amendment was made to the Law of Georgia on Customs Duties and Taxes, according to which customs duties on stationery were annulled. The defence stated that the situation of the convicted person improved as a result of the above amendment and, therefore, the law should have been retroactive in that case.

However, the Chamber of Cassation rejected the claim and stated that criminal law is retroactive only if it decriminalises an act or reduces the penalty. Therefore, the Court stated that the reference of the author of the claim to the edict of the President of Georgia was groundless.[38]

[35] ibid.
[36] ibid.
[37] Judgment of the Supreme Court of Georgia in Case No 33-სპ., 28 May 2008.
[38] ibid.

IV. ANALYSIS OF THE PRACTICE OF COMMON COURTS IN RELATION TO A PRINCIPLE OF NON-RETROACTIVITY

1. ANALYSIS OF THE INTERPRETATION OF THE SUPREME COURT OF GEORGIA IN RELATION TO A CONDITIONAL SENTENCE

A judgment of the Supreme Court of 28 June 2016 and its substantiation contradict the purpose of the part of the judgment of the Constitutional Court of 13 May 2009, which contains the Court's reasoning about a conditional sentence.

In particular, the Constitutional Court states: "When a conditional sentence is established beside punishment, it would be a mistake not to consider its influence on the existence of such punishment. In particular, the existence of a conditional sentence guarantees that there is a possibility that punishment would not be applied in its traditional form. When a conditional sentence is imposed on a person instead of serving a sentence, it indirectly indicates to more privilege than the mitigation of punishment. By that normative provision, the legislator enables a subject of crime to avoid punishment. Thus, the lifting of a conditional sentence for a criminal act after its commission shall be considered an indirect toughening of punishment, even though it is not provided for by the system of punishments. It should be taken into consideration that conditional sentence belongs to the system of indirect punishments. It is accessory in nature, as there is no conditional sentence without punishment, and in that sense, it accompanies the punishment. It is not evaluated separately and, thus, it influences the punishment."[39]

Although a conditional sentence is not included in the system of punishments, the lifting of the conditional sentence for a criminal act after its commission must be considered an indirect toughening of punishment.[40] A number of Georgian scholars agree with that opinion. For example, Professor *Merab Turava* agrees with the judgment of the Constitutional Court and with the opinion that a conditional sentence belongs to the system of indirect punishments,[41] and if the conditional sentence is lifted for a criminal act after its commission, it must be considered an indirect toughening of punishment and, therefore, such law must not be retroactive.[42]

[39] See supra note 4.

[40] Cf. ibid.

[41] There is another opinion in legal literature as well, according to which a conditional sentence does not belong, either directly or indirectly, to the system of punishments, and some authors refer to a conditional sentence as a measure of correction and prevention, which enables a convicted person to prove, during the probation period, that for his/her correction it is not necessary to actually serve a sentence. Cf. Nona Todua, "Conditional Sentence" in Nona Todua (Ed.) Liberalization Trends of Criminal Law Legislation in Georgia (2016), pp. 367-380; Nona Todua (Ed.) Criminal Law, General Part (Third edition, 2018), pp. 351-356; Nona Todua, et al. Sanctions in Criminal Law (2019), pp. 124-127.

[42] Cf. Turava, supra note 2, 562; Turava, supra note 1, 27, 31. It is notable that, according to the practice of the European Court of Human Rights, even in the case of extending the timeframe of a social protection measure after committing an act, sentence 2 of the first paragraph of Article 7 of the European Convention

Professor *Irakli Dvalidze* also agrees with the opinion that a conditional sentence is accessory in nature, as it cannot become effective without the imposition of punishment.[43] Professor *Maya Ivanidze* also believes that, although a conditional sentence is not a form of punishment, "...this issue should still be resolved according to the rules of retroactivity of criminal law...".[44]

Thus, when imposing punishment, if a person is deprived of the possibility of mitigating the punishment, which he/she enjoyed at the time of committing a crime, from the point of view of the Constitutional Court, it should be considered as the toughening of the punishment.[45] Therefore, the above reasoning of the Supreme Court in relation to a conditional sentence cannot be agreed with, and it contradicts a judgment of the Constitutional Court of 13 May 2009.

2. ANALYSIS OF THE INTERPRETATION OF THE SUPREME COURT OF GEORGIA IN RELATION TO THE BLANKET PROVISIONS PROVIDED FOR IN CRIMINAL LAW

The Criminal Code of Georgia can be divided into two areas: (1) classic torts, and (2) so-called "blanket torts". Classic torts are murder, theft, rape, etc. The violation of rules is attributable to blanket torts. More specifically, in this case, there is a disregard for specifically established rules in certain areas of the public life of people. For example, when driving a car, drivers must follow specific rules established by criminal law.[46]

Based on the above judicial practice, there is not a clear answer to the question whether or not the non-retroactivity of law should apply to blanket torts, when a special law applicable to such crimes is mitigated. Both a judgment of 10 September 2009 and a judgment of 28 May 2008 of the Supreme Court of Georgia require detailed analysis in this regard. In this case, it would be appropriate to start the discussion of the problem by clarifying the content of Article 3 of the Criminal Code of Georgia.

is violated (it is inadmissible to impose on a person a stricter punishment than the one applied at the time of committing a crime). See a decision of the European Court of Human Rights in Case No 30060/04 Jendowiak v. Germany, 14 April 2011, para 40.

[43] Irakli Dvalidze, General Part of Criminal Law, Sentence and Other Criminal Consequences of Crime (2013), p. 128.

[44] Cf. Nona Thodua et al., supra note 41, 124-127.

[45] Cf. Turava, supra note 2, 562. The Supreme Court of the United States has the same position as well. In particular, the United States judicial practice of a so-called "earned time credits" system is also in favour of a request related to a conditional sentence, under which the law reduced the number of days that were considered extra for a prisoner, which resulted in the extension of a term of imprisonment of the prisoner by two years (Weaver v. Graham, 450 U.S. 24, 1981). As the aforementioned law significantly changed the consequences of committing a crime, the possibility of early release was limited and the punishment for the crime toughened, thus, violating the principle of non-retroactivity. See supra note 4.

[46] Cf. Gamkrelidze, supra note 1, 255; Lavrenti Maghlakelidze, Intent and Awareness of Unlawfulness According to Georgian and German Criminal Law, Comparative Legal Analysis (2013), pp. 73-76.

2.1. The issue of interrelation between Article 3 of the Criminal Code of Georgia and Article 31(9) of the Constitution of Georgia

According to Article 3 of the Criminal Code of Georgia, as stated above, a criminal law that decriminalises an act or reduces penalty is retroactive, and on the contrary, a criminal law that establishes the criminality of an act or toughens the penalty is not retroactive. Therefore, the above provision of the Criminal Code regulates the issue of retroactivity of criminal law.[47] For clarity, the latter can be conditionally divided into two stages: The first stage lays down general provisions regarding the cases in which law is, or on the contrary, is not retroactive (Article 3(1)), and the second stage determines at which stage law becomes retroactive (Article 3(2) and (3)).[48]

It can be said that the above regulation of Article 3 of the Criminal Code of Georgia reiterates the provision of Article 31(9) of the Constitution of Georgia. A law (any law, not just criminal law) is not retroactive, unless it mitigates or annuls the liability. According to the interpretation of the Constitutional Court of Georgia, as stated above, "a guarantee of non-retroactivity is the guarantee for the entire criminal law, as an organic combination of provisions, not just for a certain part of it".[49]

Therefore, according to the interpretation of the Constitutional Court of Georgia, Article 31(9) of the Constitution of Georgia refers to all provisions of law that establish legal liability in any form. Thus, the position of the Supreme Court that only criminal law can be retroactive and only in relation to so-called "classic torts" should be considered incorrect.[50]

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[47] Similar provisions are provided for in both the Administrative Offenses Code of Georgia and the Civil Code of Georgia. Article 9, the Law of Georgia Administrative Offenses Code of Georgia <https://matsne.gov.ge/document/view/28216?publication=498> [last accessed on 15 March 2022]; Article 6, the Law of Georgia Civil Code of Georgia <https://matsne.gov.ge/ka/document/view/31702?publication=118> [last accessed on 15 March 2022].

[48] For more details, see Kharanauli, supra note 1, 53-57.

[49] See supra note 4.

[50] It is noteworthy that the issue of retroactivity of law is regulated differently in the Criminal Procedure Code of Georgia. In particular, according to Article 2(1) of the Criminal Procedure Code of Georgia, provisions that are in force at the time of an investigation and a court hearing are applied during criminal proceedings. According to Article 2(2) of the same Code, the amendments made to criminal procedure law result in the annulment or change of the previously adopted procedural act, provided that this improves the condition of the accused (convicted) person. According to the judgment of the Constitutional Court, "the relation of the procedural legislation to the retroactivity is mostly excluded in its basis, as it regulates procedures that are being carried out in time, and are continuous, dynamic ..., irrespective of the time of the commission of a crime. Therefore, a law applicable to their development (relations) must be applied to current relations". In this regard see supra note 11. The above substantiation of the Constitutional Court was later used by the Supreme Court in one of its judgments, stating that Article 2 of the Criminal Procedure Code of Georgia, which establishes the procedure for the application of the criminal procedure law in time, applies to the procedural and legal relations which, as a rule, have not been completed by the time of entry into force of new provisions, or fulfil the preconditions provided for by Article 310 of the Criminal Procedure Code of Georgia. According to the Supreme Court, the annulment or change of

There may actually be only a slight "contextual difference" between the provision of Article 31 of the Constitution of Georgia and Article 3 of the Criminal Code of Georgia. In particular, under Article 31 of the Constitution of Georgia, retroactivity must be applied only if law mitigates or annuls the liability, while the Criminal Code of Georgia narrows this provision in terms of non-retroactivity of law and provides two types of guarantees: (a) if a criminal law establishes the criminality of an act or (b) toughens the punishment, it must not be retroactive.[51]

Otherwise, if it is assumed that both of the above legal acts provide different legal guarantees for a person, it may lead to a completely illogical conclusion, for example, one of such conclusions may be that a provision of the Constitution regarding the non-retroactivity of law is a general provision, while Article 3 of the Criminal Code is a special provision; therefore, in the case of the competition between the two provisions, the authority applying them would use a special provision, i.e. only a criminal law, which, of course, would not be correct.[52]

It is generally recognised that the Constitution is the highest legislative act in the hierarchy of provisions. The Constitution is at the top of the hierarchy, which is followed by all other normative acts, including the Criminal Code, the Administrative Offenses Code, the Civil Code, etc. The Constitution is an act of the highest rank in the system of subordination not only because the procedure for its adoption is different but also because qualitatively, in terms of its value, it is the most complete normative act.[53] Therefore, due to those characteristics, it constitutes the basis for all normative acts. That circumstance gives special importance to the preparation of constitutional provisions in compliance with certain recognised standards.[54]

Therefore, the authority applying provisions must, first of all, use the provisions of the Constitution of Georgia, and then the legislative acts regulating specific legal relations.[55]

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the previously adopted procedural act is not provided for in other cases. In this regard see a judgment of the Supreme Court of Georgia in Case No 16ას-19, 3 February 2020; judgment of the Supreme Court of Georgia in Case No 36ას-19, 25 February 2020; judgment of the Supreme Court of Georgia in Case No 747ას-21, 1 March 2021.

[51] Cf. Diasamidze, supra note 5, 79-80.

[52] It is correctly recognised in the legal doctrine that a constitutional provision shall not be interpreted on the basis of a subordinate provision. In this regard see Tamar Shavgulidze, "Significance of Interpretation of the Constitution for Common Courts and Constitutional Norm Control" (2021), p. 25, Constitutional Law Review, p. 115.

[53] Cf. Besarion Zoidze, Problems with the Verification of Constitutional Norms and Constitutionality (2015), p. 8, Constitutional Law Review, pp. 3-17.

[54] Cf. ibid, p. 15.

[55] In such cases, the Organic Law of Georgia on Common Courts recommends that a judge makes a submission to the Constitutional Court which, of course, is the simplest and most pragmatic way to resolve that problem. In particular, under Article 7(3) of the Law, "if during the hearing of a particular case the court infers that there is a sufficient basis to believe that a law or any other normative act to be applied by the court in deciding the case may be deemed incompatible, in full or in part, with the Constitution of

In addition, it is possible that the authority applying a provision does not interpret it literally, as was the case with the Supreme Court in the above-mentioned cases, but rather in accordance with the Constitution,[56] thus reaching the desired result.[57]

2.2. Interpretation of Article 3 of the Criminal Code of Georgia in compatibility with the Constitution of Georgia

The method of interpretation compatible with the Constitution is widely spread in legal practice.[58] The contextual access to the Constitution and, subsequently, its realisation in the legal order, are the main objectives for any legal system.[59] The interpretation compatible with the Constitution is especially important in that process, as it forms a decisive basis for the actual incorporation of constitutional principles in the legal order.[60] In this regard, it is very important to recognise the idea of the entirety of the legal system.[61] The main idea is that certain legal provisions do not stand beside each other separately, without a systematic connection between them, instead law constitutes a unified system. As German scholar *Friedrich Carl Von Savigny* states, single legal concepts and rules form one big unity.[62] Therefore, the principle of "unity of law" must be followed in the interpretation of legal provisions, i.e. judgments delivered as a result of the interpretation must not contradict other legal provisions, especially the provisions that are on the same or higher hierarchical level.[63]

Georgia, it shall suspend the hearing and apply to the Constitutional Court of Georgia. The hearing shall be resumed after the Constitutional Court of Georgia has made a decision on the matter."

[56] Such interpretation may also be named "a constitution-oriented interpretation".

[57] There is an opinion in legal literature that an interpretation compatible with the Constitution does not constitute an independent interpretation method. The reason therefore may be that, in such case, the provisions subordinate to the Constitution are considered within the framework of main laws and constitute a type of systematic interpretation, because if there is a possibility of two or more interpretations of a provision, one of which leads to the results compatible with the Constitution, and the other leads to the results that contradict the Constitution, only the interpretation compatible with the Constitution must be chosen. In this regard see Shavgulidze, supra note 52, 107-108.

[58] It is noteworthy that the method of interpretation compatible with the Constitution is common in administrative proceedings as well. In particular, the Chamber of Cassation made the following interpretation regarding a judgment of 20 June 2019 of the Supreme Court of Georgia: the interpretation of provisions compatible with the Constitution should be ensured in the judicial practice; common courts are not authorised to inappropriately interpret the judgments of the Constitutional Court. According to the same judgment, "if a court hearing the case believes that a normative act is incompatible with the Constitution of Georgia, the court shall deliver a judgment in compliance with the Constitution of Georgia". In this regard see a judgment of the Supreme Court of Georgia in Case No ბს-857-853, 20 June 2019. A similar opinion is upheld in earlier judgments as well, for example, a judgment/decision of the Supreme Court of Georgia in Case No ბს-776-768(2ვ-4ვს-15), 14 July 2016.

