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THE SOCIAL STATE PRINCIPLE AT PLAY: CONSTITUTIONAL CASE-LAW ON SOCIAL MATTERS

ABSTRACT

Social rights hold a distinct historic place in the Georgian constitutionalism. Chapter 13 of the 1921 Constitution of Georgia 'socio-economic rights' encompassed many progressive provisions such as norms on unemployment reduction, social assistance for persons with disabilities, labour rights and emphasized the necessity to guarantee these rights for national minorities. In conformity with this tradition, Article 5 of the modern Constitution declares Georgia a social state. This constitutional principle encompasses a wide array of progressive social objectives and lays the foundation for social rights under Chapter 2 of the Constitution.

Despite their central role in the Georgian Constitution, the justiciability of social rights is linked with conceptual and practical difficulties. This article discusses the approach of the Constitutional Court of Georgia to social rights. With this purpose, the article reviews the case-law of the Court and concludes that it has developed bold standards in specific cases but its overall approach to social rights is restrained and cautious.

In addition, the article analyses conceptual and practical issues that the Court encounters in its case-law on social rights and finds that the challenges identified by the Court pertain to the nature of social rights as well as the mandate and function of the Constitutional Court. These questions are not unique to the Georgian judicial reality and have been often raised in the theory of social rights and international practice alike. Accordingly, the article discusses these conceptual issues and offers theoretical and practical ways of overcoming them based on the practice from various jurisdictions.

I. INTRODUCTION

Social human rights have historically occupied a central place in the Georgian constitutionalism. The 1921 Constitution of Georgia included Chapter 13 – 'Socio-economic rights', which provided progressive provisions such as the reduction of unemployment, social assistance for persons with disability, labour rights, and specifically emphasized the realization of these provisions for the national minorities. Following this tradition, the modern Constitution of Georgia establishes the principle

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of social (welfare) state as one of the foundational provisions in the Preamble. The Constitution elaborates on the meaning of this principle in Article 5, declaring Georgia a social state. This principle encompasses a wide array of social provisions and represents the foundation for social rights provided under Chapter 2 of the Constitution.

Aside from the direct incorporation in the Constitution, social rights enter the Georgian constitutional construction through Article 4. This provision acknowledges 'universally recognized human rights and freedoms that are not explicitly referred to herein, but that inherently derive from the principles of the Constitution,' and stipulates that 'the legislation of Georgia shall comply with the universally recognized principles and norms of international law.' Social rights, as guaranteed by the Universal Declaration of Human Rights (UDHR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and other international human rights treaties, impose corresponding requirements on the Georgian legal system as well.

Chapter 2 of the Constitution of Georgia guarantees enforceable human rights and freedoms. Contrary to the constitutional tradition and emphatic declarations, it adopts a minimalist approach towards social rights, especially after the 2018 constitutional amendments, that moved several social provisions out of Chapter 2. This means that there are only a few human rights with a social character that have the potential to be judicially enforced as an individual right, including by the Constitutional Court of Georgia. Consequently, constitutional case-law is not rich with cases on social issues and, therefore, has not developed a comprehensive set of standards to social rights yet. However, the Court has adjudicated on a number of cases concerning substantive social rights and discrimination in social matters. The analysis of these cases shows that the Court considers judicial interference into the state's socio-economic policy as a risk to the principle of separation of powers and, hence, has developed a careful approach towards the justiciability of social rights. This aligns well with the outdated constitutionalist approach that differentiates between economic, social and cultural (ESC) rights on the one hand, and civil and political (CP) rights on the other, and perceives the former as a subordinate at best. These challenges are not unique to the Georgian constitutional practice and have been discussed by judiciaries and scholars for decades. The Covid-19 pandemic and the consequent severe socio-economic crises rejuvenated the discussions on the issues related to health, education, work, environment, an adequate standard of living and equal distribution of welfare, and the means to enforce human rights in these areas. Judicial remedy by constitutional control institutions plays a central role in ensuring that the state's legislative framework complies with its human rights obligations to protect, respect and fulfil. With this authority and a rich record of framework-altering landmark cases, the Georgian Constitutional Court will inevitably face the need to adopt a systematic approach to substantive social rights and discrimination in social matters.

The present article aims to put the Constitutional Court's case-law, its approaches and standards into an international context and explore the conceptual or practical solutions to the challenges of justiciability of social rights. With this purpose, the article analyses the case-law of the Constitutional Court of Georgia in different directions: cases concerning substantive social provisions[1] and cases concerning the rights to equality and dignity in social matters. The article then applies the findings of the case-law analysis to determine what the Court can do to overcome the challenges and guarantee the full realization of social rights. This entails theoretical and comparative analysis of good examples from other courts of a similar mandate.

With this aim in mind, Section II of the article provides the analysis of the current content of the Constitution and the context for its minimalist approach to social rights; Section III discusses the case-law of the Constitutional Court on social matters and explores main challenges, as well as potential strengths for progressive developments in the future; Section IV puts the approach of the Court in a conceptual context and presents potential ways to overcome the aforementioned challenges; Section V concludes the article.

II. THE CONSTITUTION AND SOCIAL RIGHTS

This chapter aims to provide an overview of the case-law of the Constitutional Court of Georgia on the justiciability of social rights. However, it is also necessary to provide the context for the role of the Court, as well as the content of social rights in the Georgian Constitution. The current text of the Georgian Constitution has been in force since its amendment in 2018, which substantially altered the content of social rights in the constitution. At present,[2] the constitution includes provisions relating to social rights in two of its chapters. Article 5 in Chapter I ('General Provisions') declares Georgia a 'social state' and provides overarching policy objectives relating to social justice, equality, solidarity, and equitable socio-economic development. Article 5 also directs the state to 'take care of' specific substantive social issues, such as health and social care, subsistence minimum and decent housing, unemployment, environmental protection, etc. On the other hand, Chapter II ('Fundamental Human Rights') contains enforceable social rights, such as labour rights (Article 26), the right to education (Article 27), the right to health (Article 28), the right to a healthy environment (Article 29), as well as the right to equality (Article 11), which is an indispensable mechanism for ensuring social rights.

[1] In this part, the article discusses the cases involving substantive provisions in Chapter 2 of the Georgian Constitution, both before and after the 2018 constitutional amendments.

[2] Current version of the Georgian Constitution, available at: <https://matsne.gov.ge/ka/document/view/30346?publication=36> (accessed 1.7.2021).

Before the amendments,[3] Chapter II of the Constitution included some of the provisions that are now under Article 5. For example, before 2018, Article 32 of the Constitution provided that 'the State shall promote helping the unemployed find work. Conditions for ensuring some minimum standard of living and status for the unemployed shall be determined by law'; Article 31 guaranteed 'equal socio-economic development for all regions of the country'; Article 36(2) obliged the state to promote family welfare. These provisions have now been modified and moved to Chapter I. Some of the remaining social provisions have also been curbed and limited: the scope of the right to health now covers only citizens, whereas it was worded as 'everyone's' right before. Apart from the declaratory and conceptual implications of demoting human rights to policy objectives, the amendments also had practical ramifications for enforcing these provisions through judicial review. According to Article 60(4)(a) of the Constitution, the Constitutional Court, which is the judicial body of constitutional control in Georgia, has the power to review persons' or the Public Defender's claims on the constitutionality of normative acts only with respect to the rights and freedoms enumerated in Chapter II of the Constitution. Therefore, as the provisions of social rights were moved out from Chapter II of the Constitution, they were effectively rendered into nonjusticiable and unenforceable declaratory statements. Moreover, apart from weakening the substantive social rights framework in the Constitution, the amendments also pushed the instrumental Article 39 out of Chapter II and away from the reach of the Constitutional Court. The provision allowed applicants to invoke 'other universally recognized rights' that were not namely included in Chapter II, but stemmed from the Constitution's fundamental principles. As the Constitution of Georgia provides for a wide variety of universally recognized civil and political (CP) rights, but only a scarce selection of economic, social and cultural (ESC) rights, this constitutional amendment was arguably aimed at preventing the Constitutional Court from expanding the latter.

