*Revaz Khoperia**

ACADEMIC FREEDOM AS A CONSTITUTIONALLY GUARANTEED RIGHT

(COMPARATIVE LEGAL ANALYSIS BASED ON THE LAW OF GERMANY, THE UNITED STATES AND GEORGIA)

ABSTRACT

The external control of the educational institutions for political purposes had been a regular practice in the Soviet Union. As a result, political propaganda used to substitute the reality. Any opinion contradicting the established regime was prohibited, punished and banned from the educational institutions.

Prior to the forced Sovietization of Georgia, there were progressive safeguards established to ensure freedom in the field of education. Freedom of teaching was recognized by the Constitution. However, the rule enshrined in the first Constitution on academic freedom has never been applied in practice due to the conquest of Georgia by Russia.

After the restoration of independence, the 1995 Constitution set forth the right of education. However, in contrast to the first Constitution, it did not enshrine the rule on the freedom of teaching and research. The recent constitutional amendments recognized academic freedom as a constitutional right and hence it gained more importance to realize the legal substance of academic freedom.

This article reviews the importance of academic freedom, as a constitutionally guaranteed right, as well as its substance and standards of restriction on the basis of analysis of legislation, the opinions in the academic literature and the case law of the Federal Republic of Germany, the United States of America and Georgia.

I. INTRODUCTION

The external control of the educational institutions for political purposes used to be a well-established practice. The outcomes of this control were relatively insubstantial at times, but at other times it led to the substitution of reality with political propaganda. When education is controlled by the political opinion, whatever the governing political power decides, becomes reality and any other opinion, which contradicts the established

* Doctor of Law (LL.M.), Dean of the Law School, Free University of Tbilisi [rkhoperia@gmail.com]

regime, maybe be prohibited, punished and excluded, no matter how useful such an opinion is. To demonstrate the outcomes of the interference with academic freedom, it would be insightful to illustrate the example of *Trofym Lysenko*. *Trofym Lysenko* was an unswerving follower of political dogmas and beliefs. He achieved the trust of *Joseph Stalin* with unstudied and unverified, but politically favorable theories. Using his power, he managed to practice his theories in the whole Soviet Union and despite the disastrous consequences, the Soviet press made *Trofym Lysenko* look like a genius. As an additional illusory proof of the verity of his practice and opinions, *Trofym Lysenko* was provided with his own 'scientific journal'. Any scholar, who would dare to check the truthfulness of *Trofym Lysenko's* theories, was subjected to an attack as a sympathizer of the West. Any scholar holding opposite opinions was excluded from the scientific and educational institutions controlled by the government. The Soviet Government declared it illegal to change *Trofym Lysenko's* theories. The scholars, who followed a different practice or held different opinions, were arrested and sentenced to death. The main academic opponent of *Trofym Lysenko* was starved to death in prison.[1]

The pre-Lysenkoist Georgia had introduced very progressive safeguards, *inter alia*, in the field of education. The freedom of teaching was recognized by the Constitution. However, due to the short period of existence of the independent Georgian State and the forced Sovietization, the constitutional rule on academic freedom has never been applied in practice.

After the demolition of the Soviet Union and the regaining of independence, the newly adopted Constitution enshrined the right to receive education. However, in contrast to the first Constitution, the Constitution did not mention the independence of teaching and research. Hence, it raised the question, whether or not the applicable constitutional rules implicitly protected academic freedom. For example, it was questionable, whether or not the duty of harmonization of the Georgian educational system within the international educational space and the duty to support the educational institutions included the duty of guaranteeing and promoting academic freedom. These questions lost their relevance after the recent constitutional amendments, as a result of which academic freedom was recognized as a constitutional right.

In view of this, it became even more important to define the legal substance of academic freedom. This article aims to discuss the importance, substance and standards of the restriction of academic freedom, as a constitutionally guaranteed right using the method of comparative legal analysis. This article reviews the legislation, scholarly opinions and the case law of the Federal Republic of Germany, the United States of America (hereinafter 'the U.S.') and Georgia.