[59] Cf. Shavgulidze, supra note 52, 104.

[60] ibid.

[61] Cf. Reinhold Zippelius, Introduction to German Legal Methods (tenth edition, 2006), pp. 53-54.

[62] Friedrich Karl von Savigny, "System des heutigen Römischen Rechts" in Zippelius, supra note 61, 54.

[63] ibid, p. 60.

Therefore, the application of one article of law equals the application of the entire legal system. Accordingly, in modern law, there is a concept of unlawfulness in a broad sense as a contradiction to cultural norms, but not in its narrow sense in a form of criminal unlawfulness.[64] Thus, the "network" of the Georgian, as well as the European legal system, does not exist within the framework of one field of law, but it is interdisciplinary in nature.[65] Private law and public law are not isolated and autonomous microworlds, but they have multilateral legal relations with each other.[66] Therefore, the interpretation of any legal provision should be based on the compatibility with the Constitution. The authority applying legal provisions should make constitutionally conforming interpretation in order to establish the compatibility of a provision with the Constitution.[67]

Thus, in this case, the following formulation provided in the law "criminal law that decriminalises an act or reduces the penalty for it shall be retroactive" should be interpreted in accordance with the Constitution[68], but not literally, because the majority of crimes provided for in the Criminal Code have blanket context, which indicates that the preconditions for the criminality and punishability of an act are determined by special laws, normative acts. Accordingly, any change made in them, which may alleviate or improve the legal condition of a person, should be reflected in the court judgments made in favour of an accused/convicted person. The Constitutional Court followed the above logic in reviewing one of the cases.[69]

In particular, in this case, the subject of the dispute was the constitutionality of the words "this Code" in Article 72(1) of the Criminal Procedure Code of Georgia in relation to Article 42(7) of the Constitution of Georgia (previous version).[70] More specifically, a claimant who was accused of committing an act provided for by Article 180(3)(b) of the Criminal Code of Georgia, requested the court to declare the said provision of the Criminal Procedure Code of Georgia as unconstitutional.

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[64] The concept of "unlawfulness" was formed in the legal literature at the end of the 19th century. The formation of the concept is related to a famous German scholar Karl Binding, who was the first to formulate the theory of unlawfulness in his doctrine "The Theory of Norms". See Karl Binding, Die Normen und ihre Übertretung. Band 1, (4. Auflage, 1922), pp. 4-7. Later, the concept of unlawfulness was broadened and developed by German scholar M. E. Mayer. See Max Ernst Mayer, Der allgemeine Teil des deutschen Strafrechts (1915), pp. 9-10. In Georgian see Turava supra note 1, 163-168; Maghlakelidze, supra note 46, 65-69 and 174-179.

[65] Cf. Turava and Gvenetadze, supra note 30, 43-44.

[66] ibid.

[67] ibid, p. 44.

[68] ibid.

[69] Judgment of the Constitutional Court of Georgia in Case No 2/2/579 "Citizen of Georgia Maia Robakidze v. the Parliament of Georgia", 31 July 2015.

[70] Before that judgment of the Constitutional Court, Article 72(1) of the Criminal Procedure Code of Georgia was formulated as follows: "evidence obtained as a result of the substantial violation of this Code and any other evidence lawfully obtained based on such evidence, if it worsens the legal status of the accused, shall be considered inadmissible and shall have no legal effect."

The case was as follows: the prosecution presented the evidence at the pre-trial hearing, which was based on the information obtained by a private person in violation of the Criminal Code of Georgia and the Law of Georgia on Operative Investigatory Activities. On the above grounds, the defence filed a motion to the court and requested the declaration of the submitted evidence as inadmissible. The court rejected the motion, however, as a summary judgment had not been delivered in the case, and in addition, there was a possibility that a higher instance court could have delivered a different judgment regarding the admissibility of the evidence, the claimant filed a claim to the Constitutional Court and requested the declaration of the disputed provisions as unconstitutional.

According to the claimant, under the Criminal Procedure Code of Georgia, the evidence was inadmissible only if it was obtained as a result of the substantial violation of "this Code", i.e. the Criminal Procedure Code of Georgia, but not as a result of the substantial violation of the procedure established by other normative acts, such as the Criminal Code of Georgia, the Law of Georgia on Operative Investigatory Activities, and the Law of Georgia on Police. In addition, the claimant stated that, under the disputed provision, the evidence obtained in accordance with the procedures established by the above normative acts was also admissible, although a reasonable doubt has not been refuted that it has been replaced, or that its properties have been substantially changed, or that the traces remaining on it have substantially disappeared.

The Constitutional Court partially granted the claimant's request and stated that "in the present case, the procedure established by the provision of Article 72(1) of the Criminal Procedure Code of Georgia exists without exceptions. This provision applies generally and it does not refer to any preconditions that would narrow and make exceptional the cases of attributing legal effect to the evidence obtained in violation of law. Attributing legal effect to the evidence obtained in violation of the law encourages, in all cases and without any exception or narrowing, the arbitrariness of the state bodies obtaining evidence, and poses irreversible risks of violation of the rights and freedoms of a person. Such an approach poses a risk of violation of human rights and freedoms in the process of obtaining evidence, and contradicts the objective of Article 42(7) of the Constitution of Georgia".[71]

Based on the above, the Constitutional Court of Georgia ruled that the words "this Code" in Article 72(1) of the Criminal Procedure Code of Georgia are unconstitutional in relation to Article 42(7) of the Constitution of Georgia (previous version).

Thus, the Constitutional Court declared as unconstitutional the provision of Article 72(1) of the Criminal Procedure Code of Georgia, according to which only the evidence obtained as a result of the substantial violation of "this Code" was inadmissible, and

[71] See supra note 69.

stated that such literal legal definition posed irreversible risks of violation of the rights and freedoms of a person.

Based on the above reasoning, a logical conclusion may be made that the wording provided in the Criminal Code of Georgia "a criminal law that decriminalises an act or reduces the penalty for it shall be retroactive" should not be interpreted literally, but in accordance with the Constitution of Georgia, and the words "criminal law" should cover both so-called classic and blanket provisions of the Criminal Code.[72]

V. CONCLUSION

Thus, the guarantee function of criminal law is of utmost importance for making a correct decision regarding the criminal liability of a person. The above cases provide a clear example of how correctly that significant principle of lawfulness is realised in the judgments made by domestic courts. I think, in this regard, domestic courts pay less attention, on the one hand, to the correct interpretation of provisions, and on the other hand, to the legislative hierarchy established by the Constitution.

To sum up, based on the above analysis, the following important circumstances may be emphasised when discussing this problem:

(1) non-retroactivity of law applies not only to the provisions of the private part but also of the general part of criminal law, including a conditional sentence and a limitation period;

(2) the guarantee of non-retroactivity is a guarantee provided for the entire criminal law, as an organic combination of provisions, and not just for one of its parts;

(3) the wording provided in the Criminal Code "a criminal law that decriminalises an act or reduces the penalty for it shall be retroactive" should be interpreted in accordance with the Constitution, which means that it should cover not only so-called "classic torts" but also so-called "blanket torts" of criminal law. Therefore, any legislative change that is related to the liability of a person should be retroactive only if it improves or completely excludes criminal liability.

[72] Certain provisions of Chapter XXXIII – Drug-related Crime of the Criminal Code of Georgia also belong to blanket torts, which are being significantly revised as a result of the recent legislative amendments. Such changes may cause, in one case, the toughening, and in another case, the mitigation or complete exclusion of criminal liability against a person. The analysis of the recent practice of the Supreme Court clearly indicates that the court applies retroactively the changes made in those provisions if they improve the legal condition of an accused or a convicted person. For example, see a judgment of the Supreme Court of Georgia in Case No 79აგ-20, 3 June 2021; and a judgment of the Supreme Court of Georgia in Case No 58აგ-20, 10 December 2020.

*Tamar Avaliani**

PRESIDENTIAL PARDON POWER AS A MECHANISM TO MAINTAIN CONSTITUTIONAL ORDER

ABSTRACT

The present Article analyses the political nature of the pardon power, its historical origins, and the essence of the mechanism to maintain constitutional order. The pardon power is an important mechanism in the hands of the Head of State to do politics and influence it. It is based on exclusive power and the idea of alienation. The Article analyses the prerogative of the Head of State to influence criminal law policy and the function of influencing justice. The Article develops a discussion about the exclusive nature of the pardon power and the necessity to interpret it according to constitutional principles. The Article analyses gaps in the Georgian model of pardon power, and dubious norms, and develops recommendations to improve the pardon power in Georgia and regulate it more clearly.

I. INTRODUCTION

Almost all legal systems of the world know the pardon power, which has a function to influence criminal law policy and contribute to solving governmental crises.[1] The pardon power also has a function to correct justice and its deficiencies. The pardon power is first of all a humane and political act which equips the Head of State with a significant balancing function in the system of separation of powers. By exercising the pardon power, the Head of State participates in political processes. It is therefore not advisable to exercise the pardon power only within the context of humanity without considering its political and power aspects.[2]

The Article analyses the Georgian model of pardon power, its deficiencies and international practice, including its historical development. The aim of the Article is to contribute to the academic debate about understanding the political aspects of the pardon power and its exclusive legal nature. The Article includes recommendations

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1 Andrew Novak, "Transparency and Comparative Executive Clemency: Global Lessons for Pardon Reform in the United States" (2016), University Michigan Journal of Law 49, 818.

2 Tornike Gerliani, "The Political Nature of the Pardon Power and the Logics of Constitutional Order", Social Justice Center (Webpage of the Social Justice Center, 11 October 2019) <https://socialjustice.org.ge/ka/products/shetsqalebis-politikuroba-da-konstitutsiuri-tsesrigis-logika/> [last accessed on 8 August 2022].

towards regulating the pardon power more clearly to minimise the arbitrary use of the pardon power by the Head of State and the interpretation of the pardon power in violation of constitutional principles.

II. ORIGINS OF THE PARDON POWER AND ITS HISTORICAL DEVELOPMENT

The origins of the pardon power date back to Athens and Rome. In ancient Athens, the institute of pardon was based on direct democracy principles and was directly implemented by citizens. Before 403 B.C., the pardoning rule – *Adeia* – functioned in Athens. According to this rule, to pardon a person, it was necessary that 6 000 citizens voted for it. The pardoning process was implemented by secret ballot. The pardoning process in Athens was considered a complicated process because ordinary citizens could not gain the support of 6 000 citizens. That is why the pardon privilege was mainly available only to influential citizens. Influential citizens were athletes, orators and other powerful people. In the democratic republic of Athens, the pardon power was not implemented by the executive authority. As part of direct democracy, the pardon power was directly implemented by citizens based on the people's decision.[3]

In Rome, the pardon power was not considered an act of justice or mercy. In ancient Rome, the pardon power was used as an instrument of political subjugation of the masses of people and soldiers. The Romans used it as an instrument of intimidation and strengthening political power. The Romans punished people selectively. They punished perpetrator soldiers rather than the whole army. The Romans used the pardon power to maintain public order in the army and to spread fear.[4]

The pardon power, as a legally based power of the classical monarch, originated in Great Britain[5] and first appeared in legal texts from the 8th century.[6] *William Blackstone* considered that the British model of pardon power was based on Roman legal traditions,[7] which manifested itself in the fact that the aim of the pardon power was to strengthen the loyalty of subjects to the monarch and receive unconditional support from the latter.[8] The King of Wessex confirmed in his legislation that a person who would fight

[3] Robert Nida, Rebecca L. Spiro, "The President as His Own Judge and Jury: A Legal Analysis of the Presidential Self-Pardon Power" (1999), Oklahoma Law Review 52(2), 202.

[4] Tamar Avaliani, Giorgi Chitidze, "Georgian Model of Pardoning and International Experience" (Open Society Georgia Foundation, webpage, 25 May 2016) <https://osgf.ge/publication/shewyalebis-uflebamosileba-qartuli-modeli-da-saertashoriso-gamocdileba/> [last accessed on 8 August 2022].

[5] William F. Duker, "The President's Power to Pardon: A Constitutional History" (1977), William & Mary Law Review 18, 476.

[6] Richard M. Thompson II, "Coordinator, The President's Pardon Power and Legal Effects on Collateral Consequences" (2016), Congressional Research Service Paper 7-5700, 1.

[7] See supra note 3, 203.

[8] ibid.

within the mansion of the monarch would be responsible for all his property, and that the appropriateness of his life would be decided by the monarch.[9] In 1535, the Parliament granted the monarch an exclusive power to pardon and excluded all other persons from exercising this power.[10] The British Parliament granted *Henry VIII* an absolute pardoning power to use it in relation to high treason, murder and other crimes.[11]

In Britain, the exercise of the pardon power by the monarch was limited by the act of impeachment. The monarch had no pardon power when the Parliament initiated an impeachment procedure against him. In the centuries that followed, confession of the committed crime and the prospect of correction were seen as prerequisites for pardoning. Monarchs defined that they would issue an act of mercy and take all possible measures in relation to those who obeyed legislation and respected it.[12] Until the 17th century, the pardon power of English monarchs was absolute, but from the end of the 17th century the absolute power of monarchs was limited due to an increase in parliamentary prerogatives and the reduction of the monarch's powers.[13] The Parliament of England unsuccessfully tried to limit the monarch's pardon power, but it became possible only in 1701 when the Parliament adopted the Act of Settlement.[14]

In addition to being a purely humane act, the pardon power was also a decision expressing political authority which was used by the monarchs for economic, political and military purposes.[15] In Britain, the monarch used the pardon power for positioning his political aims and power, which was as sacred to the monarch as the "rights of an English gentleman".[16]

In republics, the pardon power was an exclusive authority of heads of state, which, in addition to the humanity and the importance of forgiveness, had the meaning of different political importance and solving crises.[17] According to the definition of the Constitutional Court of Poland, the pardon power is a prerogative of the president, who is not obliged to consult with anyone before exercising it.[18]

[9] See supra note 5, 476.
[10] ibid, 486.
[11] See supra note 4.
[12] See supra note 2.
[13] See supra note 5, 486.
[14] James P. Pfiffner, "The Scope of the President's Pardon Power" (2019), Statement of Author - Hearing on the Constitutional Role of the Pardon Power, 1.
[15] See supra note 2.
[16] See supra note 5, 487.
[17] Brandon Sample, "The History of the Presidential Pardon, Brandon Sample Attorney at Law" (Page of Brandon Sample PLC, 30 December 2018) <https://clemency.com/history-presidential-pardon/> [last accessed on 8 August 2022].
[18] Anne McMillan, "The Pardon: Politics or Mercy?" (International Bar Association, 8 August 2022) <https://www.ibanet.org/article/465431E6-8846-4A89-BA0A-6A8B85E5ED1D> [last accessed on 8 August 2022].