Few civil society organizations in Georgia objected to these foreseeable effects while commenting on the draft of amendments,[4] and offered an alternative text for the amendments that included the right to adequate housing, the creation of unemployment programs, social assistance for the unemployed, and extended versions of other social rights in Chapter II.[5] However, as the amendments also included significant changes

[3] Version of the Georgian Constitution before 2018, available at: <https://matsne.gov.ge/ka/document/view/30346?publication=34> (accessed 1.7.2021).

[4] *Jowell J.,* Review of Amendments to the Constitution of Georgia in Respect of Human Rights and Judiciary Matters, USAID and East-West Management Institute, 2017, available at: <http://ewmi-prolog.org/images/files/2106PROLoGReviewofConstitutionalAmendmentstoHRandJudiciaryrelatedmattersJeffreyJowellENG.pdf > (accessed 15.6.2021); EMC Assesses the Work of the Constitutional Commission and the Project of Constitutional Changes, 2017, available at: <https://socialjustice.org.ge/en/products/emc-assesses-the-work-of-the-constitutional-commission-and-the-project-of-constitutional-changes-5> (accessed on 8 April 2021).

[5] *Natsvlishvili V. and others*, The Draft Constitutional amendments on social Rights, 2017.

to the political system and the separation of power, social rights remained out of the spotlight and the amendments entered into force with only a brief explanation in the explanatory note of the draft bill, according to which the provisions moved to Chapter I belong to state's general social responsibility, and the expansion of the rights (including social rights) would still be possible through the human right of dignity and the other rights, remaining in Chapter II.[6]

The limitation of the justiciable social rights content in the Georgian Constitution was linked to the conservative argument that justiciability of social rights leads the courts to enter the territory of social policy and budgetary resource allocation, which is the exclusive domain of the legislative branch.[7] However, this approach was also aligned with and preceded by the case-law of the Constitutional Court, which had been careful not to encroach on the mentioned territory, even before the amendments. For instance, in 2009[8] the Court defined the scope of the constitutional provision providing for equal socio-economic development for the country regions with special privileges 'to ensure the socio-economic progress of high mountain regions.'[9] The provision was enshrined in Chapter II of the Constitution, but the Court indicated that this fact did not *per se* entail enforceability and this provision was a manifestation of the social state principle, thus, not a human right.[10] In another example,[11] the Court reviewed whether social assistance for socially vulnerable persons fell within the scope of Article 39 that would allow applicants to invoke other universally recognized human rights within the constitutional review. The Court determined that the issue of social assistance fell within the scope of Article 32 which provided for the state's responsibility to aid the unemployed and ensure a minimum standard of living in the pre-2018 version of the Constitution, which stemmed from the principle of the social state. Therefore, there was no need to bring in other internationally recognized social rights in the case through Article 39.[12]

[6] Explanatory Note for the Draft Constitutional Law on Amendments to the Constitution of Georgia, p. 4.

[7] *Jowell J.,* Review of Amendments to the Constitution of Georgia in Respect of Human Rights and Judiciary Matters, USAID and East-West Management Institute, 2017, pp. 5–6, available at: <http://ewmi-prolog.org/images/files/2106PROLoGReviewofConstitutionalAmendmentstoHRandJudiciaryrelatedmattersJeffreyJowellENG.pdf > (accessed 15.6.2021).

[8] Judgment of the Constitutional Court of Georgia of 31 March 2008 - *Citizen of Georgia Shota Beridze and others v. the Parliament of Georgia* (N2/1-392), available at: <https://constcourt.ge/ka/judicial-acts?legal=304> (accessed 1.7.2021).

[9] Version of the Georgian Constitution before 2018, Article 31, available at: <https://matsne.gov.ge/ka/document/view/30346?publication=34> (accessed 1.7.2021).

[10] Judgment of the Constitutional Court of Georgia of 31 March 2008 - *Citizen of Georgia Shota Beridze and others v. the Parliament of Georgia* (N2/1-392), II paras. 9-21, available at: <https://constcourt.ge/ka/judicial-acts?legal=304> (accessed 1.7.2021).

[11] Recording notice of the Constitutional Court of Georgia of 7 July 2017 - *Citizen of Georgia Tamar Tandashvili v. the Government of Georgia* (N2/11/663), available at: <https://constcourt.ge/ka/judicial-acts?legal=954> (accessed 1.7.2021).

[12] Recording notice of the Constitutional Court of Georgia of 7 July 2017 - *Citizen of Georgia Tamar Tandashvili v. the Government of Georgia* (N2/11/663), II paras. 8-22, available at: <https://constcourt.ge/

Coincidentally, the substantive provisions from both examples, on the socio-economic development of mountainous regions and state's responsibility to ensure the minimum standard of living and aid the unemployed, are now stripped off of their constitutional status as fundamental rights and are included in Chapter I of the current Constitution along with the instrumental provision (former Article 39) that allowed applicants to invoke international human rights in constitutional proceedings. Therefore, the constitutional amendments limiting the scope of social rights and the careful approach of the Constitutional Court to the provisions of social nature were aligned, and the case-law of the Court might have provided instructions on which provisions to move out from Chapter II of the Constitution.

The next section provides a closer look at the case-law of the Constitutional Court with respect to social matters and analyzes the common challenges and tendencies of the Court's approach.

III. CASE-LAW OF THE CONSTITUTIONAL COURT OF GEORGIA

The Constitutional Court has been the central institution for protecting human rights, particularly through its mandate to review constitutional applications lodged by individuals and legal persons. This is affirmed by an ever-increasing annual number of constitutional applications[13] and a trove of landmark judgements and decisions favouring individuals' rights and freedoms. However, partly due to the minimalist constitutional approach towards ESC rights even before the amendments, the Court's case-law is scarce with respect to social rights and issues. Regardless, the Court has reviewed cases concerning social matters and has developed respective case-law in several different directions. This section provides a brief overview of the Court's approaches and considerations towards social rights according to the following typology of cases: (1) cases with a general discussion on social rights; (2) cases involving substantive social rights (both before and after the 2018 amendments); and (3) cases concerning equality and dignity in social matters.

1. THE COURT ON THE NATURE OF SOCIAL RIGHTS

The Court has discussed the general nature of social rights and the overarching principle of social state on rare occasions. In one such case from 2009,[14] the Court reviewed the

ka/judicial-acts?legal=954> (accessed 1.7.2021).

[13] Constitutional Court of Georgia, Information on Constitutional Justice in Georgia, 2019, p. 96, available at: https://constcourt.ge/files/4/Report%202019%20ENG.pdf.

[14] Judgment of the First Chamber of the Constitutional Court of Georgia of 27 August 2009 - *Public Defender of Georgia v. the Parliament of Georgia* (N1/2/434), available at: <https://constcourt.ge/ka/judicial-acts?legal=366> (accessed 1.7.2021).

constitutionality of the rule barring individuals from seeking judicial remedy for the assessment methodology, levels and amount of social assistance with respect to the right to a fair trial. The applicant argued that the rights to social assistance, security and protection were part of the Georgian Constitution on the basis of its provisions with social nature, the principle of social state and the internationally recognized social rights. Accordingly, any state action concerning these matters would fall within the category of regulating legal rights, thus, should have been subject to judicial control.

The Court deliberated on two issues in this case: firstly, whether the disputed norm violated the rights to social security and social assistance, and, secondly, whether it violated the right to a fair trial and access to judicial review vis-à-vis the right to equality and other fundamental rights, which might have been restricted by the disputed norm. While the Court was unanimous in declaring the disputed norm unconstitutional on the latter basis, it was not as decisive about the former issue. In fact, the opinion of the justices was divided equally (2-2 split) regarding the justiciability of the right to social assistance and social security, and the Court could not reach an agreement, leaving the matter undecided.[15] The dissenting opinion of the justices *Ketevan Eremadze* and *Besarion Zoidze* took a strong stance against other judges position of non-justiciability of social rights and, based on the international human rights framework, pointed to the state's obligation for the progressive realization of social rights in accordance with its available resources.[16] Finally, the opinion acknowledged the risk of violating the principle of the separation of powers through adjudicating on social rights and called for judicial restraint and caution in such cases. However, it strongly rejected that social rights are nonjusticiable by pointing to the distinction between political and legal domains in social matters and stating that non-justiciability would give the state absolute free reign against the very requirements of the separation of powers and the checks and balances, stemming from it.[17]

More recent deliberation on the nature of social rights was included in the 2017 recording notice[18] in the case *Tandashvili v. the Government of Georgia*.[19] The applicant

[15] Judgment of the First Chamber of the Constitutional Court of Georgia of 27 August 2009 - *Public Defender of Georgia v. the Parliament of Georgia* (N1/2/434), II para. 5, available at: <https://constcourt.ge/ka/judicial-acts?legal=366> (accessed 1.7.2021).