[1] *Dayton J.*, Education Law – Principles, Policies, and Practice, 2012, pp. 185-188.

II. THE SIGNIFICANCE OF ACADEMIC FREEDOM

Academic freedom is a specific right and it is related to teaching, learning and scientific pursuit of truth in the process of research. Academic freedom is not a newly found good and is a least as old as the traditions of the *Platonic academy*.[2] An educational institution cannot produce useful public resource if devoid of academic freedom. The useful resource is produced only in the environment, which is free from interference and the restrictions of opinions and expressions of the academic staff for administrative, political or religious purposes.[3]

Quality education involves challenging the accepted opinions and the questioning of well-established doctrines. There is an opinion that good teachers will always be hated by the conservative part of the society, as they will criticize the dominant opinions. However, there is also an opposite opinion, according to which, the function of education is to understand and maintain the existing knowledge and role of a teacher is to convey the values established by the previous generation to the next generation. This is how the society preserves itself. They, who challenge the basic values of society, will be ostracized and punished not only to protect the young generation, but also to warn others. The tensions caused by these conflicting attitudes are tangible in the U.S. educational system, including the legal evaluations of educational institutions.[4]

Academic Freedom has three components: 1. Freedom of research; 2. Freedom of teaching; 3. Freedom to express ideas and to act beyond the walls of educational institutions. Academic freedom involves the freedom of ideas, research, analysis, discussion, presentation of problems, examination of theories in the sister or related disciplines. In other words, it is a right to express one's opinions freely in the field of one's interest and research. Academic freedom allows a teacher and a researcher to study and judge problems in the field of their interest and to publish their findings about them, to present their opinions and conclusions to their students. No external interference is allowed in this process. Academic freedom is the right of a student to learn and right of a teacher to teach in the classroom in a way that is free from interference and to exercise this right beyond the classroom. Academic Freedom allows the student to have access to conflicting opinions and to learn how to distinguish the facts and opinions as well as to be inspired with the passion for the pursuit of truth. Academic freedom is the right to teach free of external interferences. Academic freedom makes it possible for teachers to express their opinions without fear of censure and dismissal from one's work. In addition to academic freedom, teachers are entitled to the freedom of speech,

[2] *Dayton J.,* Education Law – Principles, Policies, and Practice, 2012, p. 185.
[3] 'Developments in the Law - Academic Freedom', Harvard Law Review 81 (5), 1968, p. 1048.
[4] *Sheppard S.,* Academic Freedom: A Prologue, Arkansas Law Review 2, 2012, pp. 177-178.

publication and assembly, as well as the right to support an organized movement, that in their belief, may promote their or public interests.[5]

III. ACADEMIC FREEDOM IN THE FEDERAL REPUBLIC OF GERMANY

1. THE REGULATION PROVIDED BY THE BASIC LAW [CONSTITUTION]

The modern conception of academic freedom has been formed in 19th century Germany, based on the merger of two conceptions: the freedom of learning (Lernfreiheit) and the freedom of teaching (Lehrfreiheit). Academic freedom in Germany allowed professor to express their opinions without fear and at the same time it provided for the mileau of harmony and accord in the process of research and teaching.[6]

According to the current Constitution (Basic Law) of Germany, sciences, research and teaching are free.[7] This constitutional rule protects teaching based on science. However, 'unscientific' teaching is not left without constitutional protection. Such a protection is provided under Article 12, Paragraph 1 or Article 2, Paragraph 1 of the Basic Law. Science-based teaching involves teaching within or outside universities by the people, who at the same time pursue academic research. The association of science and teaching serves the goal of providing quality education to the students. It is in the interests of the students to involve only those in the higher education teaching, who can follow the progress in the specific field of science and convey that knowledge.[8]

The freedom of science (Wissenschaftsfreiheit), guaranteed by the German Constitution, applies against the public authorities in the first place. It is exactly the public bodies, which are restrained by this right. Individual scholars may base their claims on this constitutional norm in their relationship with the (state) universities or their bodies. Moreover, it is noteworthy, that the constitutional norm on the freedom of science, research and teaching should be considered as *lex specialis* with regards to Article 3, Paragraph 1 of the Basic Law, while in case of the occupational freedom Article 5, Paragraph 2 of the Basic Law should prevail. However, if the main issue of the dispute involves the occupational freedom, then the constitutional rule on the right to freely choose one's profession will apply in the light of the constitutional norm on freedom of science.[9]

