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PERMISSIBILITY OF HOLDING A REFERENDUM UNDER THE CONDITIONS OF OCCUPATION OF THE TERRITORIES OF GEORGIA

ABSTRACT

It is acknowledged truth in the sphere of legal hermeneutics, that when interpreting a legal norm, we should not always rely only on grammatical and word-for-word interpretation, and we should also refer to other ways and methods of interpretation, because sometimes the norm may seem simple, but in reality its understanding requires a complex approach. We are dealing with such a case in relation to the issue of holding a referendum in Georgia. In this case, no one disputes the democracy of the referendum, the issue only concerns the admissibility of holding a referendum under the conditions of occupation of a part of the country's territory, which is aggravated by one norm of the Organic Law of Georgia "On Referendum", literal interpretation of which leads to the only conclusion, that holding a referendum in Georgia is not allowed before the restoration of territorial integrity. The present article is an attempt to answer this question not only with one approach but in a comprehensive manner, applying the main methods of legal hermeneutics.

I. INTRODUCTION

A democratic state is based on the idea of popular sovereignty. The founders of the first Constitution of Georgia were imbued with this idea, and in their opinion, people have the first place in democracy, people are the primary source of any government, the will of people is absolute and there is no state will that can stand above the will of the people. The will of the people is the supreme law and cannot be denied.[1]

Popular sovereignty ensures the right of everyone to participate in public life.[2] Every citizen has a share of sovereignty that allows them to directly contribute to political decisions through referendums.[3]

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[1] Emzar Jgerenaia, Tea Kenchoshvili (ed), Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II (National Library of the Parliament of Georgia 2018) 825 (in Georgian).

[2] Levan Izoria, Modern State Modern Administration (Siesta Publishing House 2009) 171 (in Georgian).

[3] Yasuo Hasebe, 'Constitutional Borrowing and Political Theory' (2003) 1(2) International Journal of

In recent years, the importance of referendums in liberal democratic countries has substantially increased. Despite the differences between the states, the provisions and regulations in the constitutions and other legal acts, as well as the effective practice of the referendum, have increased significantly.[4] It is known that starting from the French Revolution until 1994, a total of 1,000 national referendums were held worldwide, although the pace has increased significantly since then. Between 1994 and 2010, that is, in just 10 years, 400 referendums were held throughout the world, a quarter of which took place in Switzerland.[5] Excluding Switzerland, if a total of 181 referendums were held in Western European countries in the 20th century, 81 referendums were organized in the first seventeen years of the 21st century alone.[6] In addition to referendums of local and national importance, a number of referendums were related to the European Union. Between 1957 and 2016, 57 referendums on issues related to the European Union were held in European countries, of which 32 were held in the years 2000-2016. Referendums were held in the United Kingdom, Denmark, Spain, Ireland, Italy, the Netherlands, France, Slovenia and other countries.[7] The practice of referendums is also common in the USA, in which a total of 59 referendums were held in a single state only during the years 2000-2016.[8] The referendum is gradually moving from the doctrinal phase to the positive phase, which is why it is no longer just a matter of theoretical importance.[9]

In Georgia, as a democratic state, the principle of popular sovereignty applies.[10] According to Article 3, paragraph 2 of the Constitution of Georgia, the source of state power are people, who exercise power through their representatives, as well as through referendums and other forms of direct democracy. As we can see, according to the Constitution, the people, the citizens of Georgia, are recognized as the only source of government.[11] In addition, the right of an adult citizen of Georgia to participate in the referendum is reinforced by Article 24 of the Constitution of Georgia, and the first sentence of Article 52, Paragraph 2 gives the voter the right not only to participate in already appointed elections but also to be the initiator of the referendum.

Constitutional Law 228.

4 Laurence Morel, 'Referendum' in Michel Rosenfeld and András Sajo (eds), The Oxford Handbook of Comparative Constitutional Law (Oxford University Press 2012) 503.

5 Paul Widmer, Switzerland as a Special Case (Ilia State University 2012) 161 (in Georgian).

6 Matt Qvortrup (ed), Referendums Around the World (Palgrave Macmillan 2018) 21.

7 Micaela Del Monte, Referendums on EU Issues Fostering Civic Engagement (European Parliamentary Research Service April 2022) 11-13 <https://www.europarl.europa.eu/RegData/etudes/IDAN/2022/729358/EPRS_IDA(2022)729358_EN.pdf> [last accessed on 10 February 2023].

8 Qvortrup, supra note 6, 162.

9 Morel, supra note 4, 528.

10 Besik Loladze, Zurab Macharadze and Ana Pirtskhalashvili, Constitutional Justice (East-West Management Institute 2021) 279 (in Georgian).

11 Paata Turava (ed), Commentary on the Constitution of Georgia, Georgian Citizenship. Basic Human Rights and Freedoms, Chapter Two (Petit Publishing 2013) 344 (in Georgian).