[16] Dissenting Opinion of the justices – *Eremadze and Zoidze* - regarding the reasoning part of the Judgment of the First Chamber of the Constitutional Court of Georgia of 27th August 2009 (N1/2/434), paras. 6–10, available at: <https://constcourt.ge/ka/judicial-acts?legal=366> (accessed 1.7.2021).

[17] Dissenting Opinion of the justices – *Eremadze and Zoidze* - regarding the reasoning part of the Judgment of the First Chamber of the Constitutional Court of Georgia of 27th August 2009 (N1/2/434), paras. 17, available at: <https://constcourt.ge/ka/judicial-acts?legal=366> (accessed 1.7.2021).

[18] Recording notice of the Constitutional Court of Georgia of 7 July 2017 - *Citizen of Georgia Tamar Tandashvili v. the Government of Georgia* (N2/11/663), available at: <https://constcourt.ge/ka/judicial-acts?legal=954> (accessed 1.7.2021).

[19] It should be noted that, as this case represents a landmark case in the Court's case-law on social rights, its analysis is divided and distributed in different parts of this article.

questioned the constitutionality of the rule that excluded persons in unlawful possession of the premises owned by the state from registering in the registry for socially vulnerable families. The registry in question was a centralized database for socially vulnerable families and provided the only avenue for the eligibility for state-provided social assistance for those in need. The applicant argued that the rule barred the vulnerable from receiving social assistance and effectively forced them to choose between the roof over their head or bread on their table. Furthermore, persons in an identical situation, who managed to register before the disputed norm entered into force, were receiving the assistance without any issues. Based on these circumstances, she claimed that the disputed norm violated her constitutional rights to life, equality, dignity and a fair trial, as well as the universally recognized right to social security and assistance.[20]

Through the recording notice, the Court partially admitted this case for consideration on merits with regards to the rights to equality and dignity and declared it inadmissible with respect to the rights to life, a fair trial, as well as social security and assistance.[21] While deciding on the admissibility, the Court considered the nature of the right to social security under the constitutional provision providing for the state's responsibility to ensure a minimum standard of living for the unemployed. The Court observed the distinction between 'fundamental rights' and social rights and noted that, while the former are mostly self-enforcing, the realization of social rights is directly dependent on the state resources and requires the accumulation and distribution of considerable funds. According to this reasoning, social rights are the elements of the social state principle and the Constitution is less demanding of the state in this respect than in the case of 'fundamental rights.'[22] It should be noted that this deliberation refers to the rights related to social security and assistance, and not to the social rights at large. Nonetheless, the wording and content of this reasoning signal that there is a hierarchy between 'fundamental' rights and social provisions and it is implicit that the latter represent glorified policy objectives, rather than real human rights.

The reasoning of the Court in both cases signals its reluctance to substantively adjudge on the matters of social security and reveals a conservative approach towards the justiciability of social rights, in particular those related to social security and assistance. This approach questions the indivisibility of human rights and establishes a false hierarchy, where civil and political rights are the 'real' and enforceable human rights,

[20] The Court's reasoning on this issue is discussed above, in relation to the Articles 32 and 39 of the Constitution (before the 2018 amendments) and will not be reiterated here.

[21] Recording notice of the Constitutional Court of Georgia of 7 July 2017 - *Citizen of Georgia Tamar Tandashvili v. the Government of Georgia* (N2/11/663), III para. 1, available at: <https://constcourt.ge/ka/judicial-acts?legal=954> (accessed 1.7.2021).

[22] Recording notice of the Constitutional Court of Georgia of 7 July 2017 - *Citizen of Georgia Tamar Tandashvili v. the Government of Georgia* (N2/11/663), II paras. 17-18, available at: <https://constcourt.ge/ka/judicial-acts?legal=954> (accessed 1.7.2021).

and social rights are declaratory or programmatic manifestations of general principles of social justice and equality, or the principle of the social state, as referred to in the Georgian Constitution. The Constitutional Court based its reasoning on the challenges of the enforcement of social rights that are also recognized internationally, namely their direct budgetary implications, judicial incompetence to decide the matters of economic and social policy, and the risks vis-à-vis the separation of powers. However, Section IV of the article showcases that these challenges can be addressed and overcome in the judicial review of the cases concerning social rights.

2. THE COURT ON SUBSTANTIVE SOCIAL RIGHTS THAT HAVE BEEN REMOVED FROM CHAPTER II OF THE CONSTITUTION

As mentioned above, the Constitution of Georgia incorporates enforceable and justiciable human rights and freedoms under its catalogue of fundamental rights in Chapter II. Through the 2018 constitutional amendments, a number of provisions were removed from Chapter II and relocated to Chapter I. These provisions included the state's obligations to promote family welfare, aid the unemployed in the search of work and ensure a minimum standard of living, guarantee equal socio-economic development for all regions (with special emphasis on the high mountain regions), and encompassed more extensive wording on labour rights, including the fair compensation and healthy conditions of work, with special emphasis on minors and women. The Court has not discussed any claims related to these provisions since 2018, as it was removed from Court's authority to review individual complaints on these issues.

It should be mentioned that the Court has often invoked the principle of the social state while adjudicating this group of constitutional provisions. On some occasions, the principle was invoked in order to emphasize the fact that the social rights are dependent on budgetary considerations and subject to judicial restraint or the wide margin of appreciation, afforded to the states.[23] On other occasions, the Court explicitly declared constitutional provisions as nonjusticiable policy objectives, such as the provision of equal socio-economic development of all regions of the country.[24]

The Court has on few occasions considered the provision imposing a state responsibility to aid the unemployed in finding work and ensure a minimum standard of living. In the

[23] Recording notice of the Constitutional Court of Georgia of 7 July 2017 - *Citizen of Georgia Tamar Tandashvili v. the Government of Georgia* (N2/11/663), II paras. 17-18, available at: <https://constcourt.ge/ka/judicial-acts?legal=954> (accessed 1.7.2021).

[24] Judgment of the Constitutional Court of Georgia of 31 March 2008 - *Citizen of Georgia Shota Beridze and others v. the Parliament of Georgia* (N2/1-392), II paras. 18-21, available at: <https://constcourt.ge/ka/judicial-acts?legal=304> (accessed 1.7.2021).

case from 2003[25] the Court ruled that, along with the determination of the unemployed status and helping the unemployed to find work, the provision also protects the right to receive compensation after the dismissal from work. In another case from 2016,[26] the Court held that social compensation based on work experience did not fall within the scope of this constitutional provision. In the recording notice of the *Tandashvili* case,[27] the Court held that social assistance for vulnerable families fell within the scope of this constitutional provision and, in this way, implicitly distinguished the 'minimum standard of living' part of the provision from the unemployment-related stipulations. Prior to that, the scarce case-law viewed this constitutional provision as strictly related to unemployment and this recording notice expanded the scope of this constitutional provision.[28] However, it also had the effect of preventing the applicant from invoking other internationally recognized social rights and opening a Pandora's box of similar constitutional applications for the Court.

The Court has also reviewed rare cases concerning state responsibility to promote family welfare. In a 2014 case,[29] the Court defined the scope of this constitutional provision and stated that this provision obligated the state to promote family welfare and take certain measures in this respect. Accordingly, the 'full realization of the constitutional right to family welfare requires securing appropriate legislative guarantees that will ensure the full protection of family relationships.'[30] The Court held that this requires the state to avoid unjustified interference into family relationships and take effective measures to ensure family welfare. Therefore, the constitutional provision on family welfare was recognized by the Court as a constitutional right with negative and positive elements. However, no further substantive interpretation or application of this right can be found in the case-law of the Constitutional Court of Georgia.