[5] *Johnsen J. E.*, Freedom of Speech, 1936, pp. 131-135.
[6] *Tisdel R. P.,* Academic Freedom – Its Constitutional Context, University of Colorado Law Review 40 (4), 1968, pp. 600-601.
[7] *Jarass H. D., Pieroth B.,* Grundgesetz für die Bundesrepublik Deutschland, Kommentar, 10. Auflage, 2009, p. 173 (Commentary on Article 5, Paragraph 3).
[8] *Hartmer M., Detmer H.,* Hochschulrecht, Ein Handbuch für die Praxis, 2004, p. 29.
[9] *Jarass H. D., Pieroth B.,* Grundgesetz für die Bundesrepublik Deutschland, Kommentar, 10. Auflage, 2009, p. 219.

The constitutions and the higher education laws of the federal lands of Germany contain rules on academic freedom similar to the rule in the Basic Law.[10]

2. THE SCOPE AND THE SUBJECTS OF THE RIGHT

The scope of the constitutional right to freedom of science includes the processes, practices and decisions based on scientific work, which aims at the comprehension, explanation and dissemination of knowledge. Science is characterized by methodically organized thinking and critical observation. However, it should not be inferred that the scientific methods and outcomes are always correct. It should be noted that the term 'science' has a broad meaning and includes both research and teaching.[11] The scope of the constitutional right to freedom of science includes scientific judgement and practice and not the scientific support of political goals, which itself is duly protected under the freedom of expression.[12]

The subject of academic freedom is any person, who pursues scientific work under their own responsibility or wishes to do so. The scope of this right does not only include the teachers of the higher educational institutions. Students also fall within the ambit of this right, if they pursue scientific work, for example when they work on essays and theses to acquire respective degrees. Tutors are not considered subjects of this right, as they do not undertake the work under their own responsibility independently. The freedom of science also applies to legal persons, which carry out scientific work. This includes private higher education institutions, however, it applies to the higher education institutions and faculties incorporated as public law enterprises in the first place. What matters with regard to the institutions, is not the formal title or the positioning in the system, but the fact whether the institution aims to carry out scientific research in view of its structure and resources. The same is true for the public institutions, which are not universities. State foundations, which are not involved in scientific work, themselves become right holders only if they carry out autonomous work and are considered institutions promoting science.[13]

It is important, that the freedom of science also includes the right of the scientists to construe the term of science is, which means that only scientists can define what science is. Therefore, the state is not allowed to ban specific activity as 'unscientific'. It certainly does not mean the unconditional consideration of any opinion as science, however it is the academia itself, which sets the boundaries of science.[14]

[10] *Richter I.,* Recht im Bildungssystem, 2006, p. 157.
[11] *Jarass H. D., Pieroth B.,* Grundgesetz für die Bundesrepublik Deutschland, Kommentar, 10. Auflage, 2009, pp. 219-220.
[12] *Richter I.,* Recht im Bildungssystem, 2006, p. 157.
[13] *Jarass H. D./ Pieroth B.,* Grundgesetz für die Bundesrepublik Deutschland, Kommentar, 10. Auflage, 2009, p. 221.
[14] *Richter I.,* Recht im Bildungssystem, 2006, p. 158.