At first glance, Articles 3, 24, and 52 of the Constitution of Georgia strengthen the principle of popular sovereignty and ensure the right of Georgian citizens to directly participate in the management of the state through a referendum, however, a proper analysis reveals that this is not the case and the possibility of holding a referendum on the initiative of the population is minimal. As Professor Avtandil Demetrashvili points out, although the word "referendum" is mentioned eleven times in the Constitution and Constitutional Law of Georgia (which is an integral part of the Constitution), the founders of the Basic Law do not attach much importance to it, moreover, they seemed to be afraid of the possibility of its frequent use and promoted significant limitation of referendum issues.[12] Here, the author mainly refers to the circle of issues defined by the second sentence of Article 52, paragraph 2 of the Constitution of Georgia, on which it is not allowed to hold a referendum. It is impossible not to share the author's scepticism here,[13] especially considering that the practice of referendum in Georgia is very rare. Under the conditions of independent Georgia, the referendum was held only once. Undoubtedly, one of the main reasons for this is the legislation of Georgia, but it is also accompanied by the wrong interpretation of the legislation and the corresponding wrong practice, which makes it almost impossible to hold a referendum in modern Georgia. Specifically, we are talking about the fact of the occupation of the territories of Georgia, as an obstacle to the holding of the referendum in Georgia.

To be more specific, according to paragraph 3 of Article One of the Organic Law of Georgia "On Referendum", the referendum is held throughout the territory of Georgia. This norm still causes differences of opinion. The purpose of the article is to find out the content of this norm and to answer the question, is it permissible to hold a referendum in the presence of occupied territories under the legislation of Georgia?

II. POSITION OF THE PRESIDENT OF GEORGIA

According to Decree No. 198 of the President of Georgia of August 10, 2016 "On refusal of a request to hold a referendum" the initiative group refused to hold a referendum on the issue "Do you agree that civil marriage should be defined as a union between a man and a woman for the purpose of creating a family?"

One of the main arguments of the decree is related to the occupied territories of Georgia. In particular, based on paragraph 3 of Article One of the Organic Law of Georgia "On the Referendum", the decree states that the occupation of part of the territory of Georgia and the recognition of the two occupied territories of Georgia by the Russian Federation

[12] Avtandil Demetrashvili, 'Referendum in Georgian legislation and practice' in the collection Dimitri Gegenava (ed), Giorgi Kverenchkhiladze 50 (Sulkhan-Saba Orbeliani University Publishing House 2022) 11.

[13] ibid, 8.

as independent states make it impossible to hold a referendum in the entire territory of Georgia in compliance with the requirements of the law. At the same time, holding a referendum in such a reality will provide additional legal arguments to the occupying country and will weaken the policy of de-occupation defined by Resolution №339-IIს of the Parliament of Georgia of March 7, 2013 "On the main directions of the foreign policy of Georgia".[14]

Also, there is an indirect reference to a certain legal gap, that in the Organic Law of Georgia "On Referendum" there is no exceptional norm that can provide for the legal regulation of holding a referendum before the restoration of territorial integrity in the part of the country's territory where de facto jurisdiction of Georgia applies.[15]

To summarize briefly, in the given decree "On Referendum" the norm of the Organic Law of Georgia - "Referendum shall be held on the entire territory of Georgia" is understood literally, which means that in the conditions of occupation, i.e., until the territorial integrity of the country is completely restored, it is not allowed to hold a referendum in Georgia. In addition, it is not clear from the decree what legal argument the holding of the referendum will give to the occupying country, that is, the Russian Federation. Presumably, the decree implies that setting the referendum will be considered as an indirect recognition of the occupied territories of Georgia as independent states by the Georgian authorities, if we judge in reverse, with the reverse logic, that only the territory where the referendum will be held can be considered as the territory of the country. Since the referendum cannot be held in the occupied territories of Georgia, they remain outside the state of Georgia. Such is the logic of the argument presented in this decree.

There is a difference of opinion among scientists regarding the admissibility of holding a referendum in the conditions of occupation. One part of the researchers share the argumentation given in the Presidential Decree.[16] Contrary to this, some researchers call such an interpretation of the norm as controversial from a legal point of view, according to which a referendum cannot be held in Georgia until the jurisdiction is fully restored in the entire territory of Georgia.[17]

At first glance, the term "throughout the entire territory of Georgia" is unambiguous and should be understood literally, which implies that the norm - "referendum is held throughout the territory of Georgia" - prohibits holding a referendum until the territorial

[14] Paragraph 3, Decree No. 198 of the President of Georgia dated August 10, 2016 "Rejecting the Request to Hold a Referendum" <https://matsne.gov.ge/ka/document/view/3381283?publication=0> [last accessed on 9 March 2023].

[15] ibid.

[16] Demetrashvili, supra note 8, 10; Gigi Luashvili, 'Revision Mechanism of the Constitution of Georgia and the Constitutional Reform of 2017' (2018) 2 Journal of Constitutional Law 105.

[17] Irakli Kobakhidze, Constitutional Law (second edition, Favorite Style Publishing House 2020) 83-84 (in Georgian).

integrity of Georgia is restored. However, as Aaron Barak says, the clarity of the text does not eliminate the need for interpretation, because such clarity is the result of interpretation itself. Even a text whose meaning is undisputed requires interpretation because the absence of dispute is a product of interpretation.[18]

But in this case, we are not dealing with a clear, and even more so, indisputable text. The current interpretation of the contested norm contradicts the principles and spirit of both the Constitution and the Organic Law of Georgia "On Referendum". In addition, there is a difference of opinion on this issue, which means that the definition given in the presidential decree or by individual scientists is not enough and the issue requires a deeper analysis.