According to Article 2(2) of the US Constitution, the President enjoys the power to annul court decisions and pardon those who committed crimes against the United States, except in cases of being under the impeachment procedure.[19] Under the US Constitution, the President cannot pardon an individual(s) if he/she is under an impeachment procedure. The US Constitution also stipulates that a person must have committed an act in violation of federal legislation. The US stipulation about an impeachment procedure has an influence of Britain. In Britain, the monarch had no pardon power if he/she was under an impeachment procedure initiated by the Parliament.[20] The Federalist Papers analyse the importance of granting the pardon power to the US President and its exclusive nature in the hands of the Head of State.

According to *Alexander Hamilton*, "humanity and good policy conspire to dictate, that the benign prerogative of pardoning should be as little as possible fettered or embarrassed. The criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favour of unfortunate guilt, justice would wear a countenance too sanguinary and cruel".[21] Famous US politician and public figure *Edmund Randolph* wanted to limit the pardon power to cases of high treason and had an argument that in the case of high treason by the President, the latter would pardon himself.[22]

The founding fathers considered that the pardon power should be granted to the president, even if it was high treason or a riot.[23] The US Supreme Court considers that the pardon power is a full discretionary power that should not be subject to legislative changes.[24] *Roger Sherman*, one of the founders of the United States, considered that the president should exercise the pardon power only with the consent of the Senate. *Sherman's* opinion was not shared by the political spectrum.[25] In a number of pardoning cases, the US Supreme Court considered that the pardon power was a discretionary power that should not be limited. The pardon power derives from the US Constitution, and it should not be modified by the Congress.[26] It is the pardon power, as a single instrument, that delimitates the executive branch and the legislative branch.[27]

[19] Article 2.2., Constitution of the United States <https://www.senate.gov/civics/constitution_item/constitution.htm /> [last accessed on 8 August 2022].
[20] See supra note 3, 205.
[21] Alexander Hamilton, "The Command of the Military and Naval Forces, and the Pardoning Power of the Executive" (Federalist Papers: Primary Documents in American History, 8 August 2022) <https://guides.loc.gov/federalist-papers/text-71-80> [last accessed on 8 August 2022].
[22] See supra note 14, 3.
[23] See supra note 21.
[24] Michael A. Foster, "Presidential Pardons: Overview and Selected Legal Issues" (2020), Congressional Research Service R46179, 1.
[25] See supra note 14, 3.
[26] Schick v. Reed, 419 U.S. 256, 1974, para 3 <https://supreme.justia.com/cases/federal/us/419/256/> [last accessed on 8 August 2022].
[27] Ilona Maria Szilagyi, "Presidential versus Parliamentary System" (2009), Journal of Law AARMS Vol.

In the US, the pardon power is virtually unlimited. It is oriented on personal usage, without the control and oversight of other branches. The US Supreme Court makes reservations in respect of the pardon power only in two cases: the pardon power must be related to the commission of a federal criminal offence and the president must not be under an impeachment procedure.[1]

The US Supreme Court saw the pardon power primarily as an act of implementing policy, "part of the constitutional scheme" and a tool for reaching "public welfare".[2] The mentioned ruling was adopted by the US Supreme Court in 1927 in *Biddle v. Perovich*,[3] where the court considered the pardon power an act of political expediency. The opinion should be shared about the fact that "the very political nature of the pardon power creates the real essence of the pardon power."[4]

III. GOALS OF THE PARDON POWER ACCORDING TO THE US CONSTITUTION

According to the US Constitution, the presidential pardon power has several goals,[5] among which the goal of solving and preventing crises dominates. With the aim of mitigating the political crisis and ensuring national consolidation, US President *Gerald Ford* pardoned President *Richard Nixon* on 8 September 1974. President *Gerald Ford* exercised the exclusive power of pardon and completely released *Richard Nixon* from criminal liability. President *Gerald Ford* explained that the American people should leave the Watergate scandal behind and unite around shared national values.[6] According to *Gerald Ford*, if he had not exercised the presidential power of pardon, the state of the US would be hindered from development and constantly obsessed with the "Watergate case". Therefore, President *Gerald Ford* saw the pardon of President *Nixon* as a way out of the situation and explained that the "long national nightmare" in the US was over.[7] *Gerald Ford's* decision was a purely political act that served to achieve national peace and harmony. The political nature of *Gerald Ford's* decision is underlined by the fact that he pardoned *Richard Nixon* before the investigation had been launched and before *Richard Nixon* had been accused.[8] The political aim was behind the exercise of

8, No 2, 309.

[1] See supra note 24.

[2] See supra note 18.

[3] Biddle v. Perovich, 274 U.S. 480, 1927 <https://supreme.justia.com/cases/federal/us/274/480/> [last accessed on 8 August 2022].

[4] See supra note 2.

[5] See supra note 4, 10.

[6] President Ford Pardon of Richard Nixon in 1974, (C-SPAN, 8 August 2022) <https://www.c-span.org/video/?153623-1/president-gerald-fords-pardon-richard-nixon/> [last accessed on 8 August 2022].

[7] ibid.

[8] ibid.

the pardon power by President *Andrew Johnson*. He pardoned the Confederate officials and carried out a mass pardoning of soldiers on 9 April 1865, after the end of the Civil War in the US.[9] The exercise of the pardon power by President *Bill Clinton* had the same purpose, when he pardoned the donor of the Democratic Party *Mark Ritz*.[10] In 2018, US President *Donald Trump* pardoned boxer *Jack Jonhson* after his death. He was the victim of a racially motivated conviction. He was arrested in 1913 with his white girlfriend because of crossing the US border.[11]

The aim of restoring historical justice and achieving national harmony through the exercise of the pardon power is also revealed in the experience of other countries.[12] As the experience of different countries shows, the pardon power plays an important role in preventing legal procedures that may be contrary to the public interest and the aim of national reconciliation in traumatic situations.[13] The aim of defusing tensions was behind the exercise of the pardon power by US President *Donald Trump*. In 2018, he pardoned more than 300 persons via Twitter, who participated in the demonstration against the government.[14] The pardoning of 150 000 prisoners by the King of Thailand in 2016 served the same political aim. Those prisoners were convicted of insulting the royal family.[15]

One of the aims of the pardon power in the US is to correct judicial errors. The opinion should be shared that even the existence of a perfect justice system cannot eliminate the risk of errors being made, and in this case, the very presidential pardon power can correct the mistakes of the justice system to avoid an accusation of innocent persons.[16] The presidential pardon power can be used to restore justice when the society in the path of its development considers concrete cases unjust.[17]

One of the most widespread and classic cases of the exercise of the presidential pardon power is to pardon a prisoner who confesses and repents of the crime committed and at the same time deserves to be at liberty due to certain circumstances (deterioration of health, age, etc). This kind of aim best reveals the humane and humanitarian nature of the pardon power.[18]

[9] See supra note 5, 512.
[10] See supra note 1, 821.
[11] John Eligon, Michael D. Shear, "Trump Pardons Jack Johnson, Heavyweight Boxing Champion" (New York Times, 8 August 2022) <https://www.nytimes.com/2018/05/24/sports/jack-johnson-pardon-trump.html/> [last accessed on 14 March 2022].
[12] See supra note 18.
[13] ibid.
[14] ibid.
[15] ibid.
[16] See supra note 4, 10.
[17] See supra note18.
[18] ibid.

The aim of the presidential pardon power may also be to influence criminal law policy. The president pursues this purpose if he/she disagrees with repressive criminal law policy and severe sentences. In this case, the president can replace a disproportionately severe punishment with a more lenient one, or completely release the person from criminal liability. Using this goal, the president can substantially influence the liberalisation of criminal law policy and make the legislation more humane.[19] The opinion should be shared about the fact that "when criminal law policy and justice are strict, the president can exercise the pardon power to pursue a policy of humanity and justice".[20] For example, in 1956, US President *John Kennedy* pardoned persons who were convicted based on the Drug Act.[21] In respect of certain drug crimes, President *Barack Obama* issued a pardon law to replace the sentences of thousands of prisoners with more lenient sentences.[22] Between 18 November 2013 and 3 November 2015, the President of Georgia pardoned prisoners convicted of drug crimes (986 out of 1559 prisoners, 62%)[23].

In the US, the pardon power is double-levelled and decentralised. The US president exercises the pardon power over federal crimes. On the state level, the pardon power is exercised by state governors or commissions of pardons.[24] In the US, the decentralisation of the pardon power is confirmed by the decision of the US Supreme Court in *Herrera v. Collins*.[25] According to the court ruling, the states of the US are not required to have a pardoning mechanism in place or they themselves have the right to establish the pardoning model they prefer.[26]

In addition to the US experience, practices in different countries show a less controversial aim of pardoning, which is to unload public institutions and infrastructure.[27] For example, presidential pardon powers may be used to prevent overcrowding in penitentiary institutions.[28] In 2013, President of the Czech Republic *Václav Klaus* pardoned 6 000 prisoners (one third of the prisoners) on the occasion of the twentieth anniversary of the Czech Republic's independence. Among the prisoners were high-ranking officials accused of corruption and fraud.[29] The aim of exercising the presidential pardon power was to reduce prison overcrowding.

[19] See supra note 4, 11.
[20] See supra note 2.
[21] See supra note 17.
[22] ibid.
[23] See supra note 4, 17.
[24] See supra note 1, 823-829.
[25] Herrera v. Collins, 506 U.S. 390, 1993 <https://supreme.justia.com/cases/federal/us/506/390/> [last accessed on 8 August 2022].
[26] See supra note 1, 823-829.
[27] See supra note 18.
[28] ibid.
[29] ibid.

One of the aims of a pardon is to forgive the crime. However, despite the different aims of the pardon power, it is not an act of humanity only and should be seen from a broad political perspective. The pardon power plays an important role in the practical realisation of the principle of separation and balance of power and empowers the Head of State to solve and prevent political crises. Furthermore, by exercising the pardon power, the president influences criminal law policy, which allows the correction of judicial errors.

IV. PRESIDENTIAL PARDON POWER AND GOVERNANCE MODELS

The presidential pardon power and its political importance vary according to governance models. In countries with collegial governance, such as China and Germany, the presidential pardon power is in the hands of a collegial body, which excludes the risks of unilateral decisions.[30] The countries which have the Head of State and where the power is divided between the prime minister and the president, the exercise of the pardon power requires a countersignature mechanism.[31] Article 94 of the Constitution of Romania envisages the pardon power that applies only to the cases of prisoners who have been sentenced to imprisonment, and is applied after a judgment of conviction has entered into force.[32] In Romania, the president cannot use the pardon power at sole discretion. The power needs a countersignature of the prime minister.[33] The prime minister's countersignature on the presidential pardon power excludes the exclusivity of the pardon power because the countersigned act is considered a governmental act. The government's countersignature gives legal effect to the presidential pardon power. In the case of countersignature, the law deprives the Head of State of the possibility to use his/her arbitrary functions based on his/her constitutional status and to exercise the pardon power towards solving political crises. Unlike the Romanian model, Article 139 of the Constitution of Poland grants the president the pardon power without a countersignature mechanism. Article 139 of the Constitution of Poland provides the only exception and stipulates that the pardon power does not apply to persons who are sentenced by tribunals.[34] Article 17 of the Constitution of France contains little information on the Frech model of pardoning and only stipulates that the President of France has the pardon power.[35] The President of France does not delegate the pardon

[30] See supra note 4, 22.
[31] See supra note 1, 8.
[32] Article 94, Constitution of Romania <http://www.cdep.ro/pls/dic/site.page?id=371/> [last accessed on 8 August 2022].
[33] ibid.
[34] Article 94, Constitution of the Republic of Poland <https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm/> [last accessed on 14 March 2022].
[35] Article 17, Constitution of France <https://www.constituteproject.org/constitution/France_2008.pdf?lang=en /> [last accessed on 8 August 2022].

power to any authority.[36] The President of France has the power to commute, suspend or postpone a specific sentence, which constitutes the limited use of the pardoning mechanism.[37] The Czech model is an example of a unilateral exercise of the pardon power. According to Article 62 of the Czech Constitution, the president exercises the pardon power, commutes the punishment, instructs not to initiate criminal proceedings or to suspend them, or expunges a conviction.[38] An exclusive pardon power is also used by several states of the US.[39]

V. UNDERSTANDING THE CONCEPT OF EXCLUSIVITY OF THE PARDON POWER

According to a widespread opinion, the pardon power is based on the concept of exclusivity exercised by the Head of State without interference from different authorities.[40] The exclusive nature of the pardon power derives from the constitutional model of the United States based on the practice of the Supreme Court and the principles of supremacy and inviolability. Judge of the US Supreme Court *Warren Berger* ruled in *Shick v. Reed* that the discretionary "power flows from the Constitution alone, not from any legislative enactments, and that it cannot be modified, abridged, or diminished by the Congress".[41] An analysis of the practice of the US Supreme Court reveals that it is not permissible to interfere in the presidential pardon power, which contradicts the constitutional idea of the pardon power.[42]

The exclusive nature of the pardon power is often understood in a crude, formalistic manner and without regard to the principle of clarity. While in most countries the pardon power is in the hands of the Head of State, there are countries where the pardon power is exercised by different authorities. For example, in Turkey, Switzerland and Uruguay, the pardon power is mainly exercised by the legislative authority.[43] The principle of the rule of law requires that the pardon power and its nature should be interpreted based on the constitutional principles and with a proper understanding of their real aim.[44] The exclusivity of the presidential pardon power should be interpreted based on the

[36] See supra note 4, 22.
[37] ibid.
[38] ibid, 23.
[39] ibid.
[40] See supra note 2.
[41] Schick v. Reed, 419 U.S. 256, 1974, para 3 <https://supreme.justia.com/cases/federal/us/419/256/> [last accessed on 8 August 2022].
[42] See supra note 14, 8.
[43] See supra note 4, 21.
[44] Georgian Young Lawyers' Association, "Georgian Young Lawyers' Association refers to the fact of pardoning Tengiz Gunava by the President" (webpage of the Georgian Young Lawyers' Association, 31 July 2013) <https://gyla.ge/ge/post/saia-saqartvelos-prezidentis-mier-tengiz-gunavas-shetsyalebis-faqts-ekhmaureba-31#sthash.PIFPTYBX.dpbs/> [last accessed on 8 August 2022].

principle of certainty, which excludes the risk of exercising it arbitrarily. The importance of interpreting the pardon power particularly increases when the Constitution does not contain explicit restrictions on the use of the pardon power. For example, Article 52 of the Constitution of Georgia provides for the presidential pardon power, at a glance, without any limitations and stipulates that "the President pardons convicts".[45] The exclusivity of the presidential pardon power should not be interpreted in such a way as to enable the President to exercise it ignoring the constitutional principles. The pardon power should be exercised in accordance with the constitutional principles, for the citizens to be able to foresee the decisions of state authorities. Citizens should be able to foresee what kind of a decision this or that state authority will take in concrete circumstances.[46] The exclusivity of the presidential pardon power should be interpreted in terms of the inadmissibility of interference by different branches of government, rather than in terms of arbitrariness and ignoring the constitutional principles. The logic behind the pardon power excludes its dubious use by referring to its exclusivity. The discretionary pardon power does not imply its arbitrary and irresponsible use,[47] which is contrary to the principle of the rule of law. The exclusivity of the pardon power should be interpreted in terms of its aims, which include influencing criminal law policy in order to humanise it, resolving political crises, and using the pardon power as a humane act for those prisoners who realise the crime committed and repent of it.