[25] Judgment of the Constitutional Court of Georgia of 23 March 2003 - *Citizens of Georgia Davit Silagadze, Liana Darsania and Ekaterine Tsotsonava v. the Parliament of Georgia* (N1/3/301), available at: <https://www.constcourt.ge/ka/judicial-acts?legal=1213> (accessed 1.7.2021).

[26] Judgment of the Constitutional Court of Georgia of 12 December 2005 - *Citizens of Georgia Kakhaber Dzagania and Giorgi Gugava v. the Parliament of Georgia* (N2/6/322), available at: <https://constcourt.ge/ka/judicial-acts?legal=270> (accessed 1.7.2021).

[27] Recording notice of the Constitutional Court of Georgia of 7 July 2017 - *Citizen of Georgia Tamar Tandashvili v. the Government of Georgia* (N2/11/663), available at: <https://constcourt.ge/ka/judicial-acts?legal=954> (accessed 1.7.2021).

[28] Version of the Georgian Constitution before 2018, Article 32, available at: <https://matsne.gov.ge/ka/document/view/30346?publication=34> (accessed 1.7.2021).

[29] Recording Notice of the Constitutional Court of Georgia of 11 November 2014 - *Public Defender of Georgia v. the Government of Georgia* (N2/9/603), available at: <https://constcourt.ge/ka/judicial-acts?legal=655> (accessed 1.7.2021).

[30] Recording Notice of the Constitutional Court of Georgia of 11 November 2014 - *Public Defender of Georgia v. the Government of Georgia* (N2/9/603), II para. 4, available at: <https://constcourt.ge/ka/judicial-acts?legal=655> (accessed 1.7.2021).

These cases and provisions do not have direct relevance for the Court's judicial practice since 2018, as these substantive provisions and the instrumental provision, allowing applicants to invoke other internationally recognized social rights, have been transformed into nonjusticiable general principles. However, the standards established in these cases might create the fundament for the constitutional review on social matters from different angles, such as the right to equality, dignity or remaining substantive provisions of social nature. The next subsection of the article takes a look at the case-law concerning the social rights that are currently present in the Constitution of Georgia.

3. THE COURT ON SUBSTANTIVE SOCIAL RIGHTS REMAINING IN CHAPTER II OF THE CONSTITUTION

At present, Chapter II of the Constitution encompasses a few substantive human rights of social nature such as labour rights, including safe working conditions, unionization and right to strike (Article 26), the right to education (Article 27), the right to health (Article 28), the right to a healthy environment (Article 29) and the rights of mothers and children (Article 30). This part of the article provides an overview of the Court's interpretation of these substantive social provisions.

The Court has adjudged a number of cases involving labour rights and, as a result, has defined the scope of the right. In the judgement on a 2007 case *Natadze v. Parliament* the Court asserted that freedom of labour should be interpreted in the light of the social state principle and held that the Constitution protects not only the right to freely choose work but also the rights to perform, maintain or quit, be protected from unemployment or regulations that allow unjust, arbitrary and unfounded dismissal from work.[31] The judgment also defined that only the activities that serve a person's financial security and personal development (self-realization) can qualify as constitutionally protected labour.[32] Subsequently, the Court did not deem the positions in university and faculty boards as fitting under the constitutional definition of labour as they were not primary, but rather additional and honorary positions.

Another landmark case concerning labour rights is the case *Lezhava and Rostomashvili v. Parliament*,[33] where the Court had to review the rule determining maximum weekly

[31] Judgment of the Constitutional Court of Georgia 26 October 2007 - *Citizen of Georgia Maia Natadze and others v. The Parliament and the President of Georgia* (N2/2-389), II para. 19, available at: <https://www.constcourt.ge/ka/judicial-acts?legal=301> (accessed 1.7.2021).

[32] Judgment of the Constitutional Court of Georgia 26 October 2007 - *Citizen of Georgia Maia Natadze and others v. The Parliament and the President of Georgia* (N2/2-389), II para. 20, available at: <https://www.constcourt.ge/ka/judicial-acts?legal=301> (accessed 1.7.2021).

[33] Judgment of the Constitutional Court of Georgia of 19 April 2016 - *Citizens of Georgia Ilia Lezhava and Levan Rostomashvili v. The Parliament of Georgia* (N2/2/565), available at: <https://constcourt.ge/ka/judicial-acts?legal=1077> (accessed 1.7.2021).

work hours for certain types of workplaces (with specific work regimes) as 48 hours in comparison to the regular 40 hours with respect to the right to freedom of labour. In the judgment, the Court linked the freedom of labour to a person's life, dignity, and personal and social development, and defined it as entailing the prohibition of forced labour, but also the obligation of the state to create legal guarantees ensuring the freedom of labour. Notably, the Court discussed this provision in the light of the factual disbalance between employees and employers, emphasizing greater power of employers to influence contractual conditions for work, when employees' dignified life is often 'significantly dependent on performing work and being remunerated for it'. To level this disbalance, the freedom of labour requires the state to regulate labour law-related relationships to protect the workers' interests, including guaranteeing an adequate, non-discriminatory and dignified work environment and fair work conditions.[34] The Court went on to consider working time as an element of the freedom of labour and stated that working time has a significant impact on a person's social life and health, thus, in the absence of protective measures, the employees might be forced to sacrifice their social realization and health to keep or acquire employment. Consequently, the state is required to determine a reasonable maximal time limit for work and strong regulations to guarantee enforcement.[35] However, the Court did not rule that a 48-hour-long workweek was unreasonably long and maintained that it did not upset the fair balance between the freedom of labour and the freedom of entrepreneurship.

The substantive application of the right to education took place in only one case – *Darbinian and others v. Parliament*, where the applicant successfully challenged the rule reserving state funding for primary education for citizens only. Along with the right to equality, the Court reviewed the rule with respect to the right to education and found the rule unconstitutional. The Court discussed the nature of the right to education and emphasized that education is an indivisible part of social life and human development and represents a foundation for personal liberty, free development and meaningful integration. Furthermore, the full realization of the right to education exceeds individual benefits and represents a vital public objective, because an educated society creates the basis for democracy, the Rule of law and human rights. Therefore, funding education should not be perceived as a privilege or assistance granted by the state and the full realization of the right to education, including free primary education, is one of the primary obligations of the state.[36] However, the Court also noted that the right to

[34] Judgment of the Constitutional Court of Georgia of 19 April 2016 - *Citizens of Georgia Ilia Lezhava and Levan Rostomashvili v. The Parliament of Georgia* (N2/2/565), II paras. 30–36, available at: <https://constcourt.ge/ka/judicial-acts?legal=1077> (accessed 1.7.2021).

[35] Judgment of the Constitutional Court of Georgia of 19 April 2016 - *Citizens of Georgia Ilia Lezhava and Levan Rostomashvili v. The Parliament of Georgia* (N2/2/565), II paras. 38–43, available at: <https://constcourt.ge/ka/judicial-acts?legal=1077> (accessed 1.7.2021).