In order to understand the essence of the issue and to find out exactly the content of the given norm, not only the grammatical definition of the norm will be useful, but we must use various methods of improvement in the arsenal of legal hermeneutics and approach the issue in a more complex way.

III. EXPLANATION USING THE BASIC PRINCIPLES OF HERMENEUTICS

The interpretation of a legal norm should be based on certain principles. This is the principle of objectivity, which implies that the definition must be based on the text of the law and express the will of the legislator; the principle of integrity, that each norm should be read not separately, but systematically, in the logical context of the text of the law; the principle of genetic interpretation - the aim and intention of the legislator should be considered. The specification of the norm, its factual elements and legal result is done by defining the concepts used in the norm. By means of the mentioned definition, the legal norm can be interpreted and its content determined.[19] When interpreting the contested norm, we should be guided by these principles.

1. GRAMMATICAL DEFINITION

Clarifying the content of each norm begins with a grammatical definition.[20] This method of interpretation involves clarifying the content of the norm through the words, terms, concepts or sentences that make up the text and establishing the syntactic relationship between them. In particular, it should be determined in what sense each word, term is used, what is their relationship, etc.[21]

[18] Aharon Barak, Purposive Interpretation in Law (Princeton University Press 2005) 4.

[19] Decision of the Administrative Affairs Chamber of the Supreme Court of Georgia on case №ბს-348-345 (კ-11), June 9, 2011.

[20] Giorgi Khubua, The Theory of Law (second completed and revised edition, Meridian Publishing House 2015) 187 (in Georgian).

[21] Givi Intskirveli, General Theory of State and Law (Tbilisi State University Publishing House 2003) 176 (in Georgian).

If we don't go into the definition of each word separately, it is already clear that the disputed term contained in paragraph 3 of Article 1 of the Organic Law of Georgia - "throughout the territory of Georgia" - refers to the entire geographical area within the borders of Georgia, which is defined by the first sentence of the second paragraph of the first article of the Constitution of Georgia. In addition, the same term is used once again in the same law, namely, in Article 19, paragraph 2, subparagraph "a", which establishes that during the preparation and organization of the referendum, the Central Election Commission controls the exact and uniform implementation of this law throughout the territory of Georgia. In this norm, the disputed term is not used with a different meaning, which means that it should be understood in the same way as paragraph 3 of the disputed first article.

Here we could have completed the process of explanation and considered the content of the contested norm to be unambiguously determined, if not for one circumstance: "the definition of the norm must have a claim of universal and general validity"[22], that is, it must be possible to generalize it, and the given understanding of the norm must be useful not only in relation to the given case and the law. For this, we should refer to the systematic definition of the norm and see if the given term is used in other laws and cases and how useful the above-mentioned interpretation of the controversial term is.

2. SYSTEMATIC DEFINITION

A norm of law does not stand alone, it is part of the overall context of a larger text.[23] No linguistic communication is fully understood without its overall context. All legal material is presented in the context of the legal system in general and against the background of the whole complex of specific legal, political and factual circumstances. So, interpretation cannot be satisfactorily carried out even in a purely linguistic sense unless the whole context is considered.[24] It is impossible to understand a norm in isolation, without the interrelation between norms.[25]

A statute must be construed so as not to conflict with superior law.[26] The interpreted norm with its essence and purpose should fit in the context of hierarchically superior and equal norms. In this case, the main argument is that by avoiding the conflict of legal

[22] Khubua, supra note 20, 187.
[23] Olaf Muthorst, Foundations of Jurisprudence, Method - Concept - System (German Society for International Cooperation (GIZ) 2019) 125 (in Georgian).
[24] Neil MacCormick, 'Argumentation and Interpretation in Law' (1993) 6(1) Ratio Juris 24.
[25] Khubua, supra note 20, 197.
[26] Muthorst, supra note 23, 125

norms, legal security to be protected and the conflict of goals to be resolved fairly and optimally considering the interests of the participants of the relationship.[27]

Systematic definition is considered the first and only truly legal method of legal interpretation in the legal tradition of continental Europe, because it is a means of determining the meaning of a law (word, rule, institution, term, etc.) only in a legal context, that is, in one or more legal acts of one and the same legal system.[28] From this point of view, other types of legal interpretation, such as historical-genetic and teleological interpretation, are considered private manifestations of systematic interpretation.[29]

Thus, it can be said that the systematic definition is of crucial importance for the correct interpretation of the norm and, at the same time, to check the correctness of the interpretation.

For the purposes of this article, we need to find out in which legal acts the wording "throughout the territory of Georgia" is used and whether the meaning obtained as a result of its linguistic definition corresponds to the unified legal order. Of course, we should start checking with the Constitution of Georgia.

2.1. DEFINITION IN RELATION TO THE CONSTITUTION

In the Constitution of Georgia, the term "over the entire territory of Georgia" is mentioned only once, in the first paragraph of Article 37. In addition, the term "on the entire territory of the country"[30] is used five times in the Constitution, although both of these terms are used with the same meaning and do not allow us to interpret them differently. Therefore, the word-for-word presidential interpretation of the disputed term is used in the Constitution of Georgia with the same meaning and refers to the geographical territory within the official borders of Georgia.