The freedom of science guarantees the right to produce scientific knowledge and to disseminate it free from the state interference. This right ensures the protection of the work of a right holder from the interference of public authorities, as well as the governing bodies of the university. The interference may be directed against an individual scientist or scientific unit and even an institution. The protection from any interference in the science and autonomy of the higher education institutions is guaranteed. Even the factual interference may be considered as a restriction of these constitutional rights. The organizational regulations interfere with this right if the regulation may endanger the free exercise of research and teaching, except for the case, when the interference in the field of science is inevitable in view of other constitutional rights. It is noteworthy, that the failure of the state to fulfill its duty of the protection, promotion and support of science may be considered as an interference with the constitutional right. The objective content of the constitutional norm encompasses the duty of the state to take positive measures for the development of free science and collaborate in the process of the realization of these ideas.[15]

As any other constitutional right or freedom, the freedom of science, research and teaching means the right of protection from the state interference in the first place. Moreover, the first sentence of Article 5, Paragraph 3 of the German Basic Law imposes the duty on the state to protect the freedom of science in the institutions of scientific research and teaching, and to promote it though organizational, procedural and financial support as well as.[16]

3. CASE LAW

The Constitutional Court of Germany considered the freedom of science in its landmark judgment of 1973. According to the judgement, the state has a duty to take appropriate organizational measures, which will ensure that the constitutional right to the free pursuit of scientific work will be inviolable to the extent, that is possible in view of the other legitimate aims of the scientific institutions and constitutional rights of other participants. The discretion of the legislature to regulate this field should take the necessity to ensure the right to freely carry out research by the personnel of a higher education institution on the one hand and the opportunity of the effective exercise of their functions by the higher education institution and their bodies on the other hand into account.[17]

[15] *Jarass H. D., Pieroth B.,* Grundgesetz für die Bundesrepublik Deutschland, Kommentar, 10. Auflage, 2009, p. 222.

[16] *Magers U.,* Das Verhältnis von Steuerung, Freiheit und Partizipation in der Hochschulorganisation aus verfassungsrechtlicher Sicht, 2019, p. 9.

[17] BVerfGE 35, 79 in: *Magers U.,* Das Verhältnis von Steuerung, Freiheit und Partizipation in der Hochschulorganisation aus verfassungsrechtlicher Sicht, 2019, p. 9.

In the judgment of 1995, the Constitutional Court of Germany stated, that the legislator enjoys a wide discretion with regards to the regulation of academic self-government as long as it ensures the right of self-regulation in the core field of scientific work by the subject of the constitutional right.[18]

In the judgment of 2004, the Constitutional Court of Germany explained, that the organizational rules, particularly those related to the separation of competences should not function as a structural danger for the free pursuit of scientific work; the issue here was such organizational arrangements which provided structural ground for the interference with the freedom of science.[19]

In 2010, the Constitutional Court of Germany adopted another landmark decision, where it declared, that the participation of the individuals, who carry our scientific work in the process of the management of public resources and organization of scientific work, should be ensured. The participation of the subjects of constitutional rights is necessary to ensure and protect an appropriate decision-making process for scientific work. This guarantee applies to those substantive decisions, the making and implementation of which may endanger the freedom of scientific work and teaching. Guaranteeing the freedom of scientific work through organizational rules requires allowing the subjects of this constitutional right to participate through their representatives in the governing bodies of the higher education institutions and needs the protection of the freedom of science from possible restrictions, as well using their thematic competence for fulfillment of the freedom of science at universities. Therefore, the legislature should ensure that the subjects of the constitutional right are duly engaged in the decision-making process. The above-mentioned is examined through so-called *je-desto* [German for: the more – the merrier] test: the stronger powers are given to the decision-making bodies by the legislature, the merrier the rights of the multi-member bodies should be strengthened in order to enable them to jointly participate in a direct and indirect manner, to have influence, to receive information and to control.[20]

In 2014, the Constitutional Court of Germany made an additional explanation about the fact, that the right of joint participation not only applies to those decisions related to the goals of a specific scientific research or teaching offers, but it also encompasses the planning of the future organizational development and any other decision, which involve organizational regulation, structure and budget for scientific work. The constitutional

[18] BVerfGE 93, 85 in: *Magers U.,* Das Verhältnis von Steuerung, Freiheit und Partizipation in der Hochschulorganisation aus verfassungsrechtlicher Sicht, 2019, p. 9.
[19] BVerfGE 111, 333 in: *Magers U.,* Das Verhältnis von Steuerung, Freiheit und Partizipation in der Hochschulorganisation aus verfassungsrechtlicher Sicht, 2019, pp. 9-10.
[20] BVerfGE 127, 87 in: *Magers U.,* Das Verhältnis von Steuerung, Freiheit und Partizipation in der Hochschulorganisation aus verfassungsrechtlicher Sicht, 2019, p. 10.