There is a debate in US academic circles about the exclusivity of the pardon power. According to Professor *Andrew Kent*, the pardon power should not be considered fully unlimited and the president should not use it ignoring constitutional principles.[48] The discussions that took place with the participation of Professor *Andrew Kent* concerned the issue of pardoning the family members and friends of the president, as well as the president's criminal liability for exercising the pardon power.[49]

The exclusivity of the pardon power is related to the question of whether the president may be held liable for the exercise of the pardon power, including through an impeachment mechanism. A pardon is a political act and should be assessed primarily from a political perspective. The legal basis for impeachment is a violation of the Constitution or the commission of a crime. The opinion should be shared about the fact that "an act that is political in content and does not violate legal principles and norms should not be

[45] Article 52, Constitution of Georgia <https://matsne.gov.ge/ka/document/view/30346?publication=36/> [last accessed on 8 August 2022].
[46] See supra note 4, 43.
[47] Georgian News Agency, "The right to ask for pardon: Disability or the sacrifice of non-having right" (webpage of Georgian News Agency, 19 September 2019 <https://ghn.ge/news/232701-shetsqalebis-tkhovnis-ufleba-uunarobis-tu-uuflebobis-samskhverploze/> [last accessed on 8 August 2022].
[48] Andrew Kent, "Examining the Constitutional Role of the Pardon Power: Hearing before the House Judiciary Committee Subcommittee on the Constitution, Civil Rights, and Civil Liberties" (2019), Statement, Fordham Law School, 10.
[49] ibid.

considered a legal basis for impeachment".[50] If the president is not violating the law and is not committing a crime, his/her pardoning act has only a political significance, for which the president should not be held liable. The idea of a pardon as a political and humane decision stems from the fact that there is no judicial control over its exercise. The president may be held liable or impeached if he/she takes a bribe for pardoning or is involved in corruption. The president will be liable for violating the Constitution if he/she ignores constitutional principles and the principle of the rule of law and acts for personal gain. If the president violates constitutional principles and pardons a prisoner under the principle of *quid pro quo,* then he/she will obstruct justice.[51] The opinion should not be shared about the fact that the president may not be impeached for the pardon power.[52] On the contrary, the president may be impeached for exercising the pardon power if it contradicts the constitutional limits (principles) that are defined by the Constitution for exercising this power.[53]

The second important issue is whether the president has the right to pardon himself/herself and whether it is necessary to regulate its prohibition directly by the Constitution and other legal acts. For example, the US Constitution does not regulate the issue of self-pardoning by the president. The US Supreme Court used a "textual argument" in *Schick v. Reed*[54] and explained that the presidential pardon power is an absolute power that should be interpreted based on the text of the constitution.[55] The scholars supporting the "textual argument" say that the framers of the US Constitution wanted to specify this prohibition directly in the text of the Constitution.[56] The supporters of the "textual arguments" considered that the president had the right to self-pardoning. In the case of the US, none of the presidents used the self-pardoning power. President *Donald Trump* wrote on Twitter that he had the power to pardon himself.[57]

The US Supreme Court clarified in the case of *Ex Parte Garlan* that the exclusive nature of the pardon power can only be limited by an impeachment procedure, which is explicitly stipulated in the US Constitution.[58] According to scholars *Robert Nida* and *Rebecca Shpiro*, the presidential pardon power is "absolute and the president can exercise it at any time".[59]

[50] ibid, supra note 2.
[51] ibid, supra note 14, 6.
[52] ibid.
[53] ibid.
[54] See supra note 3, 216
[55] Schick v. Reed, 419 U.S. 256, 1974, para 3 <https://supreme.justia.com/cases/federal/us/419/256/> [last accessed on 8 August 2022].
[56] See supra note 3, 216-217.
[57] See supra note 14, 7.
[58] Ex parte Garland, 71 U.S. 333, 1866 <https://supreme.justia.com/cases/federal/us/71/333/> [last accessed on 8 August 2022].
[59] See supra note 3, 222.

The opponents of the "textual arguments" consider that the president may use the self-pardoning power to avoid charges after leaving office.[60] The threat of avoiding criminal liability after the president leaves office is ensured by the prohibition of pardoning during the impeachment procedure. Another argument of opponents of presidential self-pardoning is the possible existence of a conflict of interests, which is supported by the argument that "no one can be the judge in his/her own case".[61] This principle is enshrined in the case of *Marbury v. Madison* reviewed by the US Supreme Court.[62] According to the court, "the basics of the principle of the rule of law are that none can be above the law".[63] Therefore, the self-pardoning power enables the president to place himself/herself above the law, which is manifested in the problem that the president commits a crime and then pardons himself/herself.[64]

VI. GEORGIAN MODEL OF THE PARDON POWER AND ITS GAPS

Despite several amendments to the Constitution of Georgia and the establishment of different models of governance (presidential, semi-presidential and parliamentary), the constitutional norm regulating the pardon power remains unchanged. Although the 2018 constitutional reform deprived the president of several powers, the pardon power was retained. Article 52(1)(f) provides scarce information about the pardon power and stipulates that "the president pardons convicts".[65] Article 52 of the Constitution is characterised by general wording regarding the pardon power and does not contain provisions about the aims and scope of the pardon, which would give the pardon power more preciseness and clarity.

The Constitution of Georgia is based on the idea of the exclusivity of the pardon power, which does not extend to the other branches of government. Article 53 of the Constitution of Georgia provides that pardoning does not require the countersignature of the prime minister for the exercise of the pardon power by the president.[66] The Georgian model of the pardon power is based on the president's right to exercise it unilaterally and is oriented to preventing the interference of other branches with the exercise of the presidential pardon power.

[60] ibid, 216-217.
[61] See supra note 14, 7.
[62] Marbury v. Madison, 5 U.S. 137, 1803 <https://supreme.justia.com/cases/federal/us/5/137/> [last accessed on 8 August 2022].
[63] See supra note 14, 7.
[64] ibid.
[65] Article 52, Constitution of Georgia <https://matsne.gov.ge/ka/document/view/30346?publication=36 /> [last accessed on 8 August 2022].
[66] ibid, Article 53.

In parliamentary systems of governance, the pardon power in the hands of the president as an arbiter (who does not belong to any branch of government) is a significant balancing mechanism for other branches of government, which allows the president to solve political crises. Although the President of Georgia has been deprived of significant constitutional prerogatives as a result of constitutional amendments, the remaining pardon power is one of the basic mechanisms to influence political processes. Especially in parliamentary systems, with a weak president, where the president does not perform executive functions, the pardon power is an instrument in the hands of the president to do politics and is a significant mechanism to achieve control and balance in the system of separation of powers. By having the power to influence criminal law policy and solve governmental crises, the president becomes a real political figure to maintain constitutional order using the pardon power. The pardon power enables the president not to distance himself/herself from political processes and to exercise the functions of the Head of State properly.

The aims of doing politics and solving political crises using the presidential pardon power are read in Edict No 556 of the President of Georgia (26 November 2019) on Approving the Procedure for Pardoning, which stipulates that "the use of the pardon power by the President of Georgia is based on the principle of humanity as well as the national interests".[67] In contrast to Edict No 556, Edict No 120 of the President of Georgia (27 March 2014) on Approving the Procedure for Pardoning did not normatively define the aims of pardoning and its political nature,[68] which led to ambiguity in relation to the aims of pardoning and created false expectations about the rational use of the presidential pardon power. The absence of the aims of the presidential pardon power in legal acts created an information vacuum for convicts regarding the purpose of the pardoning mechanism and the scope of the presidential pardon power.[69]

Although there was no legal regulation of the aims of the pardon power until 2019, the aim of influencing criminal law policy was evident from the pardons granted by the fourth President of Georgia in 2013-2015. During this period, the President of Georgia pardoned 1 559 convicts, of whom 986 (62%) were convicted of drug crimes.[70] The analysis of the data shows that the aim of the fourth President was to liberalise drug policy, which manifested in the liberal approach towards the prisoners convicted of drug crimes. Furthermore, the fourth President demonstrated a liberal approach to the interests of juvenile justice and the resocialisation and rehabilitation of minor convicts.

[67] Preamble, Edict No 556 of the President of Georgia on Approving the Procedure for Pardoning, 26 November 2019 <https://matsne.gov.ge/ka/document/view/4712933?publication=0/> [last accessed on 8 August 2022].
[68] Edict No 120 of the President of Georgia on Approving the Procedure for Pardoning, 27 March 2014 <https://matsne.gov.ge/ka/document/view/2299717?publication=0/> [last accessed on 8 August 2022].
[69] See supra note 4, 14.
[70] ibid.

In 2013-2015, the President pardoned 62 out of 87 minor convicts (approximately 60% of the minor convicts).[71]

The aim of solving political crises is evident in the pardons granted by the fifth President of Georgia.

On 15 May 2020, the fifth President of Georgia pardoned politicians *Irakli Okruashvili* and *Giorgi Ugulava* and based it on the interest of solving the political crisis.[72] The fifth President of Georgia pardoned media manager *Giorgi Rurua* for political purposes.[73]

The problem of inadequate understanding of the pardon power was revealed through the declaration of a moratorium on pardons by the fifth President. By declaring a moratorium in 2019, the President of Georgia ignored the constitutional principles and refused to exercise the constitutional pardon power. In fact, by declaring a moratorium, the President of Georgia refused to fulfil her constitutional obligations. She jeopardised the practical realisation of the constitutional logic of pardoning and the implementation of criminal law policy. The President of Georgia ignored those convicts for whom a pardon was the last way to escape repressive criminal law policy.[74] By declaring a moratorium, the President placed herself above the constitutional principles ignoring the principle of accountability to the public and the interests of the convicts who had suffered from repressive criminal law policy. The President viewed the discretionary pardon power outside the constitutional logic and context, thereby arbitrarily interpreting the essence and purpose of the presidential pardon power.

The constitutional standard for exercising the pardon power requires the President to exercise it based on foreseeable and clear criteria.

Article 78 of the Criminal Code of Georgia was amended in 2019, making the presidential pardon power more foreseeable and reducing the possibility of the arbitrary use of the pardon power by the president. According to Article 78(1) of the Criminal Code of Georgia, "pardon shall be granted by the President of Georgia in relation to an individually defined person, under the procedure established by the edict of the President of Georgia".[75] The amendments to the Criminal Code of Georgia determined the normative scope of exercising the pardon power, thus making more foreseeable the procedure for exercising the pardon power by the president.

[71] ibid.

[72] News Agency „Reginfo", "Information on Pardoning" (webpage of the News Agency, 15 May 2020) <https://reginfo.ge/politics/item/17927-prezidentma-gigi-ugulava-da-irakli-oqruashvili-sheixybala/> [last accessed on 8 August 2022].

[73] Kviris Palitra, "Information on Pardoning" (webpage of Kviris Palitra, 29 April 2021) <https://kvirispalitra.ge/article/77235-qzurabishvilma-rom-thqva-zhorika-ruruas-gavathavisuflebo-ver-davijere-qzaralasthanacq-vapireb-brdzolasq-thamar-thoradze-prezidentis-gadadgomas-ithkhovs/> [last accessed on 8 August 2022].

[74] See supra note 2.

[75] Article 78, Criminal Code of Georgia <https://matsne.gov.ge/ka/document/view/16426?publication=238> [last accessed on 8 August 2022].

Furthermore, one of the gaps in the Georgian model of pardoning is that neither the Constitution of Georgia nor the presidential edict on the procedure for pardoning provides for an obligation to substantiate the act of pardon, which would make the presidential decision clearer. The substantiation of a pardon decision is a well-known standard in different countries. For example, some states of the US envisage an obligation to substantiate a pardon decision in different forms. An obligation to substantiate a pardon decision is envisaged by the local legislation of several states of the US.[76] According to the legislation of the US, an obligation to substantiate a pardon decision does not apply to a federal procedure for pardoning.[77]

The Georgian model of the pardon power is also vague because, according to the presidential edict, pardoning can be used "as an exception".[78] The presidential edict does not define what is meant by using a pardon as an exception, which creates the possibility for the President to exercise the pardon power arbitrarily. Besides, such vague norms may cause uncertainty and confusion among convicts and lawyers, which logically provokes dissatisfaction among convicts.

VII. CONCLUSION

The analysis carried out in the Article reveals that the pardon power is an important mechanism for the Head of State to do politics and influence it. The mechanism is based on the idea of exclusivity and inalienability of the pardon power. Because of the exclusive nature of the pardon power, it is important that the law regulate a clear and foreseeable procedure for pardoning, which derives from the principle of the rule of law. Although the constitutional principles are binding upon the branches of government, it is important that the legislation contain clear and unambiguous provisions on the exercise of the pardon power, which will minimise the risk of a subjective interpretation of the pardon power and its arbitrary use in practice. Furthermore, it is important that the provisions regulating the procedure for pardoning contain norms on the transparency and openness of the process. At the same time, it is advisable that the law obliges the president to substantiate pardon decisions, thus increasing the accountability and responsibility of the president before the public.