[36] Judgment of the Constitutional Court of Georgia of 12 September 2014 - *Citizens of Russia Oganes Darbinian, Rudolf Darbinian, Susanna Jamkotsian and Citizens of the Republic of Armenia Milena*

education is not an absolute right and it can be restricted if overweighed by countering legitimate aims. A legitimate aim given in this case was the preservation of exhaustible resources i.e. budgetary funds. The Court noted that the state is afforded a wide margin of appreciation when dealing with limited resources and planning economic strategy, but such resources should be aimed at the effective realization of fundamental human rights in the first place. To decide on the constitutionality of the restriction, the Court discussed the significance of and the risks connected to the exclusion of certain groups from primary education and weighed these considerations against the financial burden of funding resident non-citizens' primary education. The Court did not consider that the legitimate aim outweighed the human rights interests at play and declared the rule unconstitutional.[37]

The Court has discussed the right to a healthy environment on several occasions. In the case *Gachechiladze v. Parliament*,[38] the Court decided on the constitutionality of the rule allowing the Ministry of Energy and Natural Resources to conclude an agreement that allowed all the actions committed/carried out vis-à-vis the environment and natural resources to be deemed legitimate, effectively providing the Ministry with the power of providing an exemption from legal responsibility. The Court determined that the constitutional right to a healthy environment had negative and positive elements - obliging the state to minimize the negative impact on the environment while executing projects and protect it from harm. The positive obligation entails the establishment of adequate legal mechanisms to prevent and respond to environmental harm from third persons. The Court explained that there is a need to balance the economic and social development on the one side and environmental protection for society's wellbeing on the other, and found the disputed rule contrary to this balance, thus declaring it unconstitutional.[39] The Court has also discussed the state's obligation to collect and process the information on environmental protection and the human right to receive such information. In the *Gachechiladze* case, the Court pointed out that this right was a crucial participatory right and obliged the state to collect information on the constituent elements of the environment and factors that have an impact on it and provide access to

Barseghian and Lena Barseghian v. the Parliament of Georgia (N 2/3/540), II paras. 15–21, available at: <https://constcourt.ge/ka/judicial-acts?legal=907> (accessed 1.7.2021).

[37] Judgment of the Constitutional Court of Georgia of 12 September 2014 - *Citizens of Russia Oganes Darbinian, Rudolf Darbinian, Susanna Jamkotsian and Citizens of the Republic of Armenia Milena Barseghian and Lena Barseghian v. the Parliament of Georgia* (N 2/3/540), II paras. 27–35, available at: <https://constcourt.ge/ka/judicial-acts?legal=907> (accessed 1.7.2021).

[38] Judgment of the Constitutional Court of Georgia of 4 October 2013 - *Citizen of Georgia Giorgi Gachechiladze v. the Parliament of Georgia* (N2/1/524), available at: <https://constcourt.ge/ka/judicial-acts?legal=433> (accessed 1.7.2021).

[39] Judgment of the Constitutional Court of Georgia of 4 October 2013 - *Citizen of Georgia Giorgi Gachechiladze v. the Parliament of Georgia* (N2/1/524), II paras. 1–15, available at: <https://constcourt.ge/ka/judicial-acts?legal=433> (accessed 1.7.2021).

it.[40] In the case *Green Alternative v. Parliament*,[41] the Court dealt with the prohibition on access to information on subsoil without the owner's consent and considered it as part of the right to access information on the environment, but decided that the absence of the rule would disproportionally damage the interests of the owner companies.[42]

The Court has not adjudicated on the right to health at great length yet and has only passingly discussed the rights of mothers and children in a 2020 ruling.[43] The Court found the applicants' claim unsubstantiated, which alleged that the provision in question encompasses the state's obligation to provide social assistance and aid in finding employment for persons protected under this provision.

4. THE COURT ON EQUALITY AND DIGNITY IN SOCIAL MATTERS

In sharp contrast with substantive social rights in the constitution, the Court has developed considerable case-law with respect to equality in matters of social nature. Many cases concerning substantive social provisions also include the claims of discrimination. For instance, the *Darbinian and others* case also disputed the constitutionality of the rule barring non-citizens from receiving funding for primary education with respect to the non-discrimination norm.[44] The Court determined that this differentiation was characterized by high intensity and applied a strict test of scrutiny, which the legitimate aim of preserving limited budgetary resources could not pass. Consequently, the rule was found unconstitutional in this account as well.[45] Similarly, in the case *Lezhava and Rostomashvili v. Parliament* the applicants claimed that, besides their labour rights, the rule providing for different maximum weekly hours of work for specific regime

[40] Judgment of the Constitutional Court of Georgia of 4 October 2013 - *Citizen of Georgia Giorgi Gachechiladze v. the Parliament of Georgia* (N2/1/524), II para. 20, available at: <https://constcourt.ge/ka/judicial-acts?legal=433> (accessed 1.7.2021).

[41] Judgment of the Constitutional Court of Georgia of 14 December 2018 - *N(N)LE 'Green Alternative' v. the Parliament of Georgia* (N3/1/752), available at: <https://constcourt.ge/ka/judicial-acts?legal=1192> (accessed 1.7.2021).

[42] Judgment of the Constitutional Court of Georgia of 14 December 2018 - *N(N)LE 'Green Alternative' v. the Parliament of Georgia* (N3/1/752), available at: <https://constcourt.ge/ka/judicial-acts?legal=1192> (accessed 1.7.2021).

[43] Recording Notice of the Constitutional Court of Georgia of 5 June 2020 - *Elga Maisuradze, Irma Ginturi and Leri Todadze v. the Parliament of Georgia* (N1/7/1320), available at: <https://constcourt.ge/ka/judicial-acts?legal=9517> (accessed 1.7.2021).

[44] Judgment of the Constitutional Court of Georgia of 12 September 2014 - *Citizens of Russia Oganes Darbinian, Rudolf Darbinian, Susanna Jamkotsian and Citizens of the Republic of Armenia Milena Barseghian and Lena Barseghian v. the Parliament of Georgia* (N 2/3/540), II paras. 15–21, available at: <https://constcourt.ge/ka/judicial-acts?legal=907> (accessed 1.7.2021).

[45] Judgment of the Constitutional Court of Georgia of 12 September 2014 - *Citizens of Russia Oganes Darbinian, Rudolf Darbinian, Susanna Jamkotsian and Citizens of the Republic of Armenia Milena Barseghian and Lena Barseghian v. the Parliament of Georgia* (N 2/3/540), II paras. 36–55, available at: <https://constcourt.ge/ka/judicial-acts?legal=907> (accessed 1.7.2021).

enterprises (48 hours) and regular types of work (40 hours) also violated their right to equality. The Court determined that the norm differentiated on the ground of the nature of work and, as the intensity of differentiation was not high, the rational basis test was applied in the case. The Court determined that the disputed rule existed based on the objective needs of specific types of enterprises (with specific work regimes) and did not deem the norm discriminatory.[46]

Another case involving discrimination, that has been discussed in this article, was the *Tandashvili* case. The judgment on this case dealt with the rule that excluded those persons from registering in the registry for the socially vulnerable families, who were unlawfully residing in state-owned spaces. The rule did not cover already registered people, it applied to future registrations instead, including the registration of the applicant of the abovementioned case. While discussing the right to equality, the Court ruled that the registration in the registry for socially vulnerable families was the only way to receive social assistance and other welfare benefits related to this status, and applied the strict scrutiny test in the case. While considering the legitimate aim of protecting state property, the Court did not find the differentiation between comparable groups suitable to achieving this aim and pointed out that both - depriving already registered persons and restricting future registrations would have similarly severe economic implications. Therefore, the Court deemed the norm discriminatory and declared it unconstitutional.[47] However, the novelty of this judgment was the fact that it applied the right to dignity to social welfare matters. It was clear in the case, that the state leveraged social assistance to push the applicant and other persons in a similar situation out of the state properties. As a result, this rule effectively imposed a diabolical choice between subsistence funds and housing for these persons. The Court ruled that this violated the right to dignity and its central requirement that humans cannot be used as instruments to achieve goals.[48]

The Court also considered the differentiation in the amount of social assistance for children. On the one hand, the Court observed the difference between the reintegration allowance and foster care payment and, on the other hand, it examined the differentiation between the reimbursement of child care costs of biological and foster families.[49] While

[46] Judgment of the Constitutional Court of Georgia of 19 April 2016 - *Citizens of Georgia Ilia Lezhava and Levan Rostomashvili v. The Parliament of Georgia* (N2/2/565), II paras. 1–31, available at: <https://constcourt.ge/ka/judicial-acts?legal=1077> (accessed 1.7.2021).

[47] Judgment of the Constitutional Court of Georgia of 11 May 2018 - *Citizen of Georgia Tamar Tandashvili v. the Government of Georgia* (N2/3/663), II paras. 2–38, available at: <https://constcourt.ge/ka/judicial-acts?legal=960> (accessed 1.7.2021).