right will become meaningless, if the framework of the organizational structure and budget, which are factual preconditions for the exercise of this constitutional right, is not ensured.[21]

IV. ACADEMIC FREEDOM IN THE U.S.

1. INDEPENDENT CONSTITUTIONAL RIGHT OR A SPHERE OF CONSTITUTIONAL INTEREST?

At the end of the 19th century, the influence of the German universities in the sphere of the U.S. education was evident. By 1880, more than 2000 Americans studied at Göttingen, Berlin and at other German institutions. These students put the groundwork for the changes of the educational system after returning to the U.S. The most vivid and first example of these changes was John Hopkins University, which opened in 1876 based on the German university model. One of the innovations coming from Germany was the principle of academic freedom. However, the American version of it was not an exact copy of the academic freedom in Germany. Three main differences should be noted: 1. The theory of *in loco parentis* ['in the place of a parent'], which was established and followed in the U.S., excluded the incorporation of the freedom of learning [Lernfreiheit], a familiar concept for the German students. 2. The second difference was the negative attitude towards Proselytism. The German idea of the conviction of students by a professor and converting them to one's philosophical beliefs or outlook was not shared in the U.S. An American professor had to take a neutral stance in the debate on conflicting ideas. The third and the most important difference was emanated by the U.S. constitutional system, which differed substantially from the German system. For example, the German society at that time did not enjoy or had very little freedom of speech. Academic freedom of a professor was strictly limited to academia. In the U.S., the opposite was true – the major part of the bundle of rights, implied by the academic freedom, is available to every individual. As a result of such a constitutional setting and system, the opinion that the academic freedom should have been recognized as an independent constitutional right did not succeed in the U.S.[22] Although academic freedom is not recognized as an independent constitutional right, it is considered that it still falls within the sphere of the constitutionally protected interest.[23]

[21] BVerfGE 136, 338 in: *Magers U.,* Das Verhältnis von Steuerung, Freiheit und Partizipation in der Hochschulorganisation aus verfassungsrechtlicher Sicht, 2019, pp. 9-11.

[22] *Tisdel R. P.,* Academic Freedom – Its Constitutional Context, University of Colorado Law Review 40 (4), 1968, pp. 601-603.

[23] *Briggs W. K.,* 'Open-Records Requests for Professors' Email Exchanges: A Threat to Constitutional Academic Freedom, Journal of College and University Law 39 (3), 2013, p. 630.

2. CASE LAW

There is a minority opinion in the academic literature which states, that academic freedom is a constitutionally guaranteed right along with the freedom of speech and this opinion is based on two judgments of the U.S. Supreme Court: *Sweezy v. New Hampshire* and *Keyshian v. Board of Regents of the University of the State of New York*. Both cases dealt with the regulation that aimed to identify and exclude communists from serving in public offices. In its opinion, the Supreme Court emphasized the danger to academic freedom. Despite the elevated rhetoric with regards to the academic freedom, the Court did not explicitly recognize the academic freedom as an independent constitutional right. In the case of *Sweezy v. New Hampshire* the Court majority underscored the importance of academic freedom, even though it did not refer to academic freedom as a constitutional right. The Court explained, that the need and importance of the freedom in the communities of the U.S. universities is self-evident. No one is allowed to disparage contribution to democracy of those people, who train the youth. The educational process cannot proceed in the atmosphere of suspicion and distrust. Similarly, in the case of *Keyshian v. Board of Regents of the University of the State of New York* the Court underscored the importance of academic freedom again, however it did not indicate that academic freedom is a constitutional right. However, according to the Court, academic freedom has transcendental value not only to those people who teach, but to all of us as well. Academic freedom belongs to the ambit of the special interest of the First Amendment of the Constitution. Similarly, to the ruling in *Sweezy v. New Hampshire*, the Court based its decision in this case again on the fact, that the regulations were vague, instead of the argument of the restriction of academic freedom. The latter case law of the U.S. Supreme Court is similar to the cases and does not contain any indication, that the faculty members enjoy individual academic freedom.[24]