However, the contradiction arises not directly in relation to this term, but between the word-for-word understanding of the contested norm of the Organic Law of Georgia "On Referendum" and the constitutionally guaranteed principle of people's sovereignty, in particular, in relation to Article 3, paragraph 2 of the Constitution of Georgia already quoted above. The Constitution of Georgia does not provide for any reservations

[27] Reinhold Cipelius, The Doctrine of Legal Methods (tenth revised edition, Beck Publishing 2006) 54 (in Georgian).

[28] Ivan L. Padjen, 'Systematic Interpretation and the Re-Systematization of Law: The Problem, Co-Requisites, a Solution, Use' (2020) 33(1) International Journal for the Semiotics of Law 192.

[29] ibid.

[30] Article one, paragraph one; Article 5, paragraph 3; Article 7, paragraph 3; Article 14, paragraph one; Article 72, paragraph 2, Constitution of Georgia <https://matsne.gov.ge/ka/document/view/30346?publication=36> [last accessed on 31 March 2023].

or exceptions regarding the limitation of the holding of the referendum due to the occupied territories. Now, today, even under the conditions of occupation of a part of the territory of Georgia, it provides for the exercise of power by people both through representatives and through a referendum. If it was the will of the Constitution, i.e., the legislator, to restrict the holding of the referendum due to the occupation, then it would have made an appropriate reservation and linked the possibility of holding the referendum to the restoration of territorial integrity. The fact that such reservations are not foreign to the Constitution of Georgia, is evidenced by several of its articles. In particular, according to Article 7, paragraph 3, the Constitution links the revision of the territorial state organization of Georgia and the adoption of the Georgian Constitutional Law in this regard to the full restoration of Georgian jurisdiction over the entire territory of the country. Similarly, the first sentence of the first paragraph of Article 37 of the Constitution of Georgia specifies the full restoration of jurisdiction over the entire territory of Georgia as a condition for the creation of two chambers within the Parliament of Georgia. Therefore, if it was the will of the legislator to allow the holding of the referendum only in the conditions of the territorial integrity of Georgia and not in the conditions of occupation, then such a reservation would have been made in the Constitution without a doubt. Therefore, if it was the will of the legislator to allow the holding of the referendum only in the conditions of the territorial integrity of Georgia and not in the conditions of occupation, then they would have made such a reservation in the Constitution without a doubt. Since there is no such reservation, the Constitution does not restrict or prohibit the holding of a referendum under the conditions of occupation of a part of the territory. Two conclusions can be drawn from this: either the norm that the referendum is held on the entire territory of Georgia contradicts the Constitution of Georgia, or this norm should not be understood word for word and we should find a different understanding of it, which would be in accordance with the Constitution and would make the holding of the referendum permissible even under the conditions of occupation of part of the territory.

There is one point that calls the logic of our previous reasoning into question. Let's ask the question: is it permissible to hold a referendum, for example, during a state of war? Sub-paragraph "b" of Article 4, paragraph 2 of the Organic Law of Georgia "On Referendum" prohibits the holding of a referendum at such a time, although the Constitution of Georgia does not provide for such a restriction. It is possible to apply the same logic here and say that the Constitution of Georgia allows a referendum to be held during martial law, but the fact is that according to the same Constitution, general elections are not allowed to be held during martial law.[31] It is impossible for the Constitution to prohibit the holding of general elections, on the one hand, and to allow

[31] Article 71, paragraph 5, Constitution of Georgia <https://matsne.gov.ge/ka/document/view/30346?publication=36> [last accessed on 31 March 2023].

a referendum, on the other hand, under the conditions of martial law. Thus, here we can talk more about the constitutional flaw and rely on the last sentence of Article 52, paragraph 2 of the Constitution of Georgia, that the issues related to the appointment and holding of the referendum are determined by the Organic law. In such a case, we can use the same logic in relation to the prohibition of holding a referendum under occupation and say that the reservation of the prohibition of holding a referendum under occupation in the Constitution is not necessary, because the Constitution has delegated the issues related to the appointment and holding of the referendum to the Organic law. The conclusion follows that the Organic Law of Georgia "On Referendum" prohibits holding a referendum in the occupied territories, and there is no contradiction with the Constitution in this matter, because the Constitution itself has delegated this right to the Organic Law. But such logic will not be fully justified due to the fact that Article 4, paragraph 2 of the Organic Law of Georgia "On Referendum" is a prohibitive norm and unequivocally establishes the inadmissibility of holding a referendum during martial law. As for the inadmissibility of holding a referendum due to the occupied territories, there is no such norm in the law, and such a prohibition is only the result of the literal interpretation of the contested norm, that is, only one of the methods of interpretation of the norm.

There is also a much weightier argument, for which we must again refer to the systematic explanation.

2.2. DEFINITION IN THE CONTEXT OF THE HIERARCHICALLY EQUAL NORM

For the purposes of correct understanding of the legal norm and legal security, it is important to find out the relation of the president's interpretation of the contested norm to the hierarchically equal, i.e., Organic laws. We need to see if the term "in the entire territory of Georgia (the country)" is used in other Organic laws of Georgia and, in such a case, what its understanding is.