[48] Judgment of the Constitutional Court of Georgia of 11 May 2018 - *Citizen of Georgia Tamar Tandashvili v. the Government of Georgia* (N2/3/663), II paras. 39–54, available at: <https://constcourt.ge/ka/judicial-acts?legal=960> (accessed 1.7.2021).

[49] Judgment of the Constitutional Court of Georgia of 28 October 2015 - *Public Defender of Georgia v. the Government of Georgia* (N2/4/603), available at: <https://constcourt.ge/ka/judicial-acts?legal=661> (accessed 1.7.2021).

defining the scope of the issue at hand, the Court drew on the international human rights law (IHRL) and stated that the state is obligated to ensure minimum conditions for the raising and development of a child and for its subsistence, but the form of assistance depends on the necessities of the child based on the best interests of the child.[50] In this reasoning, the differences in social assistance were considered reasonable, as they served to create familial conditions for children in need and, therefore, the application was not granted.

The Court has also reviewed the differentiating rule that entitled some persons to a full package of social security under the Universal Healthcare program, and some to only a partial one.[51] The Court considered the harsh socio-economic reality in the country and noted that affordability of healthcare is essential, as the failure in this sense might result in dire or irreversible consequences.[52] The Court pointed out that the state is afforded a wide margin of appreciation in determining the healthcare policy, but it is obligated to provide the selected one on the basis of equality.[53] In response to the state's argument of limited and exhaustible budgetary resources, the Court noted the significance of the Universal Healthcare program and stated that, as this can serve as a justifiable legitimate aim at times, only budgetary considerations cannot serve as an absolution card.[54] Considering the potential impacts on the applicants' health, the Court held that this differentiation was not justifiable and rendered the norm unconstitutional.

However, the Court considered budgetary constraints and the minimization of spending as reasonable justifications in another case. In the case concerning welfare and other types of benefits for residents of high mountainous regions,[55] the Court ruled that the exclusion of permanent resident non-citizens from receiving these benefits was constitutional. In this case, likewise, the Court stated that increasing budgetary

[50] Judgment of the Constitutional Court of Georgia of 28 October 2015 - *Public Defender of Georgia v. the Government of Georgia* (N2/4/603), II paras. 20–21, available at: <https://constcourt.ge/ka/judicial-acts?legal=661> (accessed 1.7.2021).

[51] Judgment of the Constitutional Court of Georgia of 25 October 2017 - *Citizens of Georgia Roin Gavashelishvili and Valeriane Migineishvili v. the Government of Georgia* (N1/11/629, 652), available at: <https://constcourt.ge/constc/public/ka/judicial-acts?legal=1091> (accessed 1.7.2021).

[52] Judgment of the Constitutional Court of Georgia of 25 October 2017 - *Citizens of Georgia Roin Gavashelishvili and Valeriane Migineishvili v. the Government of Georgia* (N1/11/629, 652), II para. 13, available at: <https://constcourt.ge/constc/public/ka/judicial-acts?legal=1091> (accessed 1.7.2021).

[53] Judgment of the Constitutional Court of Georgia of 25 October 2017 - *Citizens of Georgia Roin Gavashelishvili and Valeriane Migineishvili v. the Government of Georgia* (N1/11/629, 652), II para. 13, available at: <https://constcourt.ge/constc/public/ka/judicial-acts?legal=1091> (accessed 1.7.2021).

[54] Judgment of the Constitutional Court of Georgia of 25 October 2017 - *Citizens of Georgia Roin Gavashelishvili and Valeriane Migineishvili v. the Government of Georgia* (N1/11/629, 652), II paras. 31–37, available at: <https://constcourt.ge/constc/public/ka/judicial-acts?legal=1091> (accessed 1.7.2021).

[55] Judgment of the Constitutional Court of Georgia of 7 December 2018 - *Citizens of the Republic of Armenia Garnik Varderesian, Artavazd Khachatrian and Ani Minasian v. the Parliament of Georgia* (N2/9/810, 927), available at: <https://constcourt.ge/ka/judicial-acts?legal=1174> (accessed 1.7.2021).

expenses cannot solely be the justifying argument for differentiation.[56] However, the Court indicated that the strong legal links of citizenship provided more certainty for citizens to remain in the country, whereas permanent residents can be expelled. Consequently, the Court considered that differentiation was reasonable as the state had a higher expectation that citizens would remain on the territory and, hence, the result of these investments would be better for the development of high mountainous regions.

5. THE COURT ON SOCIAL MATTERS (IN SUM)

Regardless of the minimalist constitutional approach to social rights, the Court has developed its own approach and standards to constitutional provisions of social nature. These standards are more concrete and elaborate for the cases that are of negative nature and do not require the state to go an extra mile. Examples of this are the cases concerning labour rights or the right to a healthy environment. At the same time, the Court's case-law is relatively extensive on inclusion in social matters, and, with few exceptions, the Court has annulled discriminatory norms that excluded groups such as non-citizens, persons in need of healthcare or economic assistance, and, in this way, guaranteed the protection of social rights for the vulnerable. The *Tandashvili* case has also sown the seeds for future litigations on social rights and issues from the angle of the right to dignity.

However, the Court's case-law also demonstrates a cautious approach to social rights that involve a financial burden for the state: The Court never fails to indicate a wide margin of appreciation and show deference in such cases. At the same time, the case-law almost always connects social provisions with the constitutional principle of the social state and, as it should normally convey the significance of social provisions, the Court employs this connection at times to establish a hierarchy between fundamental rights and social provisions, implying that they are not really rights. Moreover, while the case-law on the rights to equality and dignity in social welfare matters is promising, it has significant limitations for upholding social rights.

The right to equality in the Constitution entails discrimination analysis and it can only be used to secure substantive social guarantees by eradicating the exclusion of vulnerable groups. Moreover, the Court applies the rational basis and strict scrutiny tests to assess differentiation, and whereas the latter is a classic proportionality test, to pass the former, the state just needs to provide a reasonable explanation for differentiation. The reasons linked to limited budgetary resources can serve as a reasonable explanation

[56] Judgment of the Constitutional Court of Georgia of 7 December 2018 - *Citizens of the Republic of Armenia Garnik Varderesian, Artavazd Khachatrian and Ani Minasian v. the Parliament of Georgia* (N2/9/810, 927), II para. 24, available at: <https://constcourt.ge/ka/judicial-acts?legal=1174> (accessed 1.7.2021).

for differentiation and have resulted in maintaining the *status quo* of the exclusion of vulnerable groups from welfare assistance and benefits. For the mistreatment to be considered under the right to dignity, on the other hand, it has to be of extremely high intensity, to the extent that the disputed norm uses humans as an instrument to achieve a goal. Therefore, as the dignity and equality scrutiny can handle a portion of social issues, they cannot ensure the full realization of social rights.

The reasons behind the Court's cautious and wary approach to social rights and matters are well articulated in the Dissenting Opinion of the justices *Ketevan Eremadze* and *Besarion Zoidze* in a 2009 case.[57] They underline the conceptual and practical challenges that courts face while reviewing cases concerning social matters. They acknowledge that courts face the risk of violating the separation of powers and entering the territory of economic policy-making, and point out that the judges are often not competent to adjudicate on complex matters of social nature. These challenges of justiciability on social matters are not only limited to the Georgian constitutional tradition and have been discussed by judges and scholars for decades. The following sections of the article discuss these challenges and their implications and suggest ways to overcome or outmaneuver them.

IV. THE JUSTICIABILITY OF SOCIAL RIGHTS

1. CHALLENGES

Adjudication on (economic and) social rights has long been at the center of discussion among judicial practitioners and scholars, including in this journal. In an article published in 2019,[58] one of the most esteemed constitutional scholars of our time, *András Sajó* argued against extensive judicial interference in social matters and pointed to the risks of justiciability resulting in policy settings that have direct budgetary implications.[59] According to *András Sajó,* this is a strictly legislative and executive function, constrained by the principle of democratic accountability and dependent on the specific socio-economic circumstances. The judiciary does not meet these criteria, since democratic accountability does not apply to the judges as a rule, and they do not have expertise regarding welfare policies and budgetary matters.[60] On this basis, the

[57] Dissenting Opinion of the justices – *Eremadze* and *Zoidze* - regarding the reasoning part of the Judgment of the First Chamber of the Constitutional Court of Georgia of 27th August 2009 (N1/2/434), paras. 6–10, available at: <https://constcourt.ge/ka/judicial-acts?legal=366> (accessed 1.7.2021).