[76] See supra note 1, 842.
[77] ibid.
[78] Preamble, Edict No 556 of the President of Georgia on Approving the Procedure for Pardoning, 26 November 2019 <https://matsne.gov.ge/ka/document/view/4712933?publication=0/> [last accessed on 8 August 2022].

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IMPORTANCE OF REFUSAL TO GIVE EVIDENCE AND OF INDIRECT EVIDENCE IN DOMESTIC VIOLENCE AND DOMESTIC CRIME CASES

ABSTRACT

Despite significant legislative and institutional changes in recent years, combating violence against women and domestic violence remains a challenge.

Given the increasing number of facts of domestic violence in the country, in some cases, perpetrators go unpunished, as domestic violence cases are generally characterised by a lack of evidence, and it is difficult to obtain direct evidence, especially where the victim uses the constitutional right and refuses to testify against the perpetrator who is their close relative.

Although the Supreme Court of Georgia has repeatedly noted in recent years that due to the specific nature of a domestic crime, even if no victim's testimony or document confirming the absence of claims of the victim against the accused is adduced to the case, the issue of liability of the accused must be decided based on other evidence, yet the practice of the common courts shows that special attention is paid to the victim's testimony in rendering judgments of conviction in such cases, especially where, by the judgment of the Constitutional Court of Georgia of 22 January 2015, it is inadmissible to render a judgment of conviction based on indirect testimony.

In addition, because it is usually difficult to obtain direct evidence in domestic violence and domestic crime cases, in practice a guilty verdict is to some extent prevented by the provision of the Criminal Procedure Code of Georgia being narrowly interpreted by the Supreme Court, according to which a judgment of conviction should only be based on a "body of consistent, clear and convincing evidence", which is interpreted by the court as requiring at least two pieces of direct evidence.

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To facilitate a better administration of justice, this Article will review the criminal law of common law countries in relation to victim testimonies. In addition, the decisions of the Supreme Court and the Constitutional Court will be analysed to illustrate existing jurisprudence in Georgia.

I. INTRODUCTION

Domestic violence is the most widespread category of crime in many countries of the world, and to combat it, states seek to develop, as a matter of priority, an appropriate legislative framework, harmonise their national laws with the provisions of the Istanbul Convention and take effective measures in this regard. However, despite the efforts made, domestic violence remains a major problem in modern society. The problem has become even more evident in the context of the pandemic. In particular, according to the World Health Organization,[1] during the current pandemic, cases of domestic violence in the world have increased by one third, as the triggering factors of violence, stress, dramatic economic deterioration, etc. have also increased. Unfortunately, Georgia stands out among other countries with alarming statistics of domestic violence. Therefore, it is obvious that improving the legislative framework alone is not sufficient to effectively combat this category of crime, and, based on the specific nature of the problem, a unified, complex and coherent policy based on the specific nature of the problem need to be implemented. In this regard, it is important to emphasise the responsible role of the judiciary.

Court decisions in domestic violence and domestic crime cases, as part of a strict national policy on such crimes, serve not only the purpose of identifying the offender and imposing on him or her adequate criminal responsibility, but also have the additional preventive function of not encouraging a "syndrome of impunity".

Domestic violence is a latent crime characterised by non-disclosure, concealment, misrepresentation, a narrow scope of persons to be interviewed, and a refusal to testify. In addition, judicial practice shows that victims, who during the investigation disclose much more information about the violence shortly after the occurrence thereof, adapt over time to the violence that has taken place and try to avoid responsibility for the accused in various ways (of their own free will or with the intervention of the accused).[2] Given the fact that this category of crime tends to be characterised by a lack of evidence, it is more difficult to obtain much direct evidence. Thus, the judgment

[1] World Health Organization Data <https://www.who.int/reproductivehealth/publications/emergencies/COVID-19-VAW-full-text.pdf> [last accessed on 2 February 2022].

[2] Ana Sigua, Peculiarities of Judicial Evaluation of Evidence in Domestic Violence Cases (Master's thesis, Tbilisi State University 2019), p. 16 <https://openscience.ge/bitstream/1/964/1/samagistro%20sigua.pdf> [last accessed on 18 April 2022].

of the Constitutional Court of Georgia concerning indirect testimony and the practice established by the common courts – the narrow interpretation of the "standard of a body of evidence" necessary for rendering a judgment of conviction (the need for the presence of at least two pieces of direct evidence) has created certain problems in terms of the administration of justice.

Proceeding from the above, the purpose of this Article is to analyse the said judgment of the Constitutional Court *vis-à-vis* the practice of the common courts. In addition, the reader will be introduced to the legislation of foreign countries and the case-law of the European Court of Human Rights concerning the question of admitting testimonies in domestic violence cases as direct evidence and the exceptional legislative regulations on the refusal of a witness to testify against a close relative.

II. IMPORTANCE OF DIRECT AND INDIRECT EVIDENCE

In general, it is difficult to obtain direct evidence in domestic violence and domestic crime cases, especially where the victim exercises the procedural right granted to him or her by the Constitution[3] and refuses to give evidence against an abusive relative. The scope of relatives is defined by law. In particular, the Criminal Procedure Code of Georgia allows a witness not to give evidence that discloses the commission of a crime by a close relative.[4] The scope of close relatives is defined by the same code[5] and includes a parent, an adoptive parent, a child, a foster child, a grandfather, a grandmother, a grandchild, a sister, a brother, a spouse, including a divorced spouse.

Proceeding from the above-mentioned motive, even if a comprehensive investigation is conducted, the prosecution is objectively deprived of the possibility to obtain and present to the court direct evidence confirming the criminal facts in the above-mentioned category of cases.[6] In practice, this circumstance becomes one of the grounds for the court to pass a judgment of acquittal. Accordingly, it is obvious that the victim's testimony is the most important evidence in such cases. However, it should be kept in mind that the victim may have many, including logical reasons, for refusing to testify: 1. The possibility of reconciliation, while giving evidence may put the marital relationship at risk; 2. Fear about financial security; 3. Concern for the welfare of

[3] Article 31, paragraph 11, Constitution of Georgia <https://matsne.gov.ge/ka/document/view/30346?publication=36> [last accessed on 18 April 2022].

[4] Article 49, paragraph 1, sub-paragraph (d), Criminal Procedure Code of Georgia (hereinafter referred to as "the Criminal Procedure Code") <https://matsne.gov.ge/ka/document/view/90034?publication=142> [last accessed on 18 April 2022].

[5] ibid, Article 3, paragraph 2.

[6] Goga Khatiashvili, Handbook on Violence against Women and Children, and Combating Domestic Violence (USAID 2021), p. 58.

the children; 4. Pressure emerging from family members not to testify; 5. Cultural or religious beliefs that would condemn her, resulting in alienation from the family for testifying against a spouse; 6. The problem of the witness victim's perception of himself or herself as a victim of violence because of the systemic nature of the violence; 7. Fear of being alone; 8. Feelings towards the abuser or, in some cases, fear of a trial, an information vacuum that can lead to secondary victimisation.[7]

Taking into account cases where the victim does not disclose the abuser, the court is frequently left to assess only a forensic examination report and direct evidence. Even in the absence of physical injuries on the victim's body, if there is no testimony from the victim and/or other witnesses, "an expert opinion cannot be regarded as credible evidence in the context of identifying the person who caused the injury, as a medical examination can determine the presence, quantity, severity and location of the injury, rather than that identity of the person causing it".[8] To reach a guilty verdict against a person, it must be established that the injuries were inflicted by a specific person on the victim and, therefore, the act was culpable.[9]

As regards the indirect testimony, according to the judgment of the Constitutional Court of Georgia,[10] recognising a person as an accused and reaching a verdict against him or her on the basis of indirect testimony was found unconstitutional. The court deliberated on the following circumstances: whether it was possible to bring charges or reach a verdict on the basis of unreliable evidence, whether the possibility of using indirect testimony posed a risk of violating constitutional law, whether there entailed a risk that a verdict would be reached on the basis of doubtful, false or inadequate evidence. Furthermore, the court had to examine whether the criminal procedure law contained sufficient safeguards to credibly prove that a person had committed an offence.[11] The court stated in connection with the above that recognising as admissible the evidence that was based on the statement made by another person or on information disseminated contained many risks. Among other things, it is difficult to assess whether such information is reliable or credible because the court is limited in its ability to verify the attitude of the person disseminating the information and his or her relation to the events surrounding the criminal case. It is also difficult to foresee how this person would testify if he or she were to appear in court.[12] Although the criminal procedure

[7] Application of International Standards in Domestic Violence Cases (Supreme Court of Georgia, 2017), p. 68 <https://www.supremecourt.ge/files/upload-file/pdf/kvleva-ojaxshi-zaladobaze.pdf> [last accessed on 18 April 2022].

[8] Judgment of Tbilisi City Court in Case No 1/1385-17, 7 July 2017.

[9] See supra note 7.

[10] Judgment of the Constitutional Court of Georgia No 1/1/548 in the case "Citizen of Georgia Zurab Mikadze v. the Parliament of Georgia", 22 January 2015.

[11] ibid, II-4.

[12] ibid, II-29.

legislation criminalises the giving of false testimony by a witness, the court explained: "In the case of indirect testimony, this mechanism would provide a less effective means of ensuring credibility because the person giving indirect testimony cannot confirm whether the information disseminated by another person was reliable".[13] The court considered that it was not justified to automatically admit indirect testimony as evidence in the criminal case and use it irrespective of in which conditions, in which form and by which means the person giving indirect testimony became aware of the information in question.[14] However, it should be noted that the Constitutional Court has not ruled out the appropriateness of the use of indirect testimony in exceptional cases. In particular, an exception may be justified "where there is an objective reason why it is not possible to interrogate the person on whose words the indirect testimony is based and where this is necessary in the interests of justice. For example, the court may consider admitting the indirect testimony where the witness or the victim has been intimidated or there is a need to ensure his or her safety as a witness. Unlawful acts of the accused – the intimidation of a witness – should not obstruct the administration of justice and therefore, in exceptional cases, the court should have the power to assess the necessity of justice and its administration".[15] However, "the question of finding the indirect testimony admissible and making use of it must be decided in the context of clearly formulated provisions and adequate procedural safeguards. In each particular case, the court must assess the circumstances which are named by the prosecuting body to justify the submission of indirect testimony".[16]

It should be noted that prior to the above-mentioned judgment of the Constitutional Court, the Supreme Court of Georgia adopted a decision of similar content based on the provisions of criminal procedure law.[17] In particular, the court referred to the provision of paragraph 1 of Article 76 of the Criminal Procedure Code, according to which "testimony cannot be considered as evidence if the witness does not refer to the source of the information provided...". Furthermore, Article 76 establishes that "testimony that is based on the information disseminated by any other person shall be considered indirect" (paragraph 1), and "indirect testimony shall be considered as admissible evidence only if the person giving indirect testimony refers to the source of information that can be identified and the real existence of which can be established" (paragraph 2). In the case before the court, the fact of the criminal act had been confirmed only by the indirect testimony of the police officer, who explained that he had learned about it from intelligence information. Based on the legislative regulations mentioned above,

[13] ibid, II-31.
[14] ibid, II-34.
[15] ibid, II-36.
[16] ibid, II-37.
[17] Judgment of the Supreme Court of Georgia in Case No 218ბ3-14, 18 December 2014, Reasoning Part, para 4.1.12.

the Chamber of Cassation did not accept the testimony of the law enforcement officer because the source of the information provided was intelligence information that could not be verified against the initial source of information.

The judgment of the Constitutional Court has had a significant impact on the practice of the common courts in the use of indirect testimonies. When discussing indirect testimony, judges actively refer to this very judgment of the Constitutional Court and it is obvious that the standard of proof increased. However, in many cases, judges assess the evidentiary force of indirect testimony based on whether there is direct evidence corroborating the indirect testimony adduced to the case. For example, in the reasoning part of the judgment of 30 June 2015, the Supreme Court referred to the judgment of the Constitutional Court of 22 January 2015 and noted that the indirect testimony given by the witness did not meet the constitutional and legal standard of credibility, so the Chamber of Cassation, having regard to the fact that the witness's indirect testimony had not been corroborated by any other direct evidence, considered that the accused should be acquitted.[18] It may thus be said that in practice the evidentiary force of indirect testimony depends to a large extent on the evidence supporting its credibility. This should not be limited to direct evidence as it is possible to judge the evidentiary value of indirect testimony even if indirect evidence corroborating it is available in the case. In particular, "where there is more than one piece of indirect evidence, each may not independently prove the existence/absence of a fact beyond a reasonable doubt, but taken together it may naturally and reasonably enable us to reach that conclusion".[19]

In parallel to the 2015 judgment of the Constitutional Court, the Supreme Court developed a practice whereby the existence of at least two pieces of direct evidence was considered necessary for rendering a judgement of conviction. This high standard has created certain problems in terms of access to justice, especially in relation to crimes that are already characterised by a lack of evidence by virtue of their nature and specificity, including domestic violence and domestic crime cases.

However, it is possible that only evidence that does not, directly and indirectly, point to the circumstances of the subject of proof, but at least indirectly proves the involvement of the accused in the crime beyond a reasonable doubt, may be available in the case. The legislator did not establish criteria for separating direct and indirect evidence from each other and did not set out the required number of pieces of direct evidence. It avoided classifying evidence into separate types, rejected the principle of formal proof and defined that no evidence should have a pre-determined value, and entrusted the judge with reasoning about the reliability of evidence.[20]

[18] Judgment of the Supreme Court of Georgia in Case No 14ბ-15, 30 June 2015, Reasoning Part, para 23.
[19] Tornike Khidesheli, "Importance of Hearsay in Accordance with the Practice of the European Court of Human Rights" (2019) 1, Journal of Law, p. 256.
[20] Lavrenti Maglakelidze, Giorgi Tumanishvili, "Importance of Indirect Evidence in Accordance with the

At the same time, due to the specific nature of such cases of domestic violence and domestic crime, the requirement of two pieces of direct evidence means that even if the victim's testimony is compelling and reliable, unless it is supported by other evidence, a guilty verdict will not be reached. This issue becomes more problematic if in crimes of such category the victim exercises the right granted to him or her and does not give evidence that would disclose the commission of a crime by his or her close relative. Given the above, the prosecution is essentially deprived of the possibility to obtain and present to the court a sufficient amount of direct evidence proving the criminal fact. In some cases, problematic issues emerge in the process of rendering justice, such as the automatic equation of indirect testimony with indirect evidence. If the indirect evidence adduced to the case meets the standard of credibility and also corroborates the information conveyed in the indirect testimony, it is possible that the indirect testimony may be given evidentiary value and, in combination with other evidence, used in rendering a guilty verdict.[21] Therefore, given the high standard of proof, the prosecution should make a greater effort to obtain evidence that will corroborate the charges so that it is not dependent on the exercise of witness immunity by the victim.