In order to check an interference with the academic freedom, the standards developed in the freedom of speech cases need to be applied, namely the so-called *Hazelwood* test and *Pickering-Connick-Garcetti* (PCG) test.[25]

2.1. Hazelwood School District v. Kuhlmeier

The factual circumstances of the case were as follows: The students prepared stories about teen pregnancy and its effects on divorce for the newspaper that was sponsored and funded by their school. When the stories were published, the principal deleted the respective pages without informing the students about it. The students took the case

[24] *Briggs W. K.,* 'Open-Records Requests for Professors' Email Exchanges: A Threat to Constitutional Academic. Freedom, Journal of College and University Law 39 (3), 2013, pp. 606-607.
[25] *Wright R. G.,* The Emergence of First Amendment Academic Freedom, Nebraska Law Review 85(3), 2011, p. 816.

to the court claiming, that the school violated their constitutional rights from the First Amendment. The Court ruled that the school had the authority to remove stories from the publication that were written as part of a class. The decision was appealed and the Appellate Court declared that the stories were published in the 'public forum' and the school's authority did not extend beyond the school walls. The governing bodies of the school could censor the content only under exceptional circumstances. The school challenged the Appellate Court judgment to the U.S. Supreme Court. The U.S. Supreme Court decided, that the school principal did not violate the students' free speech rights. The Court stated that the publication was funded by the school and the school had a legitimate interest to apply preventive measures and not publish inappropriate articles. The Court noted that the paper was not intended as a public forum in which everyone could share their views; it was rather a limited forum for the journalism students.[26]

This judgment has been criticized in the academic literature. The unswerving protection of constitutional rights is nowhere as relevant, as in American schools. The *Hazelwood* judgment is a clear reminder that the rights guaranteed under the First Amendment of the Constitution should not be taken for granted.[27] Following the above judgment, some States even adopted *Anti-Hazelwood* regulations to explicitly denounce the degrading of the free speech rights of the students.[28]

2.2. Pickering-Connick-Garcetti (PCG)

The main alternative of the *Hazelwood* test is the test applied in the *Pickering-Connick-Garcetti* (PCG)[29] cases. According to the PCG test, firstly it should be ascertained, whether the message expressed by a teacher is related to the matters of public concern. The issues related to curriculum do not amount to the matters of public concern. If the message spread by a teacher is related to a matter of public concern, the Court will apply a balancing test. The Court will evaluate the interest of the teacher-employee (to express their opinion in public) against the interest of a government – employer (efficiency, discipline, morals and normal functioning of a public institution in general). The opinion of the teacher will be protected under the PCG test, if it is related to the matter and sphere of public concern and the interest

[26] *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), available at: <https://www.uscourts.gov/educational-resources/educational-activities/facts-and-case-summary-hazelwood-v-kuhlmeier> (accessed 1.7.2021).

[27] *Bryks H.,* A Lesson in School Censorship: *Hazelwood v. Kuhlmeier*, Brooklyn Law Review 55 (1), 1989, pp. 291-326, 325

[28] *Tyler J. B.,* The State Response to *Hazelwood v. Kuhlmeier*, Maine Law Review 66 (1), 2013, pp. 89-162, 110.

[29] *Pickering v. Board of Education of Township*, 391 U.S. 563 (1968), available at: <https://supreme.justia.com/cases/federal/us/391/563/> (accessed 1.7.2021); *Connick v. Myers* , 461 U.S. 138, (1983), available at: <https://supreme.justia.com/cases/federal/us/461/138/> (accessed 1.7.2021); *Garcetti v. Ceballos*, 547 U.S. 410 (2006), available at: <https://supreme.justia.com/cases/federal/us/547/410/> (accessed 1.7.2021).

of the public expression of the opinion of the teacher outweighs the interest of a public body – employer.[30]

V. ACADEMIC FREEDOM IN GEORGIA

1. THE REGULATION PROVIDED BY THE CONSTITUTION

The 1921 Constitution of Georgia devoted its 12th chapter (Learning, Education and Schools) to education. The first Constitution of Georgia guaranteed the freedom of science and teaching. The state had a duty to care for science and teaching process and to foster their development.[31] The constitutional entrenchment of the guarantees of academic freedom demonstrates how progressive the 1921 Constitution of Georgia was.