[58] *Sajó A.,* Possibilities of Constitutional Adjudication in Social Rights Matters, Journal of Constitutional Law 1, 2019, p. 7. The article was published in 2019, but it was prepared and presented in 2009 and might not reflect author's contemporary views.

[59] *Sajó A.,* Possibilities of Constitutional Adjudication in Social Rights Matters, Journal of Constitutional Law 1, 2019, pp. 13–14.

[60] *Sajó A.,* Possibilities of Constitutional Adjudication in Social Rights Matters, Journal of Constitutional Law 1, 2019, pp. 14–15.

article rejects the appropriateness of individual justiciability on substantive social rights and calls on courts to employ other strategies while adjudicating, such as discrimination analysis.[61] While making some refutable claims too,[62] the article put forward theoretical challenges to social rights justiciability that have created conundrums in the case-law of the Georgian Constitutional Court. Moreover, the article's recipe of how courts should adjudicate on social matters correlates with the past years' developments in the Georgian Constitution (weakening of social rights after the 2018 amendments) and approaches of the Court as well..

Some scholars argue that many theoretical issues with the justiciability and enforceability of social rights stem from the fictional separation of human rights into CP and ESC rights.[63] This view establishes a hierarchy between the two sets of rights and proclaims that ESC rights are not legal or fundamental rights, but rather directives and policy objectives. *Katie Boyle*[64] refers to this as a 'false dichotomy' and points to the foundational principles of universality and indivisibility of the rights to establish that IHRL does not provide this hierarchy of rights.[65] She further elaborates on theoretical objections to the justiciability of social rights and categorizes them into three main types:[66] 1) *Anti-democratic critique* – questions the legitimacy of judicial interference into social matters and resource allocation based on the principle of the separation of powers; 2) *The indeterminacy critique* – points to the vagueness of ESC rights and claims that their substantive interpretation should not be left up to the judiciary; 3) *The capacity critique* – argues that the courts do not have the capacity and expertise to deal with complex socio-economic issues and the areas of governance related to them;

However, civil and political rights can also be costly and require resource allocation, for instance, the right to a fair trial or other rights might require setting up expensive enforcement mechanisms. Furthermore, courts often refer to external sources of information and expertise to deal with all types of cases. The Constitutional Court of Georgia has involved experts in its decision-making process of the cases on drug offences or blood donation.

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[61] *Sajó A.,* Possibilities of Constitutional Adjudication in Social Rights Matters, Journal of Constitutional Law 1, 2019, p. 25.

[62] For instance, the article proclaims that extensive enforcement of social rights goes against the principles of free market and non-subordination of one person to another. *Sajó A.,* Possibilities of Constitutional Adjudication in Social Rights Matters, Journal of Constitutional Law 1, 2019, pp. 11–12.

[63] *Tinta M. F.,* Justiciability of Economic, Social, and Cultural Rights in the Inter-American System of Protection of Human Rights: Beyond Traditional Paradigms and Notions, Human Rights Quarterly 2(29), 2007, pp. 431, 432–438.

[64] *Boyle K.,* Economic and Social Rights Law: Incorporation, Justiciability and Principles of Adjudication, 2019.

[65] *Boyle K.,* Economic and Social Rights Law: Incorporation, Justiciability and Principles of Adjudication, 2019, pp. 46–48.

[66] *Boyle K.,* Economic and Social Rights Law: Incorporation, Justiciability and Principles of Adjudication, 2019, pp. 13–16.

Besides, the separation of powers principle does not entail a complete separation; its essential requirements constitute a proper system of checks and balances and accountability mechanisms between the branches. In this sense, judicial supervision over social matters is a requirement of this principle, as explained in the dissenting opinion of the justices *Ketevan Eremadze* and *Besarion Zoidze*.[67] Finally, regardless of the challenges, justiciability of social issues and rights is a requirement of the international legal setting: social rights are human rights, and their full realization requires judicial oversight and the corresponding access to remedy for individuals.[68] Therefore, the contemporary question is not whether social rights are justiciable or not, but rather how the courts can overcome the abovementioned challenges and adjudicate on cases concerning social matters. The next subsection of the article provides an overview of the potential approaches the Constitutional Court of Georgia can employ for this purpose.

2. POTENTIAL APPROACHES FOR OVERCOMING CHALLENGES

The question of how the courts should approach social matters does not have a definitive answer as there is no consensus among judiciaries. Scholars distinguish three main approaches of judicial review: strong, weak and intermediate review systems. The strong review systems recognize social rights as justiciable, directly enforceable human rights, whereas weak review systems entail great deference to executive and legislative branches.[69] The intermediate review systems recognize justiciability and enforceability, but also include more flexible instruments of review.[70] Others distinguish between the deferential and managerial judicial review systems.[71] These typologies serve to better understand different review systems theoretically, but in reality, the approaches might differ on a case-by-case basis. The case-law of the Georgian Constitutional Court demonstrates the variability of approaches: in some cases, the Court has denied

[67] Dissenting Opinion of the justices – *Eremadze* and *Zoidze* - regarding the reasoning part of the Judgment of the First Chamber of the Constitutional Court of Georgia of 27th August 2009 (N1/2/434), paras. 6–10, available at: <https://constcourt.ge/ka/judicial-acts?legal=366> (accessed 1.7.2021).

[68] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 9: The domestic application of the Covenant, 3 December 1998, E/C.12/1998/24, para. 4, available at: <https://www.refworld.org/docid/47a7079d6.html> (accessed 1.7.2021).

[69] *Tushnet M.,* Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights, Comparative Constitutional Law, 2009, pp. 22–31.

[70] *Rodríguez-Garavito C., Rodríguez-Franco D.,* Radical Deprivation on Trial: The Impact of Judicial Activism on Socioeconomic Rights in the Global South, 2015, pp. 10–12, available at: <https://www.cambridge.org/core/books/radical-deprivation-on-trial/E5288EDB3B74666BBD62542C5B256F0F> (accessed 15.6.2021).

[71] *Young K. G.,* Constituting Economic and Social Rights, 2012, pp. 142–166, available at: <https://oxford.universitypressscholarship.com/view/10.1093/acprof:oso/9780199641932.001.0001/acprof-9780199641932> (accessed 15.6.2021).

justiciability of social rights altogether, whereas in other cases it has adopted the strict scrutiny test and invoked the absolute right to dignity in connection with social issues for the vulnerable. In this context, it might be more appropriate to identify potential theories and concepts that the Court can apply while adjudicating on social matters.

As determined through the analysis of the Georgian constitutional framework of social rights, only a few substantive rights remain in the Constitution that can be adjudicated on by the Constitutional Court on the basis of individual applications; the main avenue of constitutional redress is the right to equality, and the Court has developed a novel approach by reviewing and declaring a norm of social nature unconstitutional with respect to the right to dignity. The consideration below takes this as a basis for further analysis of the internationally recognized theories, concepts and interpretation methods.

The concept of minimum core obligations (MCO) has emerged through the interpretations of the content of the ICESCR. MCO refers to the state's obligation to ensure, at the very least, minimum essential levels of substantive social rights and if it fails to do so, the violation of substantive social rights is found. However, MCO is directly connected to the state's resources, but the state must prove that due to the lack of available resources, it is unable to meet MCO for a specific right.[72] For instance, MCO for the right to education includes non-discrimination in access to public education, providing primary education for all, adopting a national educational strategy and ensuring free choice of education in conformity with 'minimum educational standards.'[73] MCOs for the right to just and favourable conditions of work include: non-discrimination, establishing legislative minimum wages, establishing a national policy on occupational safety and health, minimum standards of rest, leisure, reasonable limitation of working hours, paid leave and public holidays, etc.[74] MCOs for the right to the highest attainable standard of health include the non-discrimination in the access to healthcare, access to the minimum essential food and freedom from hunger to everyone, access to basic shelter, housing, and an adequate supply of safe and potable water, provision of essential drugs, etc.[75] Apart from MCOs, while defining the scope of specific rights, it can be useful to draw

[72] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, para. 1of the Covenant), 14 December 1990, E/1991/23, para. 10, available at: <https://www.refworld.org/pdfid/4538838e10.pdf> (accessed 15.6.2021).