The judicial practice has developed by following the problematic issues and we increasingly are seeing a modified approach in court decisions, the need for the existence of at least two pieces of direct evidence understood as the "body of evidence" for reaching a guilty verdict. In 2018, the Supreme Court clarified in a domestic violence case that "having the 'beyond reasonable doubt' standard does not imply an abundance of evidence in a criminal case, but there must be a combination of weighty and compelling evidence that, if combined and not assessed individually, would convince a reasonable and objective person of the culpability of the person".[22]

In recent years, the Court of Cassation has been actively referring in domestic violence cases to the state's positive obligation. In particular, the state has an obligation to prevent crime, protect the victim and hold the abuser responsible, regardless of whether the victim has withdrawn the complaint or has been reconciled with the abuser.[23]

However, it should be noted that "a victim's refusal to give incriminating testimony against a close relative during the trial on the merits does not constitute a denial of the factual circumstances presented by him or her in the information provided at the investigation stage, hence, due to the specific nature of domestic crime, even in the absence of a victim's testimony or a document confirming that the victim has no claims against the accused, available in the case file, the question of the liability

Georgian and International Criminal Procedure" (2017) 1(53), Justice and Law, p. 39.

[21] Khidesheli, supra note 19, 256.

[22] Decision of the Supreme Court of Georgia in Case No 394ბპ-17, 3 January 2018.

[23] Judgment of the Supreme Court of Georgia in Case No 443ბპ.-20, 29 October 2020, Reasoning Part, para 7.

for the accused must be decided on the basis of other evidence available in the case file".[24] In practice, we may encounter judgments where the court focuses on the victim's behaviour after the commission of the crime – whether the victim was motivated to support an objective investigation: to be interviewed voluntarily, to participate in investigative/procedural actions, including the examination of injuries on the body and an investigative experiment, to conduct a medical examination. It is important to analyse and assess the above because if the victim initially showed a strong will to cooperate with the investigative authority and then radically changed his or her position and did not even give incriminating testimony against the abuser in court, this indicates that we may be dealing with the classic behaviour of victims of domestic violence, where they continue to live in constant fear and tension after the violence. The frightened victim sees the possibility of survival in a changed lenient position towards the abuser.[25]

Therefore, taking into account the specific nature of this category of cases, it is necessary to thoroughly examine all the meaningful evidence. Among other things, it is important to interview neutral witnesses. These witnesses are often neighbours and relatives or persons with whom the victim has first communication shortly after the violence. These persons might not be direct witnesses of the fact, but might have information about the relationship between the alleged abuser and the victim, or might have had instantaneous contact with the alleged fact and can describe in detail the victim's psycho-emotional state. The witness testimony in such a case may be partly indirect and partly direct. For example, a woman told her friend how her husband had abused her. The testimony given by the friend from the woman's story would be indirect, but in the part describing the victim's emotional state, *inter alia*, indicating the signs of injuries on the woman's body, would be direct.[26]

Notably, the importance of indirect testimony is recognised in international practice and must be assessed by the court on a case-by-case basis: according to the International Criminal Court (ICC), indirect testimony does not automatically mean that it has no value for the case. As with any other type of evidence, although indirect testimony may have less weight, its assessment must ultimately depend on the various circumstances surrounding it.[27] Indirect testimony should be assessed at a trial and should not automatically be excluded from the case. Indirect testimonies are allowed in *ad hoc*

[24] Decision of the Supreme Court of Georgia in Case No 145ბ-19, 27 May 2020; Decision of the Supreme Court of Georgia in Case No 766ბ-19, 3 February 2020.
[25] Judgment of the Supreme Court of Georgia in Case No 118ბ-20, 28 July 2020, Reasoning Part, para 8.
[26] Khatiashvili, supra note 6, 60-61.
[27] Judgment of the International Criminal Court in Case No 01/04-02/06 "The Prosecutor v. Bosco Ntaganda", 8 July 2019, para 67; Decision of the International Criminal Tribunal for the Former Yugoslavia on the Prosecutor's Appeal on Admissibility of Evidence in Case No 95-14/1-AR73 "The Prosecutor v. Zlatko Aleksovski", 16 February 1999, para 15.

tribunals, provided that they are relevant and valuable to the case. Tribunals have the discretion to accept indirect testimonies and rely on them if they have been accepted.[28]

III. EVIDENTIARY VALUE OF INDIRECT TESTIMONY IN ACCORDANCE WITH THE LEGISLATION OF FOREIGN COUNTRIES AND THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

1. REVIEW OF THE LEGISLATION OF FOREIGN COUNTRIES

Evidence is the necessary basis for proof. Convincing people of the correctness or incorrectness of an issue is based on evidence because society does not believe in abstract or theoretical arguments.[29]

The rules and principles of admissibility of indirect testimonies in criminal procedure laws of common law and continental law countries differ insofar as their systems are different. At the same time, some continental European countries have established minimum principles of the admissibility of indirect testimonies (Spain, Italy). In Estonia, the criteria for the admissibility of indirect testimony are concretised in the Criminal Procedure Code. In common law countries, such concretisation is done in jurisprudence, but the situation is different in Canada where the rule of the admissibility of indirect testimony is general and the court is allowed to admit a certain testimony as evidence based on general principles. In the federal rules of the USA, unlike in other common law countries, there is a very broad list of exceptions to the rule prohibiting indirect testimonies. In some countries, where court proceedings are based on inquisitorial principles (e.g., France, Belgium, Germany), indirect testimonies are allowed and the judge decides on the value of such testimony.[30]

According to Article 195 of the Criminal Procedure Code of Italy, if there is indirect testimony, the judge shall summon the direct witness to court based on a party's request or of his or her own volition. Indirect testimony is allowed only if the direct witness has died, has mental problems or cannot be found. According to paragraph 4 of the same article, criminal police officers do not have the right to give evidence on the basis of an interrogation of witnesses that has been conducted in accordance with the procedure provided for in that code.[31]

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[28] ibid, para 67.

[29] Deborah Merritt Jones and Ric Simmons, Learning Evidence From The Federal Rules to The Courtroom (American Casebook Series 2009); Khidesheli, supra note 19, 251.

[30] "Indirect Testimonies, Legislation and Practice of Foreign Countries" (Supreme Court of Georgia, 2016) <https://www.supremecourt.ge/files/upload-file/pdf/iribi-chvenebebi1.pdf> [last accessed on 25 November 2021].

[31] Criminal Procedure Code of the Republic of Italy <https://www.legislationline.org/documents/section/

The Criminal Procedure Code of Estonia considers indirect testimony inadmissible, except where there is any case prescribed by law. In particular, under Article 66, the testimony of a witness in relation to facts that are connected to the subject of proof, of which the witness became aware from another person, shall not become evidence, except in cases where: the direct source of the evidence cannot be interrogated for the reasons set out in sub-paragraph 291(1) of the Code; the content of a witness's testimony is what he or she heard from another person about circumstances that were directly perceived by him or her during the conversation, still under the influence of what had been disclosed to him or her, and provided that there are no grounds to believe that he or she distorts the truth; the content of a witness's testimony is what he or she has heard from another person and which contains an assumption about the commission of a criminal offence or which is in conflict of interest with the talker; the content of a witness's testimony contains circumstances related to a crime committed by more than one person.[32]

Under Article 291 of the Criminal Procedure Code of Estonia, indirect testimony is allowed if during the cross-examination the witness cannot be called for the following reasons: the witness has died; refuses to give evidence during the court hearing; cannot give evidence for health reasons; cannot be located despite taking reasonable measures; could not appear in court because of other obstacles that are long-term or removing those obstacles will involve a disproportionate amount of money, and the party who made the motion applied all reasonable measures to bring him or her to court.

The case-law established that the criteria will be met if indirect testimony is necessary to prove a concrete fact, provided that direct evidence is not available and evidence of the same quality cannot be obtained.[33]

To sum up, some Western European countries make specific exceptions by allowing indirect testimonies. The American model includes fairly broad exceptions, as does the Canadian model, although in this case it is up to the judge to assess the fact. The rules established by case-law in Ireland and the UK are ambiguous, striking a balance between the judge's discretion and the determination of specific exceptions. The Estonian model is best suited to Georgian procedural law where specific exceptions are listed at the legislative level.[34]

criminal-codes/country/22/Italy/show> [last accessed on 25 November 2021].

[32] Penal Code of the Republic of Estonia <https://www.legislationline.org/documents/section/criminal-codes/country/33/Estonia/show> [last accessed on 25 November 2021]; supra note 30.

[33] Consultation Paper, "Hearsay in Civil and Criminal Cases" (Law Reform Commission, 2010) <https://www.lawreform.ie/_fileupload/consultation%20papers/cp60.htm#_Toc256423784> [last accessed on 25 November 2021].

[34] See supra note 30.

2. PRACTICE ESTABLISHED BY THE EUROPEAN COURT OF HUMAN RIGHTS REGARDING THE ADMISSIBILITY OF INDIRECT TESTIMONY

The European Convention on Human Rights does not limit the use of indirect testimony in criminal proceedings. Moreover, the Strasbourg Court has entrusted the regulation of issues related to evidence to the Contracting States.[35] However, as the Court pointed out, before national courts discuss the use of such evidence, the issue must be examined in detail, given that the indirect testimony has less evidentiary value than the direct testimony of a witness.[36] In addition, a judgment of conviction cannot be based solely on indirect testimony.[37]

According to the case-law of the European Court of Human Rights, there will be no violation of the right to a fair trial if, for good reason, the deposited testimony of a witness was published at the trial and the defence had an opportunity to ask him or her questions at earlier stages of the proceedings.[38]

It is important to highlight the case *Al-Khawaja and Tahery v. The United Kingdom*[39] in the case-law of the European Court of Human Rights, in which the Court has clearly established a three-step standard for the use of indirect testimonies. In particular, taking into account the requirements of the right to a fair trial, indirect testimony is admissible in the following circumstances: there must be a substantial reason for the witness not to appear in court; indirect testimony must not be a substantial or sole basis for the verdict; and negative factors that emerged for the defence with the admissibility of the indirect testimony must be properly balanced out.

Based on the above, the European Court is guided by the al-Khawaja test when assessing the fairness of the entire trial, but it should also be noted that the absence of a substantive reason for the non-appearance of a witness does not mean *a priori* that it prevents from assessing the entire proceedings as fair.[40] For example, in *Schatschashvili v. Germany*[41] the

[35] Judgment of the European Court of Human Rights, Garcia Ruiz v. Spain, no. 30544/96, 21 January 1999, para 28 <https://hudoc.echr.coe.int/tur#{"itemid":["001-58907"]}> [last accessed on 18 April 2022].
[36] Judgment of the European Court of Human Rights, Pichugin v. Russia, no. 38623/03, 23 October 2012, para 198 <https://hudoc.echr.coe.int/eng?i=001-114074> [last accessed on 18 April 2022].
[37] Khidesheli, supra note 19, 257.
[38] Judgment of the European Court of Human Rights, Mirilashvili v. Russia, no. 6293/04, 11 December 2008, para 217 <https://hudoc.echr.coe.int/eng?i=001-90099> [last accessed on 18 April 2022].
[39] Judgment of the European Court of Human Rights, Al-Khawaja and Tahery v. The United Kingdom, no. 26766/05, 15 December 2011, paras 119-125 <https://hudoc.echr.coe.int/fre#{"itemid":["001-108072"]}> [last accessed on 18 April 2022].
[40] Judgment of the European Court of Human Rights, Schatschashvili v. Germany, no. 9154/10, 15 December 2015 <https://hudoc.echr.coe.int/fre#{"itemid":["001-159566"]}> [last accessed on 18 April 2022]; Judgment of the European Court of Human Rights, Seton v. the United Kingdom, no. 55287/10, 31 March 2016 <https://www.bailii.org/eu/cases/ECHR/2016/318.html> [last accessed on 18 April 2022].
[41] Schatschashvili v. Germany, supra note 40, paras 113, 116.

Court once again emphasised the importance of balancing factors. They should be assessed not only where the witness's indirect testimony was essential or the only evidence for the conviction of the person, but also where such evidence had considerable weight and, by its being admitted, the defence came across obstacles during the trial. In particular, the greater the importance attached to so-called "unverified evidence", the more balancing factors are required. Thus, under this judgment, the Strasbourg Court considered it possible to use the Al-Khawaja test when assessing the fairness of a trial, regardless of whether the substantive reason for the non-appearance of the witness was satisfied.

The case-law of the European Court of Human Rights thus clearly defines the conditions that must be met for any trial to be considered fair. As regards indirect testimony, it is clear that it is not excluded from proceedings and is admissible evidence. However, particular care must be taken when assessing its credibility, and the more evidentiary value will be attached to the testimony of a witness who did not appear, the more balancing factors will be required during the proceedings.[42]

IV. PRACTICE OF GIVING EVIDENCE BY VICTIMS (WITNESSES) IN DOMESTIC VIOLENCE CASES IN ACCORDANCE WITH THE LEGISLATION OF FOREIGN COUNTRIES AND THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

In the practice on domestic violence cases, the refusal of a spouse witness to give evidence or the change of his or her testimony often poses problems, which for the most part becomes one of the grounds for terminating criminal prosecution by prosecutors or for passing a judgment of acquittal by the court.

It should be noted that in common law countries, criminal legislation mainly provides for a victim's obligation to give evidence where the case concerns a domestic crime.

Section 80(3) of the Police and Criminal Evidence Act 1984 of England defines the following specific categories of offences where a spouse or civil partner is required to give evidence: (a) if violence or a threat of violence is directed against the spouse or civil partner or a person who was at the material time under the age of 16; (b) if a sexual offence has been committed in respect of a person who was at the material time under the age of 16; (c) or if the act consists of attempting, aiding or abetting the commission of an offence falling within paragraph (a) or (b).[43]

A divorced spouse is also required to give evidence, and the failure of an accused's

[42] Khidesheli, supra note 19, 261.