This term is contained in several Organic laws of Georgia, which cannot be listed and discussed in detail in the format of this article. Only one Organic law will be discussed here, which will clearly show us the absurdity of the presidential interpretation of the contested norm. We are talking about the Election Code of Georgia.

The mentioned term is found in several places in the Election Code of Georgia. In particular, part 3 of Article 7 of the Code is noteworthy, which stipulates that the CEC, within its powers, directs and controls election commissions of all levels and ensures the uniform application of Georgian election legislation throughout the territory of Georgia. Also, subparagraph "a" of the first part of Article 13 of the Election Code defines

the CEC's obligation to ensure the holding of elections, referendums and plebiscites within the scope of its powers, to monitor the implementation of the Georgian election legislation throughout the territory of Georgia and to ensure its uniform application.

The mentioned norms clearly establish that the election legislation must be applied uniformly throughout the territory of Georgia, and the execution and application of the election legislation uniformly throughout the territory of Georgia is the responsibility of the CEC. Despite the imperativeness of the given norms, no one thought (and rightly so) to request the CEC to organize elections in the occupied territories of Georgia. One important point should be noted here: the Election Code of Georgia regulates the issues related to the referendum and the definition of the referendum is also given in it. This definition also states that the referendum is held in the entire territory of Georgia.[32] Accordingly, it is impossible for the disputed term to mean one thing in one case and another in the other case in the same law. If we interpret the contested norm in relation to the Election Code in the same way as it is given in the disputed decree of the President of Georgia in 2016, then the CEC should ensure the holding of all parliamentary and presidential elections in Georgia, depending on their universality, in the entire territory of Georgia, including the occupied territories. And since the CEC violated the election code, it could not hold elections in Abkhazia and the territory of the so-called former South Ossetia Autonomous Region, i.e., in approximately one-fifth of the total territory of Georgia, such elections and the bodies elected as a result of these elections cannot be considered legitimate.

Accordingly, the understanding of the contested norm, as it is given in the 2016 presidential decree, leads to the illegitimacy of the President of Georgia (including the same president who passed the contested decree) and the Parliament.

3. TELEOLOGICAL DEFINITION

The text of the legal norm serves a specific purpose. Therefore, understanding the purpose of the norm is of great importance for the relation of the norm. If we understand the purpose of the law (norm), we will also understand the law (norm).[33] The purpose of teleological interpretation is to realize the purpose for which the legal text was created. The goal is rooted in the constitutional principles. The primary determinants of the purpose of a public legal text are the constitutional considerations of democracy, the separation of powers, the rule of law, and the role of the judge in a democracy.[34]

[32] Article 2, subparagraph "a", Organic Law of Georgia on Election Code of Georgia <https://matsne.gov.ge/ka/document/view/1557168?publication=79> [last accessed on 31 March 2023].

[33] Khubua, supra note 20, 193.

[34] Barak, supra note 18, 88.

For the purposes of this article, we should establish, on the one hand, the purpose of the Organic Law of Georgia "On Referendum" with reference to the referendum and, on the other hand, the purpose of the contested norm.

First of all, the emphasis should be placed on the "constitutional considerations of democracy", that is, the approach of the Constitution of Georgia to such an important mechanism of popular sovereignty as the referendum. We have already touched on this issue, but it should be noted once again that the Constitution of Georgia does not provide for any reservation regarding the inadmissibility of holding a referendum, similar to general elections, before the restoration of territorial integrity. Here we should once again return to Article 3, paragraph 2 of the Constitution of Georgia, which states: "The source of state power is the people. The people exercise power through their representatives, as well as through referendums and other forms of direct democracy." This norm, its 2nd sentence, puts elections and referendum on an equal footing in the sense that the action verb "performs" is used in relation to both of these institutions, and the constitution does not apply a condition to either of them - "full restoration of Georgia's jurisdiction over the entire territory of the country", as we have in relation to the revision of the territorial arrangement and the introduction of the bicameral parliament. We should also consider the last sentence of Article 52, paragraph 2 of the Constitution of Georgia, which stipulates that the issues related to the appointment and holding of the referendum are determined by the Organic law. This norm delegates to the Organic law that the latter determines matters related to the conduct. Of course, this may mean, among other things, the definition of (temporary) impeding circumstances, but not the actual prohibition of this mechanism. Thus, paragraph 2 of Article 3 of the Constitution of Georgia is a living norm, the purpose of which is to realize people's sovereignty. This conclusion will be supported by the historical explanation, which we will touch on below.

Like the Constitution, the Organic Law "On Referendum" also serves to realize the people's sovereignty as a whole. Thus, it is not clear how the purpose of the law can be that which is prohibited by one norm of the same law. Such a situation is created in the case of such an understanding of the contested norm, as it is given in the 2016 decree of the President of Georgia.