In contrast to the first Constitution of Georgia, the 1995 Constitution did not entrench academic freedom as a constitutionally guaranteed right.[32] Under the amendments to Article 35 of the Constitution, adopted in 2006, the state was imposed with an obligation to harmonize the educational system of Georgia within the international educational space.[33] This norm possibly implied, along with other principles of educational sphere, the duty to establish academic freedom and autonomy principles and to recognize academic freedom as a constitutional right, however, the opinions about this matter differed.[34] It is noteworthy, that there was an opinion in the academic literature about the fact, that Article 35 of the Constitution also included the autonomy and independence of work of the academic personnel. This argument is based on Article 35, Paragraph 4 of the Constitution, according to which, the state had a duty to support the educational institutions as prescribed by law.[35] Under the amendments to the Constitution adopted in 2018, academic freedom was recognized as a constitutional right.[36]

---

[30] *Wright R. G.,* The Emergence of First Amendment Academic Freedom, Nebraska Law Review 85(3), 2011, pp. 797-798.

[31] 1921 Constitution of Georgia, Article 109, available at: <https://matsne.gov.ge/document/view/4801430?publication=0> (accessed 15.7.2021).

[32] Constitution of Georgia, First Redaction, Article 35, available at: <https://matsne.gov.ge/ka/document/view/30346?publication=0> (accessed 1.7.2021).

[33] Constitutional Law of Georgia on the Amendments to the Constitution of Georgia, available at: <https://www.matsne.gov.ge/ka/document/view/25864?publication=0> (accessed 1.7.2021).

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

[35] *Kantaria B.,* Commentary to the Constitution of Georgia, Chapter 2, Citizenship of Georgia, Fundamental Human Rights and Freedoms, 2013, p. 436 (in Georgian).

[36] Constitutional Law of Georgia on the Amendment of the Constitutional Law of Georgia, Amendment of Article 27, para. 3, available at: <https://www.matsne.gov.ge/ka/document/view/4110673?publication=0> (accessed 1.7.2021).

2. THE LEGISLATIVE GROUNDS FOR THE RESTRICTION OF ACADEMIC FREEDOM

Academic freedom is not an absolute right and can be restricted by the law. Legal grounds for its restriction are provided in the legal acts. It is noteworthy in this regard, that the adoption of these legal acts preceded the recognition of academic freedom as a constitutional right, which leads to the necessity of the reconsideration of the grounds of its restriction.

2.1. The General Education Field

The Law of Georgia on General Education recognizes the academic freedom of the teachers. However, in contrast to the higher education field, general education and teaching content is regulated in detail by the State with the national curriculum. Therefore, the freedom of a teacher is circumscribed with the national curriculum and their academic freedom should not contradict the goals established by the national curriculum.[37] In the field of general education, the academic, or in other words, the pedagogic freedom of a teacher is circumscribed by the document of national goals for general education and the national curriculum.

2.2. The Vocational Education Field

The Law of Georgia on Vocational Education does not contain an explicit rule on the issues of academic freedom, however, it grants the right to the students and teachers of the vocational education to enjoy all the rights and freedoms provided by the educational institution and the legislation of Georgia without discrimination. [38] Academic freedom is one of these rights.

The limits of academic freedom in the field of vocational education are determined by the relevant professional standards and educational programs.