[43] Police and Criminal Evidence Act 1984 <https://www.legislation.gov.uk/ukpga/1984/60/section/80> [last accessed on 18 April 2022].

spouse (wife or husband) to give evidence should not become the subject of additional actions for the prosecution. In England, there is no rule requiring the judge to warn the witness (spouse) of the compulsory testimony, but according to the established judicial practice it is advisable to give such a warning to the witness.[44]

The legislative regulation of the obligation for spouse witnesses to give evidence in domestic violence cases is unusual in European countries of continental law. For example, Article 52 of the German Code of Criminal Procedure broadly defines the scope of persons who have the right to refuse to give evidence. In particular, a spouse (wife or husband), fiancé or fiancée, or civil partner has the right not to give evidence.[45] Thus, German law explicitly excludes the possibility of forcibly interrogating a spouse witness, including in connection with a domestic crime.[46] Furthermore, it is important to note that according to Article 52(3) of the German Code of Criminal Procedure, a person who has the right to refuse to give evidence must be informed of this possibility prior to interrogation.

The criminal legislation of most member States of the Council of Europe generally provides for the right of the spouse of the accused or his/her registered partner (Austria, Belgium, the Czech Republic, Germany, the Netherlands, Hungary, Finland, Norway, Sweden, Switzerland) or a person who shares a household with the accused (Finland, Germany, Hungary, Lithuania, Norway, Turkey, Sweden, Ukraine, Poland, Slovakia, Andorra) to enjoy witness immunity and not to give evidence. The exceptions, in this case, are France and Luxembourg where there is no such privilege and giving evidence is compulsory for all, while in Belgium, Malta and Norway the testimony of the accused's spouse is automatically excluded.[47]

Under Article 6(3)(D) of the European Convention on Human Rights, everyone charged with a criminal offence has the right to examine or have examined witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her; It should be noted that none of the domestic violence cases examined by the Strasbourg Court so far have dealt with the issue of giving evidence by a spouse witness, whether by compulsory or voluntary means. The European Court's reasoning regarding witness immunity

[44] Wendy Harris, "Spousal Competence and Compellability in Criminal Trials in the 21st Century" (2003) 3(2), Queensland University of Technology Law and Justice Journal, p. 13.

[45] German Code of Criminal Procedure <https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html> [last accessed on 18 April 2022].

[46] Michael Wutz, "Evidentiary Barriers to Conviction in Cases of Domestic Violence: A Comperative Analysis of Scottish and German Criminal Procedure" (Aberdeen Student Law Review, 2011) 89 <https://cupdf.com/document/evidentiary-barriers-to-conviction-in-cases-of-domestic-evidentiary-barriers.html?page=1> [last accessed on 18 April 2022].

[47] Judgment of the European Court of Human Rights, Van Der Heijden v. The Netherlands, no. 42857/05, 3 April 2012, paras 32-35 <https://hudoc.echr.coe.int/eng?i=001-110188> [last accessed on 18 April 2022].

in general is well demonstrated in the judgment of the Grand Chamber in *Van Der Heijden v. The Netherlands.*[1] In that case, the applicant argued that the Kingdom of the Netherlands had violated the rights guaranteed to her by Articles 8 (right to respect for private and family life) and 14 (prohibition of discrimination) of the European Convention because, despite her long-term cohabitation with the accused, she had not been granted the testimonial privilege and was required to compulsorily give evidence. In particular, the applicant's husband was charged with murder and the investigating judge required the applicant to give evidence, which she refused to do referring to the fact that she had lived with the defendant for 15 years and had children, so despite the absence of a registered relationship she should have been granted the possibility to refuse to give evidence, just as it would be done in the case of his spouse or registered partner.[2] It should be noted that 13 days' detention was imposed on the applicant for failing to comply with the court's order (for refusing to give evidence). In that case, the European Court pointed out that any right not to give evidence constituted an exemption from normal civic duty acknowledged to be in the public interest. Accordingly, such a right may be made subject to certain conditions and formalities, with the categories of its beneficiaries clearly set out.[3] The national court was to decide on a case-by-case basis whether there is a need to take evidence from a particular.[4] When examining the application, the Strasbourg Court also drew attention to the fact that the applicant had never attempted to register their relationship, whereby she would easily fall within the scope of persons enjoying an exception under Article 217 of the Dutch Code of Criminal Procedure, while registration in the respondent State was particularly important for various reasons, including social security and tax obligations. In addition, according to the European Court, even though giving evidence is a civic duty, the attempt to compel the witness to give evidence in the criminal proceedings constitutes an interference with her right to respect for her family life, while the legitimacy of the interference should be assessed using the following test: (1) whether the interference was in accordance with the law; (2) whether the interference pursued a legitimate aim; and (3) whether it was necessary in a democratic society. The Strasbourg Court made it clear in its judgment that domestic authorities enjoy a wide margin of appreciation and are in a better position to assess the lawfulness of an interference, taking into account the specific factual circumstances of each case.[5] Thus, the Court ruled that there had been no violation of the European Convention.

[1] ibid.

[2] Under Article 217 of the Criminal Procedure Code of the Kingdom of the Netherlands, an accused's spouse or registered partner enjoys immunity. Criminal Procedure Code of the Kingdom of the Netherlands <https://www.legislationline.org/documents/section/criminal-codes/country/12/Montenegro/show> [last accessed on 18 April 2022].

[3] Van Der Heijden v. The Netherlands, supra note 47, para 67.

[4] ibid, para 75.

[5] ibid, para 57.

V. CONCLUSION

This Article has analysed the problematic issues related to the administration of justice in domestic violence and domestic crime cases. Among such issues is the high standard of proof established in practice by the common courts (a combination of at least two pieces of direct evidence required to pass a judgment of conviction), which does not take into account the specificity and nature of such crimes. In addition, the importance of the evidentiary value of indirect testimonies in the context of the 2015 judgment of the Constitutional Court of Georgia has been studied. In the wake of the review of national legislation and jurisprudence, the Article presents relevant provisions from the current legislation of foreign countries and the approaches of the European Court of Human Rights.

In working on this issue, it was identified that the rules and principles of the admissibility of indirect testimonies in criminal procedure laws of common law and continental law countries differ insofar as their systems are different. In particular, some continental European countries have established minimum principles for the admissibility of indirect testimonies, while in common law countries such concretisation is done in jurisprudence, within the discretionary powers of judges. The Estonian model is best suited to Georgian procedural law where specific exceptions are listed at the legislative level. It is also worth noting that the European Convention on Human Rights does not limit the use of indirect testimony in criminal proceedings. Moreover, the Strasbourg Court has entrusted the regulation of issues related to evidence to the Contracting States. In addition, the case *Al-Khawaja and Tahery v. The United Kingdom* should be particularly highlighted in the case-law, in which the Court developed a three-step standard for the use of indirect testimonies.[6]

One of the grounds determining the passing of a judgment of conviction in domestic violence cases, as repeatedly mentioned, is the exercise by the victim of his or her constitutional right to refuse to give evidence against a close relative. Accordingly, in the authors' view, to present the issue comprehensively, it would be interesting to study the legislation of foreign countries to identify exceptional approaches and, in doing so, to analyse the case-law of the Strasbourg Court.

In common law countries, unlike in European countries of continental law, legislation provides for an obligation for a spouse witness to give evidence. In particular, in some countries (England, Scotland, a few states of Australia) the legislative provision imperatively imposes an obligation on a spouse witness to give evidence in relation to specific categories of crimes. Canadian law is relatively different in this respect. It is more general in content and imposes an obligation to give evidence in relation to any category of crime. It is also important to note that some states in Australia have

[6] Al-Khawaja and Tahery v. The United Kingdom, supra note 39, paras 119-125.

established a discretionary approach whereby a judge has the discretion to decide, by comparing public and private interests, on a case-by-case basis whether a spouse should give evidence or be exempted from this duty. It should be noted that none of the domestic violence cases examined by the Strasbourg Court so far have dealt with the issue of giving evidence by a spouse witness, whether by compulsory or voluntary means. The European Court's reasoning regarding the enjoyment of witness immunity in general is well demonstrated in the judgment of the Grand Chamber in *Van Der Heijden v. The Netherlands*.[7] According to the European Court, even though giving evidence is a civic duty, the attempt to compel the witness to give evidence in the criminal proceedings constitutes an interference with her right to respect for her family life, while the legitimacy of the interference should be assessed using the following test: (1) whether the interference was in accordance with the law; (2) whether the interference pursued a legitimate aim; and (3) whether it was necessary in a democratic society.

[7] Van Der Heijden v. The Netherlands, supra note 47, para 75.

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UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS – REVIEW OF YANIV ROZNAI'S BOOK

ABSTRACT

Yaniv Roznai's "Unconstitutional Constitutional Amendments, The Limits of Amendment Powers" (Oxford University Press, 2017) analyses the increasing tendency in global constitutionalism on limitations of formal amendments to the constitutions. The book starts with a table of jurisprudence, legislation and instruments. It also includes the rules on unamendable provisions of various national constitutions, and a bibliography. Part I of the book concerns comparative constitutional unamendability, Part II deals with the theory of constitutional unamendability, and Part III with enforcing constitutional unamendability. The author offers his views in the conclusion concerning unconstitutional constitutional amendments.

I. CONSTITUTIONAL AMENDMENTS, THE IMPORTANCE OF UNAMENDED PROVISIONS

The book discusses in detail the importance of constitutional amendments and unamended provisions, and emphasises that the formula of amendments is primarily important to maintain a balance between stability and the change. However, amendment rules are not merely a technical mechanism of balancing constitutional stability and flexibility.[1] The book also provides a detailed analysis of the structure, [2] content[3] and objectives of unamendable provisions.[4]

II. THE "BASIC STRUCTURE DOCTRINE"

The book examines in detail the so-called "Basic Structure Doctrine". The author points out that in countries where constitutions do not contain unamendable provisions, the courts have identified[5] a certain constitutional core or set of basic constitutional

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[1] Yaniv Roznai, Unconstitutional Constitutional Amendments, The Limits of Amendment Powers (Oxford University Press 2017) 5.

[2] ibid, 22.

[3] ibid, 23.

[4] ibid, 26-36.

[5] ibid, 69.

principles that form a constitutional identity, which cannot be abrogated through the constitutional amendment process.[6] The book examines in detail the case law of more than 15 countries on different continents, where this doctrine has migrated from India.[7]

III. SUPRANATIONAL LIMITATIONS

In the author's opinion, constitutional amendments should be subject to certain supranational limitations, such as international human rights law and regional law in Europe, which may play a central role in the judicial review of constitutional amendments. Article 193(4) and Article 194(2) of the 1999 Constitution of Switzerland are cited as examples.[8]

IV. SEPARATION OF POWERS AND CONSTITUTIONAL AMENDMENTS

The book discusses the vertical separation of powers between the primary power and the secondary power[9] and notes that the constitutional amendment power should not be equated with the primary constituent power. It is a delegated power and, based on its nature, it should be limited.[10] The amendment power was introduced to preserve the constitution rather than to destroy it. Thus, even in the absence of an explicit unamendability, the power "to amend" the Constitution cannot be clearly used to abrogate the Constitution. That would be seen as a breach of trust.[11]

V. JUDICIAL REVIEW OF CONSTITUTIONAL AMENDMENTS

The book develops a noteworthy view that it supposedly contradicts the separation of powers, although the judicial review of constitutional amendments is consistent with the principle of vertical separation of powers that exists between the primary constituent power and the secondary power.[12] Judicial review is necessary, among other things, for the effective separation of powers,[13] and the court must interpret the constitution to fulfil its role.[14] The judicial review of amendments ensures the normative supremacy of

[6] ibid, 70.
[7] ibid, 47-68.
[8] ibid, 71.
[9] ibid, 133-134.
[10] ibid, 135.
[11] ibid, 142.
[12] ibid, 180.
[13] ibid, 181.
[14] ibid, 181.

the primary constituent power's decisions, namely 'the people's' supreme will.[15] The author points out that courts should intervene in the case of political process failure... By its intervention, the court prevents the tyranny of the majority.[16] In a democratic society, the court has the power to annul even constitutional amendments when there are failures in the work of democratic institutions. For example, situation in which the parliament, which was elected for a limited time period, amends the constitution according to the amendment procedure in order to prolong its own term.[17] In this respect, the doctrine of constitutional unamendability can be seen as a safeguard of the primary constituent power of the "people".[18]

VI. JUDICIAL ACTIVISM

The issue of constitutional amendment review is of great interest to us. As noted in the book, the constitution can directly grant this power to the court,[19] although most constitutions are silent on this issue. They simply do not regulate this issue. Faced with such an issue, the court cannot avoid taking a decision. A court has to fill this gap and clarify the silence.[20] Courts in Germany, Brazil and the Czech Republic have done so, although, in other countries, such as Slovenia and Georgia, courts have ruled that it is outside the jurisdiction of the court. Other courts (India, Bangladesh, Kenya, Colombia, Peru, Taiwan and Belize) have held that the court, as the guardian of the constitution, has a duty to enforce such implied unamendability and ... facing silence regarding unamendability, a court's decision regarding a limited amendment power may only derive from judicial activism or daring.[21]

VII. DIFFERENT PROCEDURES: ORDINARY AMENDMENTS AND "TOTAL REVISION"

The book discusses another topical issue – when there is a general procedure for ordinary amendments and, separately, a more complicated "people's" procedure for the "complete revision" of the constitution or a revision of certain "basic principles".[22] According to the work, such formal distinctions allow for judicial intervention in the case of the violation of these procedures.[23]

[15] ibid, 183.
[16] ibid, 184.
[17] ibid.
[18] ibid, 196.
[19] ibid, 197-198.
[20] ibid, 202.
[21] ibid, 209.
[22] ibid.
[23] ibid, 210.

The book is interesting in terms of teaching constitutional law, research and the development of the constitutional review of constitutional amendments in Georgia. This review will stimulate interest in the book and encourage academic debate on the most relevant issues discussed in it.

CASE NOTES OF THE CONSTITUTIONAL COURT OF GEORGIA

ABSTRACT

The Journal of Constitutional Law continues to offer the readers brief summaries of the latest significant cases resolved by the Constitutional Court of Georgia. For this Volume two judgments were selected for publication. The Journal hopes the notes will bring more interest towards the case-law of the Court and will motivate further discussions around its practice.

GIORGI BERUASHVILI V. THE PARLIAMENT OF GEORGIA

On 15 July 2021, the Second Board of the Constitutional Court of Georgia delivered a decision in *Giorgi Beruashvili v. the Parliament of Georgia* (Constitutional Complaint No 1289).

The subject of the dispute in Constitutional Complaint No 1289 was the constitutionality of the wording "or other anti-social activities" of paragraph 1 of Article 171 of the Criminal Code of Georgia with respect to the first sentence of paragraph 9 of Article 31 of the Constitution of Georgia. The contested provision establishes criminal liability for persuading a minor to get involved in anti-social activities.