For teleological interpretation of the contested norm, we must start from the fact that the purpose of the Constitution of Georgia and the Organic Law of Georgia "On Referendum" is to realize public sovereignty, including through a referendum. Therefore, the purpose of the contested norm should not be to ban the holding the referendum for an indefinite period. This assumption is supported by the fact that Article 4, paragraph 2 of the Organic Law of Georgia "On Referendum" establishes the circumstances, in the presence of which the holding of a referendum is not allowed. There are three such circumstances: a) an armed attack on Georgia; b) being in a

state of war in the country; c) mass unrest, military coup, armed rebellion, ecological disaster and epidemic or any other case when state government bodies are deprived of the possibility of normal exercise of constitutional powers. In fact, if the same circumstances exist the elections of general[35] and municipality bodies are not held.[36] Therefore, the inadmissibility of holding a referendum in the Organic Law of Georgia "On Referendum", given in paragraph 2 of Article 4, is a prohibitive norm. As for the contested norm, it is prohibitive and is given in paragraph 3 of the first article. If this were a prohibitive norm, then the legislator would place it in paragraph 2 of the same Article 4 as an additional circumstance.

If not this, then what could be the purpose of the contested norm?

Depending on the territorial scope, the referendum is national or local.[37] There are states where a referendum can be held both at the general public and at the regional (constituent territory of the federation, autonomous unit, etc.) level. For example, in the Swiss confederation, a referendum can be held at the federal level, although the cantons also have the right to hold it.[38] The Constitution of Ukraine recognizes all Ukrainian and local referendums.[39] The latter can be held both in the autonomous unit[40] and in the territory of the local self-government.[41]

Unlike such countries, the legislation of Georgia does not allow holding a referendum at the local (autonomous republic, district, municipality) level, which is aimed at avoiding the danger of separatism.[42] I think this is the purpose of the contested norm - to clearly define that the holding of a referendum is allowed only at the state-wide level and not separately in any autonomous or other territorial unit. Part of the Georgian scientists see this controversial norm through this prism. In particular, Mr. Johnny Khetsuriani writes that the referendum "is being held in the entire territory of Georgia, i.e., at the common national level. Thus, legislation of Georgia does not recognize the possibility of holding local referendums."[43] Speaking about the constitutional control of the referendum, scientists B. Loladze, Z. Macharadze and A. Pirtskhalashvili, referring

[35] Article 71, paragraph 5, Constitution of Georgia <https://matsne.gov.ge/ka/document/view/30346?publication=36> [last accessed on 31 March 2023].

[36] Article 133, Part 3, Organic Law of Georgia on Election Code of Georgia <https://matsne.gov.ge/ka/document/view/1557168?publication=79> [last accessed on 31 March 2023].

[37] Avtandil Demetrashvili and Sophio Demetrashvili, Constitutional Law, Textbook (Sulkhan-Saba Orbeliani Publishing House 2021) 287 (in Georgian).

[38] Widmer, supra note 5, at 173.

[39] Article 38, Constitution of Ukraine <https://zakon.rada.gov.ua/laws/main/254%D0%BA/96-%D0%B2%D1%80?lang=en#Text> [last accessed on 31 March 2023].

[40] ibid, Article 138, Clause 2.

[41] ibid, Article 143, Paragraph 1.

[42] Kobakhidze, supra note 17, 84.

[43] Johnny Khetsuriani, the Jurisdiction of the Constitutional Court of Georgia (second revised and completed edition, Favorite Style Publishing 2020) 233-234 (in Georgian).

to Professor Johnny Khetsuriani, say: a referendum cannot be held in a part of the country's territory, for example, only in some municipality. The legislation does not recognize the institution of a local referendum. Thus, the referendum held at the general state level is subject to constitutionality control.[44]

Based on the above, it can be said that the purpose of the contested norm is to declare the inadmissibility of a local referendum and, therefore, prevent separatism. Historical explanation will further strengthen this opinion.

4. HISTORICAL EXPLANATION

Norms of law stand in relation to each other not only in a systemic but also in a historical context.[45] The historical definition is a variety of teleological definition because in this case the historical purpose of the legislator should be established.[46]

The current Constitution of Georgia was adopted in 1995. By this moment, the territorial integrity of Georgia was already violated, Georgia's jurisdiction did not extend to the entire territory of Georgia, in particular, to the territories of the Autonomous Republic of Abkhazia and the former South Ossetia Autonomous Region. This is already a well-known fact, and it is not necessary to provide historical sources to prove it. It is enough to read the text of the first edition of the Constitution of Georgia itself, the second article of which stated the full restoration of jurisdiction over the entire territory of Georgia as a prerequisite for the adoption of the constitutional law on territorial organization.[47]

Thus, the legislator was aware of the existence of a violation of territorial integrity, although, in relation to the people's sovereignty, the legislator actually had the same position as it is in the current edition of the Constitution of Georgia. Article 5, paragraph 2 of the first edition of the Constitution of Georgia stated that the people exercise their power through referendums, other forms of direct democracy, and through their representatives. The legislator declared the principle of popular sovereignty as a valid principle, and the referendum as a real means of this principle and did not make any reservations or hints about the impossibility of holding a referendum due to violation of jurisdiction.