2.3. The Higher Education Field

The Law of Georgia on Higher Education was the first legislative act that addressed the issues related to the academic freedom. It defined the notion of academic freedom, as well as the grounds for its restriction. Namely, according to the Law, academic freedom

[37] 'Law of Georgia on General Education', Article 14, para. 5, available at: <https://matsne.gov.ge/ka/document/view/29248?publication=88> (accessed 1.7.2021).
[38] 'Law of Georgia on Vocational Education', Article 4, para. 2, available at: <https://matsne.gov.ge/ka/document/view/4334842?publication=5> (accessed 1.7.2021).

was defined as the right of the academic and scientific personnel and the students to independently carry out teaching activities, scientific work and study. The Law allows the restriction of academic freedom only in the following cases:

- in the process of the determination of the organizational issues and priorities (for the purpose of the freedom of scientific work);

- in the process of the resolution of the organizational issues regarding the study process, and the issues concerning the approval of the timetable of lectures and the curricula (for the purposes of the freedom of teaching);

- in the process of organizing the study process and ensuring high quality studies (for the purposes of the freedom of learning).

Moreover, academic freedom may be restricted, when the implementation of a scientific research and publication of its results are restricted under an employment agreement or when the results of it contain a state secret.[39]

2.4. The Regulation of the Quality of Education

The legal means for the interference in the constitutionally guaranteed academic freedom in Georgia is provided by the legislation on the quality of education. The main legal tools in this regard are the standards and procedures for the authorization and accreditation prescribed by the Law of Georgia on the Development of Quality of Education.[40] According to the normative legal act,[41] adopted on the basis of the aforementioned Law, the legal persons of the public law, founded by the state, are authorized to examine and evaluate the content of the teaching courses designed by the academic personnel of the higher education institutions. This control extends to the full learning process, including the evaluation methods, criteria and teaching materials provided by the teaching courses designed by the academic personnel. It is important, that any interference and indication of a failure to meet the standard should emanate from the goals of quality development and be reasoned in view of the substance of the constitutionally guaranteed academic freedom.

[39] 'Law of Georgia on the Higher Education', Article 2, subpara. 'c' and Article 3, subpara. 4, available at: <https://matsne.gov.ge/ka/document/view/32830?publication=86> (accessed 1.7.2021).

[40] 'Law of Georgia on Education Quality Improvement', Chapter 3 and 4, available at: <https://matsne.gov.ge/document/view/93064?publication=20> (accessed 1.7.2021).

[41] 'Standards of Accreditation of the Higher Education Programs', approved by the Order N65/N of 4 May 2011 of the Minister of Education and Science of Georgia on the Approval of the Statute and Fee of Accreditation of the Educational Programs of General and Higher Education Institutions, available at: <https://matsne.gov.ge/ka/document/view/1320588?publication=0> (accessed 1.7.2021).

VI. CONCLUSION

In Germany, academic freedom is protected under the Basic Law (Constitution) of Germany. The freedoms of research, teaching and learning are differentiated from each other. The case law sets strict standards for the protection of academic freedom forth and imposes both positive and negative duties on the state for the protection of this right.

In contrast to Germany, academic freedom is not recognized as an independent constitutional right in the U.S. The case law is also not uniform. However, academic interest is considered to fall within the sphere of interest for the purposes of constitutional protection. The academic literature applies the tests developed in the case law to check the interference in the right, the most widespread and relevant of which is the *Pickering-Connick-Garcetti* (PCG) test for the evaluation of an interference in the freedom of speech.

In Georgia, academic freedom is a constitutionally guaranteed right. It implies the free pursuit of research, freedom of teaching and the freedom of learning. An interference in the right is allowed and may be justified only in case of the presence of specific legal grounds and preconditions, which are prescribed by law. The current constitutional rule, which takes traditions of the 1921 Constitution into account, is designed under the German model, however its text is more modern and unambiguous.

In the educational system, which experienced 'Lysenkoism' in the past, it is important to correctly understand the academic freedom, which includes the ability to research and teach freely without the fear of being punished on one hand, and not to transform into a privileged class, which spreads unfounded, dangerous and false ideas under the guise of right on the other hand. Moreover, the idea of quality assurance in education should not be employed for unreasoned interference with the institutional or individual academic freedom. In this regard, the constitutional requirement is a more reasoned decision-making, than what has been done in practice until now.