According to the complainant's position, the term "or other anti-social activities" in the disputed regulation is vague and impossible to foresee the content of the prohibited actions meant within it. Moreover, the impugned norm, due to uncertainty, in the presence of identical circumstances, allows for different, including contradictory, interpretations. For its part, this poses a threat of abuse of power and contradicts the constitutional requirements of the foreseeability of the law establishing liability.

The respondent, the representatives of the Parliament of Georgia, indicated that the purpose of the disputed regulation is to protect the best interests of minors and to prevent the involvement of minors in anti-social activities. In this regard, it is impossible to provide an exhaustive list of all possible actions in the Criminal Code of Georgia that pose a threat to the best interests of minors. That is why the legislator considered it expedient and justified to use a relatively general term – "or other anti-social activities". Nevertheless, the respondent considers that the content of the term is clear and comprehensible, both in terms of the textual perception of the impugned norm and the consistent practice established by the common courts.

The Constitutional Court of Georgia initially clarified that the norms establishing liability are used to regulate a rather wide, constantly changing, dynamic and pre-identifiable spectrum of relations. In addition, in some cases, there is a need to define

responsibilities in a number of technical and specific areas. In addition, when regulating the relationship, it is often necessary to introduce complex legislative structures and/or use terms that are specific to technical areas. On the contrary, the obligation for the legislator to introduce a notably detailed, rigid regulation contains the danger of leaving particular socially dangerous acts unpunished. Consequently, according to the Constitutional Court of Georgia, the usage of general and interpretable and/or technical terms, as well as complex formulations, in regulations establishing liability does not automatically indicate its unconstitutionality. In such cases, the requirement of the foreseeability of the law establishing liability will be considered satisfied even if the addressee of the norm can foresee legal consequences, including with the help of lawyers and specialists in relevant fields.

Further, the Constitutional Court of Georgia emphasised the importance of the practice of the common courts in defining terms used in norms establishing liability and noted that the best indicator of their foreseeability is the existence of the uniform practice of common courts for a significant period of time. According to the Constitutional Court of Georgia, the constitutional standard of the foreseeability of norms establishing liability will not be met in cases involving liability for the content/application of the norm if (a) there is a conflicting practice of the common courts; (b) as a result of the change in the practice of the common courts, a newly established normative content of the norm is applied to actions committed before the said definition; and/or (c) the imposition of liability on a person is the result of an overly broad, pre-determined definition of the impugned norm.

Based on the named criteria, the Constitutional Court of Georgia analysed the case-law of the Supreme Court of Georgia in terms of the interpretation/application of the disputed norm and identified cases of its conflicting application. In particular, in some cases, according to the case-law of the Supreme Court of Georgia, inciting a minor to commit a crime is an anti-social activity and is punishable under paragraph 1 of Article 171 of the Criminal Code of Georgia, while in other cases it indicates that such behaviour is not punishable under the impugned regulation. Subsequently, the Constitutional Court of Georgia considered that when different compositions of the Supreme Court of Georgia use the disputed norm with contradictory content, it is impossible for the addressee of the norm, including even with the help of a qualified lawyer, to pre-determine whether inciting a minor to commit a crime constitutes an anti-social activity.

Given all the above, the Constitutional Court of Georgia considered that the normative content of the wording "or other anti-social activities" in paragraph 1 of Article 171 of the Criminal Code of Georgia, which provides for the possibility of imposing liability on a person for persuading a minor to commit a crime, contradicted the requirements of the first sentence of paragraph 9 of Article 31 of the Constitution of Georgia and was declared invalidated.

GIORGI KEBURIA V. THE PARLIAMENT OF GEORGIA

On 25 December 2020, the Constitutional Court of Georgia adopted a judgment in *Giorgi Keburia v. Parliament of Georgia* (Constitutional Complaint No 1276). The disputed norms of the Criminal Procedure Code of Georgia established the purpose and basis of a search, as well as the standard for evidence to pass a judgment of conviction.

The complainant pointed out that, according to the disputed norms, it was possible to conduct a search only based on operative information received by a law enforcement officer so that the defence and the court did not have the opportunity to verify this information with the first source. Moreover, according to the complainant, in such a case, no additional investigative action was required to substantiate the information provided to law enforcement agencies by an operative source or an anonymous person. Such regulation created risks of an unjustified restriction on the right to privacy. In addition, according to the complainant, the common courts often relied on the item seized as a result of the search to assess the lawfulness of the search, which was also contrary to the right to privacy protected by the Constitution of Georgia.

The complainant also considered it unconstitutional to use as a basis for conviction a law enforcement officer's testimony on the operative information obtained concerning the crime and indicated that the disputed norms did not meet the constitutional requirement of a judgment of conviction based on incontrovertible evidence. In addition, the complainant considered that the normative content of Article 13 of the Criminal Procedure Code was unconstitutional. It allowed the passing of a judgment of conviction only on the basis of an item seized as a result of a search based on the information received by an operative source/anonymous person or based on evidence stemming from this – testimonies of employees who eye-witnessed the search, search/arrest records, and an expert opinion (in other words, a report on the type and amount of items seized), while the defendant initially argued that the illegal item did not belong to him and was "planted" by the police.

The respondent explained that the information of an operative source or an anonymous person is not sufficient to carry out an investigative action. The respondent noted that after receiving the above-mentioned information, to verify its credibility, additional information is sought concerning specific circumstances. Only after that, a collection of information is created, making it possible to conduct a search.

The respondent disagreed with the complainant's position regarding the accessibility of the court to the identity of the provider of operative information and explained that, in such a case, the activities of investigative bodies would be significantly hindered. At the same time, according to the respondent, the persons provided for by law have access to the identity of the provider of operative information, which ensures the risks of arbitrariness on the part of an investigative body.

The respondent also clarified that the outcome of the search is not important to the court in examining the legality of an already conducted search, and the main factor is to give the judge internal belief that, along with probable cause, there were preconditions of urgent necessity for conducting an investigative action.

In addition, according to the respondent, the testimony of a law enforcement officer about the operative information received concerning the crime is not evidence, it is in its essence neither direct nor indirect testimony. Consequently, it cannot constitute a basis for a judgment of conviction. Concerning the use as a basis for a judgment of conviction of an item seized as a result of a search based on information from an operative source or an anonymous person and related testimonies of law enforcement officers, the respondent pointed out that the disputed norm and law, in general, preclude the possibility to base a judgment of conviction on questionable evidence.

The Constitutional Court of Georgia indicated that information provided to law enforcement agencies by an operative source (confidant/informant) and an anonymous person makes a particularly significant contribution to the fight against crime. The information provided by the public to law enforcement agencies ensures the rapid detection or prevention of crimes, which would not have been possible without this information being provided. Thus, the State cannot refuse to use the information provided by these entities. Moreover, according to the Constitutional Court, the disclosure of an operative source to verify the information provided by it at the trial cannot be considered a less restrictive means of achieving the legitimate goals mentioned in the case. If the source did not have a guarantee of confidentiality, he/she and other potential individuals would refrain from cooperating with law enforcement agencies in the future, which would harm important state and public interests.

According to the Constitutional Court, unlike an ordinary witness, in the case of an operative source and an anonymous person, the court does not/cannot verify the reliability of the first source of information. The Constitutional Court has pointed out that in the case of using such information as a basis for a search, without proper verification, there is a high risk of unnecessary restriction of the person's personal space and right to communication. Thus, for a law enforcement officer to expect obtaining evidence as a result of a search (which is a legitimate basis for conducting a search), this information must be properly verified.

The Constitutional Court noted that the reliability of the information for the purposes of the search could be substantiated by a variety of circumstances. For the information provided by an operative source or an anonymous person to be the basis for a human search, the information itself must be such that it can be verified to some degree so that the objective person/judge can be sure that the information provider has data relevant to the case, can point to specific facts, or has a description of a specific future event related

to the crime, or the information itself is characterised by certain details. It should be noted from the information that the source is indeed indicating details that may not be easily identifiable to an ordinary third party, and that its observation must involve some effort/experience. In addition, the reliability of information can also be confirmed by a testimony of a police officer who has been warned of criminal liability for providing false information and which indicates that the source is experienced and reliable, and the information provided by him/her was credible in the past. It is not out of the question for a police officer to fabricate this information because of his/her interest in the case, however, as noted, a fact entails criminal liability and this reduces the risk of intentionally providing inaccurate and false information by the police officer.

The Constitutional Court pointed out that any predetermined formula for verifying information fails to properly serve the purposes of the State in combating crime, and the circumstances cited in the judgment are only a few of the many factors that would justify the credibility of operative information.

The Constitutional Court noted that based on a systematic and grammatical interpretation of the law, a search based solely on the information provided by an operative source or an anonymous person should be excluded, as probable cause requires at least one more piece of information or fact for an authorised person to have a reasonable degree of suspicion. Thus, a lawful search based only on an operative source or information provided by an anonymous person should be excluded under the Criminal Code.

The Constitutional Court shared the complainant's view that if the record of the drafter/recipient of a report on the receipt of operative information, without providing any additional information, repeats only the information described in the report or only the information provided by an operative source, it equates to one piece of information rather than a set of pieces of information or facts. Or else, a combination of facts and pieces of information can always be created, as there will always be a police officer who will confirm the fact of transfer of information from an operative source and convey the content of the information provided by the operative source. However, there was no clear and relevant practice provided in the case to prove that the basis of the search was only the report of the person receiving the operative information and the record of the interview of that person repeating the information in the report and/or provided by the operative source, without any additional information or verification.

The Constitutional Court found that there had been cases in the case-law of the common courts where the result of the search had been the basis for substantiating the lawfulness of the search. The Constitutional Court clarified that the fact of obtaining evidence as a result of the search was an irrelevant circumstance in verifying whether the law enforcement agencies had correctly assessed the existence of probable cause before the search. Accordingly, the assessment of the need/necessity of conducting a particular

search is not affected by the fact that relevant evidence was obtained as a result of that search. Accordingly, the Constitutional Court of Georgia declared unconstitutional the normative content of paragraphs 1 and 4 of Article 119 and paragraph 1 of Article 121 of the Criminal Procedure Code of Georgia, which considers the result of the search as one of the grounds for establishing probable cause for a search.

The Constitutional Court found that there had been instances in the practice of the common courts where the testimony of a police officer receiving operative information, in which the latter simply conveyed the narrative of the source of operative information without giving any additional information, was used as one of the grounds for a judgment of conviction. The Constitutional Court noted that the testimony of a police officer based on the information provided by a source of operative information – a confidant/ an informant – is substantively a form of indirect testimony that poses equal risks to the State's obligation to base a judgment of conviction on incontrovertible evidence. In addition, the Constitutional Court clarified that the use of such testimony for a judgment of conviction puts the defence in an unequal position. The defence does not have the opportunity to directly interrogate the person providing operative information, to question the credibility of the person on whose testimony the court relies in passing a judgment of conviction. The absence of such an opportunity for the defence clearly poses a risk that the judgment of conviction will be based on questionable evidence.

Given the above, the Constitutional Court of Georgia has declared unconstitutional the normative content of the second sentence of paragraph 2 of Article 13 of the Criminal Procedure Code, which allows a judgment of conviction to be based on the testimony of a law enforcement officer, which is based on information from an operative source.

The Constitutional Court also assessed the constitutionality of the use as a basis for a judgment of conviction of material evidence seized as a result of a search based on operative information and the evidence derived from it. The Constitutional Court found that the case file showed that in the common courts, including the courts of appeal and the supreme court, there had been instances in which a person had been convicted based on the body of evidence consisting of an item (drug or firearm) seized as a result of the search based on the information provided by an operative source, the consistent testimonies of the police officers/accomplices in the search, the search and arrest records, and the chemical examination (describing the type and quantity of the item seized).

The Constitutional Court observed that the above-mentioned body of evidence, which forms the basis for a judgment of conviction, may in some cases fail to meet the constitutional requirements for incontrovertible evidence set forth in Article 31(7) of the Constitution of Georgia. The State is obliged to establish a system of obtaining evidence as a result of the search, which, on the one hand, equips law enforcement agencies with

the ability to obtain neutral evidence to ensure the credibility of the search, and on the other hand, reduces the risk of abuse of power. In general, the importance of having confidence in the actions taken by a police officer for the effective administration of justice is immeasurably great. At the same time, no state body, not even a court, can gain trust without carrying out its activities properly. When the question of the use of an item seized as evidence depends solely on the testimony of police officers, it is essential to their credibility, which things led to the creation of such a situation. The presumption of good faith action of the police is much simpler when it is proved that due to the factual circumstances in the case, it was impossible (immeasurably difficult) to obtain additional evidence regarding the reliability of the search. However, when it becomes apparent that the police officer could have obtained evidence to substantiate the credibility of the search and he/she did not do so, the degree of confidence in his/her actions is greatly diminished.

The Constitutional Court noted that, given the complexity of the investigative action and due to objective circumstances, it might be impossible to substantiate the fact of the search with neutral evidence, although it must be confirmed that the competent person took reasonable steps to ensure neutral evidence was obtained. An obvious example of this is when the investigation of the case reveals that the possibility of the presence of a neutral witness during the search of the person or his property objectively existed and the police did not provide it. Moreover, modern technological progress makes it possible to videotape the search process to strengthen the position of the prosecution. Significant doubts about the credibility of the evidence are also raised by the circumstance when, under the security conditions of the police, there was a real possibility of video recording of the search and the police did not use it. Obtaining operative information does not always require urgent action, and the authorised person may have some time and opportunity to prepare for the search, be equipped with the appropriate technical means, and, where possible, provide a video recording of the search. In addition, even in an emergency, it is usually not insurmountable to detect a search even with a video camera on a mobile phone, which is now an everyday item.

Given the above, the Constitutional Court clarified that failure to make actual use of the available possibilities, which would prove/corroborate the body of evidence against the person, poses significant risks of error, arbitrariness and abuse of power in the administration of justice. Nevertheless, current law does not impose an obligation on law enforcement agencies to obtain neutral evidence to ensure the credibility of a search, even when it is possible to act within reasonable limits without compromising the security of the police and/or the threat of destruction/concealment of evidence.

Given all the above, the Constitutional Court ruled that legislation and the disputed norm fail to ensure the risks of a person's conviction by using questionable evidence. Accordingly, the normative content of the disputed norm, which allows the use as

evidence of an illegal item seized as a result of a search, provided that the possession of the item by the accused is confirmed only by the testimony of law enforcement officers and at the same time the law enforcement officers failed to obtain neutral evidence, fails to meet the constitutional requirements of incontrovertibility of evidence reflected in paragraph 7 of Article 31 of the Constitution of Georgia and is unconstitutional.