The Law of Georgia "On Referendum" was adopted after the adoption of the Constitution - in 1996, and in 2002 it became an Organic law.[48] Nevertheless, paragraph 3 of article 1

[44] Loladze, Macharadze, Pirtskhalaishvili, supra note 10, 278-279.
[45] Cipelius, supra note 27, 54.
[46] Khubua, supra note 20, 191.
[47] Article 2, paragraph 3, Constitution of Georgia <https://matsne.gov.ge/ka/document/view/30346?publication=0> [last accessed on 31 March 2023].
[48] Organic Law of Georgia on Amendments to the Law of Georgia on Referendum <https://matsne.gov.ge/ka/document/view/14128?publication=0> [last accessed on 31 March 2023].

of the mentioned law had the same content as now and said that the referendum is held in the entire territory of Georgia. If we consider that the purpose of this norm is to prohibit the holding of a referendum on the entire territory of Georgia until the jurisdiction is fully restored, that is, for an indefinite period, it will be absurd because it turns out that the legislator deliberately adopted a "dead" law doomed to the same inaction. But the fact that the disputed norm was not understood in this way, testifies that on the basis of this legislation, in 2003, on the initiative of the voters, on the basis of the decree[49] of the President of Georgia No. 428 of September 2, 2003, a referendum was held in Georgia regarding the reduction[50] of the number of members of the Parliament to 150, to which the majority of the voters responded positively[51] and the decision was later reflected in the Constitution of Georgia.[52] Despite some question marks, the results of the mentioned referendum are valid and no one has cancelled them. Moreover, when in 2011 the governing and individual opposition parties agreed to increase the number of members of the parliament to 190, the main obstacle to this was the 2003 referendum, and the opinion was expressed that increasing the number of deputies without a new referendum was legally unjustified.[53]

It should be noted here that the actual situation has not changed between 2003 and 2016. The separatist authorities on the territory of the Autonomous Republic of Abkhazia and the so-called former South Ossetia Autonomous Region, declared so-called independence in the early 1990s, and Georgia's jurisdiction over these territories did not extend to the same extent in 2003 as in 2016. The only legal difference was that on October 30, 2008, the Law of Georgia "On Occupied Territories" was adopted, on the basis of which the said territories were declared occupied, although in 2003, as in 2016, the Georgian authorities were powerless to hold a referendum on these territories. Therefore, the refusal of the President of Georgia to hold a referendum with the argument of violation of territorial integrity is incomprehensible, especially since the Law of Georgia "On Occupied Territories" put the Georgian government in a more profitable position due to assigning responsibility to Russia[54] for human rights violations in the occupied territories, which the President of Georgia could use as a certain support in 2016.

[49] Decree No. 428 of the President of Georgia dated September 2, 2003 on Calling a Referendum <https://matsne.gov.ge/ka/document/view/33940?publication=0> [last accessed on 31 March 2023].

[50] Demetrashvili, supra note 12, 11.

[51] Referendum of November 2, 2003 in Georgia <shorturl.at/OQTU7> [last accessed on 31 March 2023].

[52] Constitutional Law of Georgia on Amendments and Additions to the Constitution of Georgia <https://matsne.gov.ge/ka/document/view/30862?publication=0> [last accessed on 31 March 2023].

[53] "Demetrashvili: the only way to increase the number of deputies is a new referendum" (Civil Georgia, June 29, 2011) <https://old.civil.ge/geo/article.php?id=24258?id=24258> (in Georgian) [last accessed on 31 March 2023].

[54] Article 7, Paragraph 1, Law of Georgia on Occupied Territories <https://matsne.gov.ge/ka/document/view/19132?publication=8> [last accessed on 31 March 2023].

Against this background, the argument of the decree that holding a referendum will give additional legal arguments to the occupying country and weaken the policy of de-occupation seems even more absurd, which undoubtedly implies that it will be considered as an indirect recognition of the occupied territories as independent states and it will be difficult for us to justify ourselves. But if the recognition of the territorial unit as an independent state depends on holding a referendum in Georgia, then it turns out that these territories have already been unofficially recognized as independent by the 2003 referendum. Such logic is very absurd and harmful.

Thus, based on the above, it is proven not only by historical interpretation but also by practice, that the disputed norm does not prohibit the holding of a referendum in the occupied territories while assuming the opposite logic leads to absurd results.

IV. THE IDEA OF A REFERENDUM

For correct interpretation of the disputed norm, we must leave the framework of formalism and look at the issue in a complex manner. In this case, we will need to use the methods of systematic and teleological explanation. First, let's get off the mark and ask the question: what is the idea of the referendum? The idea of the referendum is to ensure the broad participation of the population (citizens) in politics[55], that is, to realize the principle of popular sovereignty. Therefore, the main thing is not the territorial principle, that is, where the elections are held, but the quantitative principle - how many people have the opportunity to participate in the decision of the state issue. Therefore, it is not the territory that is of decisive importance, but the fact that all those citizens of Georgia "whose participation is not excluded by the constitution" can take part in the elections.[56]

Also, we should approach the referendum not only as a procedure and holding the referendum should not be equated with setting up a ballot box in a specific area and setting up precincts but should look at it as a right. "The concept of "citizen" itself includes the idea of the right to be directly involved in political decisions. Citizens and legislators cannot be considered as two conflicting principles - the sovereign power belongs to the citizens."[57] Based on Article 24 of the Constitution of Georgia, participation in the referendum and elections is a fundamental right of an adult citizen of Georgia. The realization of this right is of crucial importance for the existence and functioning of political institutions in the country.[58] The state of Georgia must respect