[73] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 13: The Right to Education (Art. 13 of the Covenant), 8 December 1999, E/C.12/1999/10, para. 57, available at: <https://www.refworld.org/docid/4538838c22.html> (accessed 15.6.2021).

[74] UN Committee on Economic, Social and Cultural Rights (CESCR), General comment No. 23 (2016) on the right to just and favourable conditions of work (Article 7 of the International Covenant on Economic, Social and Cultural Rights), 7 April 2016, E/C.12/GC/23, para. 65, available at: <https://www.refworld.org/docid/5550a0b14.html> (accessed 15.6.2021).

[75] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), 11 August 2000, E/C.12/2000/4, para. 43, available at: <https://www.refworld.org/pdfid/4538838d0.pdf> (accessed 15.6.2021).

on the authoritative definitions of international corresponding provisions, such as the constitutive elements of Availability, Accessibility, Acceptability and Quality (AAAQ) for the right to health.[76]

The Constitutional Court is not obligated to implement the IHRL standards in its case-law, on contrary, it is solely bound by the Constitution of Georgia. However, the international law standards and the comparative analysis can often aid the national judicial review in interpreting and defining the scope of rights in the absence of corresponding case-law. This is not unusual for the Constitutional Court either, because it has referred to and drawn on international human rights treaties at times, including the ICESCR. At the same time, it is not necessary to copy international standards unchanged, they can be modified to fit in the domestic context. For instance, the Constitutional Court of Columbia has adopted a modified MCO standard in the form of a 'vital minimum' for ESC rights.[77] The Indian Supreme Court employs the phrase 'the essential minimum of the right' to convey the same content and principle.[78]

However, in other examples, the courts have opted not to apply MCO in their jurisdiction, for instance, the Constitutional Court of South Africa has explicitly refused to implement the MCO standard in its landmark case *Grootbroom v. the Government of South Africa*.[79] The Court noted that the constitutional right of adequate housing and the corresponding ICESCR provision differed in a way, that the latter provided for more extensive guarantees. The Court employed the reasonableness test instead to assess whether the state's actions were reasonably sufficient in order to meet the constitutional obligation. The state was found in violation of its obligation to progressively realize the right.[80] However, this case has been severely criticized as it did not provide for an individual remedy.[81]

[76] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), 11 August 2000, E/C.12/2000/4, para. 12, available at: <https://www.refworld.org/pdfid/4538838d0.pdf> (accessed 15.6.2021).

[77] *Landau D.,* The Reality of Social Rights Enforcement, Harvard International Law Journal 1(53), 2012, pp. 207–209.

[78] *Chowdhury J.,* Judicial Adherence to a Minimum Core Approach to Socio-Economic Rights – A Comparative Perspective, Cornell Law School Inter-University Graduate Student Conference Paper 27, 2009, p. 9, available at: <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1055&context=lps_clacp> (accessed 15.6.2021).

[79] Judgment of the Constitutional Court of South Africa of 4 October 2000 – *Government of the Republic of South Africa and Others v. Grootboom and Others*, 2000 (11) BCLR 1169 (CC), case CCT11/00, available at: <https://collections.concourt.org.za/handle/20.500.12144/2107> (accessed 1.7.2021).

[80] *Boyle K.*, Economic and Social Rights Law: Incorporation, Justiciability and Principles of Adjudication, 2019, pp. 122-124.

[81] *Boyle K.,* Economic and Social Rights Law: Incorporation, Justiciability and Principles of Adjudication, 2019, p. 124; *Fuo O.,* In the Face of Judicial Deference: Taking the 'Minimum Core' of Socio-Economic Rights to the Local Government Sphere, Law, Democracy & Development 19, 2015, p. 1.

Beyond the substantive social rights, the Constitutional Court of Georgia can protect social rights via the right to equality. In this direction, the Court has a well-developed and promising case-law, but some deficiencies can also be identified, in particular when the case is assessed through the rational basis test. In this regard, the case concerning welfare and other benefits for the residents of high mountainous regions[82] should be mentioned. Arguably, the Court failed to acknowledge the full context, magnitude and implications for systemic inequality between citizens and non-citizens in this case.[83] To ensure that equality analysis factors in the full social and economic context, the Court can model its analysis in accordance with the theory of substantive equality. The advantage of this theory is the fact that it shifts the spotlight to the disadvantaged and aims to account for the full picture of inequality. Its core principle can be summed up as 'the basic principle that the right to equality should be located in the social context, responsive to those who are disadvantaged, demeaned, excluded, or ignored.'[84] The courts in South Africa, Canada and the UK have employed the substantive equality standard to decide on differentiation in matters of social nature.[85]

Finally, the case of *Tandashvili* has created a novel avenue for redress in social matters. In this sense, dignity is closely connected to substantive equality, restorative justice and equity, and guarantees the most basic elements of the right to an adequate standard of living. For example, the Constitutional Court of Germany applied the right to dignity (read together with the principle of the social state) to the subsistence minimum and elaborated that human dignity entails material conditions necessary for physical existence and minimum participation in social, cultural and political life.[86] Such progressive judicial interpretation of the right to dignity can facilitate the protection of the most basic social security and welfare rights that are absent from the Constitution of Georgia.

[82] Judgment of the Constitutional Court of Georgia of 7 December 2018 - *Citizens of the Republic of Armenia Garnik Varderesian, Artavazd Khachatrian and Ani Minasian v. the Parliament of Georgia* (N2/9/810, 927), available at: <https://constcourt.ge/ka/judicial-acts?legal=1174> (accessed 1.7.2021).

[83] *Arevadze N.,* Substantively Close, Legislatively Afar: Disparities between Citizens and Permanent Residents in Georgia, pp. 48–50.

[84] *Fredman S.,* Substantive Equality Revisited, International Journal of Constitutional Law 3(14), 2016, pp. 712–713.

[85] *Fredman S.,* Providing Equality: Substantive Equality and the Positive Duty to Provide, South African Journal on Human Rights, 2(21), 2005, pp. 163, 172–184.

[86] *Boyle K.,* Economic and Social Rights Law: Incorporation, Justiciability and Principles of Adjudication, 2019, p. 135.

V. CONCLUSION

Since the creation of the international human rights law, justiciability and enforceability of social rights have always been contentious conceptual and practical issues. Classical critiques that questioned, whether social rights constitute human rights, have long been addressed and refuted, and the views of non-justiciability of social rights are considered outdated.[87] However, the courts still face challenges while adjudicating on social rights and the central question remains undecided: what is the appropriate and necessary judicial interference into social policy and when does it become an overreach contrary to the separation of powers? Not knowing the answer, judicial institutions often adopt a cautious and deferential approach in the cases concerning social matters and, in particular, resource-intensive issues such as welfare benefits. The Constitutional Court of Georgia is not an exclusion from this general rule: it too has developed a restrained approach to social matters. The Court always emphasizes that the state enjoys wide discretion in social and economic policy-making and resource-allocation. However, the Court has also developed promising and progressive standards and has guaranteed social rights to the disadvantaged and vulnerable.

In light of the minimalist constitutional approach to social rights, the case-law of the Constitutional Court can serve as a foundation for future cases and interpretations that extensively protect the social rights and interests of the most disadvantaged. However, the Court will need to adopt a consistently bolder stance on social issues, examples of which have already been demonstrated in several cases discussed above. This will require a more standardized and comprehensive approach and the concepts and theories offered by this article can serve as points of departure. By interpreting substantive social rights in line with IHRL interpretations, adopting a substantive equality perspective and expanding the scope of the right to dignity, the Court will be able to overcome the challenges linked with justiciability of the social rights and take the constitutional practice of social rights protection to another level.

[87] *Boyle K.,* Economic and Social Rights Law: Incorporation, Justiciability and Principles of Adjudication, 2019, p. 18.