[55] Michel Rosenfeld and András Sajo (eds), The Oxford Handbook of Comparative Constitutional Law (Oxford University Press 2012) 253.
[56] Demetrashvili, supra note 12, 10.
[57] Bruno Kaufmann and others, Guidebook to Direct Democracy in Switzerland and Beyond (Initiative & Referendum Institute Europe 2010) 68.
[58] Paata Turava (ed), supra note 11, 334.

and ensure the implementation of this right. For this, it should use all the mechanisms at its disposal and give the citizens of Georgia, including the citizens of Georgia living in the occupied territories, the opportunity to realize the mentioned right. For this, it should use all mechanisms and bodies at its disposal, including the authorities of the occupied Autonomous Republic of Abkhazia and the administration of the temporary administrative-territorial unit of the former South Ossetia Autonomous Region. An example of this is the Decree No. 428 of the President of Georgia dated September 2, 2003 "On calling a Referendum", according to paragraph 5 of which the ministries of Georgia, the authorities of the Autonomous Republics of Abkhazia and Adjara, regional administrations and other agencies were instructed to implement measures that would ensure the holding of the referendum.[59]

Citizens of Georgia living on the occupied territories have the opportunity to participate in the referendum in the same way as in the case of general elections. Of course, a large number of Georgian citizens living in the occupied territory will not be able to participate in the referendum (as well as in the elections). In such a case, their fundamental right is violated, but it is not violated by the government of Georgia, the state of Georgia. In this case, we should refer to the Law of Georgia "On Occupied Territories". This is a very important law that will help avoid many inconveniences and misinterpretations. Therefore, not only in the interpretation of the disputed norm, but also in many other cases where "the entire territory of Georgia" is mentioned, the norms should be interpreted considering the Law of Georgia "On Occupied Territories". According to this law, the Russian Federation is responsible for human rights violations in the occupied territories[60], and the obligation of the Georgian authorities is to provide information to international organizations about the facts of human rights violations in the occupied territories.[61] Most importantly, as a result, if a referendum is held, the issue of its legitimacy and legality is not in question.

Of course, it would be better if the Organic Law of Georgia "On Referendum" and/or the Law of Georgia "On Occupied Territories" would directly provide for a reservation on holding a referendum under occupation, which would avoid many misunderstandings. However, despite this, we cannot say that there is a flaw in the legislation of Georgia regarding the given issue, which is indicated by the disputed decree of the President of Georgia of 2016. It might be said that this is not a flaw, but a more Dworkin's complex case, the solution of which is a process of interpretation.[62]

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[59] Paragraph 5, Decree No. 428 of the President of Georgia dated September 2, 2003 "On Calling a Referendum" <https://matsne.gov.ge/ka/document/view/33940?publication=0> [last accessed on 31 March 2023].

[60] Article 7, Paragraph 1, Law of Georgia on Occupied Territories <https://matsne.gov.ge/ka/document/view/19132?publication=8> [last accessed on 31 March 2023].

[61] ibid, paragraph 3.

[62] Dimitri Gegenava, 'The Complexity of the Complex Case' in the collection Ronald Dworkin (ed), Complex Cases (Sulkhan-Saba Orbeliani University Publishing House 2021) 6 (in Georgian).

V. CONCLUSION

The answer to the main question of the article - "Is it admissible under the legislation of Georgia to hold a referendum in the presence of occupied territories?", is positive. The legislation of Georgia does not prohibit the holding of a referendum under the conditions of occupation. The opposite opinion derives from the literal interpretation of the provision of Article 1, paragraph 3 of the Organic Law of Georgia "On the Referendum" ("the referendum shall be held on the entire territory of Georgia"), which is incorrect due to the following circumstances:

1. Such reasoning contradicts the principle of popular sovereignty guaranteed by the Constitution of Georgia;
2. Such reasoning directly leads to the illegitimacy of all general elections held in Georgia, which is evident as a result of the systematic interpretation of the given norm;
3. The purpose of both the Constitution of Georgia and the Organic Law of Georgia "On Referendum" is to realize the principle of popular sovereignty. In addition, at the time of the adoption of these normative acts, the territorial integrity of Georgia was already violated, and the Georgian government could not control the already occupied territories, although the legislator did not consider this circumstance in the prohibitive norms;
4. Based on the existing legislation, one referendum was already held in Georgia in 2003, which confirms the fact that at that time the contested norm was not understood literally.

When explaining the disputed norm, we should proceed from the idea of a referendum. Since the idea of the referendum is to ensure the maximum involvement of the population in political processes, the main thing is the quantitative principle, that is, how many people can participate in this process, and not where (territorial principle) they have the opportunity to do so. Therefore, holding a referendum should not be equated with placing a ballot box or setting up an election precinct in a specific area of the country, but we should look at it as a right and use the same approach that we have in the case of general elections. It is permissible to hold a referendum in Georgia in the same way as a general election. It is true that a large part of Georgian citizens living in the occupied territories will not be able to participate in this process, thus their rights will be violated, but the Russian Federation is responsible for this violation, according to the Law of Georgia "On Occupied Territories". Most importantly, in this case, the issue of the legitimacy of the referendum, as well as general elections, will not arise.