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FOREWORD

The idea of modern constitutionalism implies the existence of an active and open discussion mechanism on legal issues, which ensures, on the one hand, the search for conclusions based on critical, rational reasoning, and, on the other hand, raising of legal awareness in professional circles and general public. All this will strengthen public trust in the field of law and add vitality to the existing constitutional order.

"Journal of Constitutional Law" is an internationally-referenced, authoritative academic platform that gives Georgian scientists, practitioners of the legal profession, and young researchers the opportunity to present their work to the general public and gain a place in the field of research. In addition, the publication is a valuable source for students and legal professionals to obtain information and deepen their knowledge of current, relevant legal issues.

The present edition of "Journal of Constitutional Law" combines six academic pieces of Georgian authors. In particular, the journal collects the works of Georgian researchers on the following interesting legal issues: peculiarities of teaching the discipline of constitutional proceedings (authored by Professor Dimitri Gegenava and Associate Professor Paata Javakhishvili), socio-legal understanding of the right to property (authored by Professor Ana Pirtskhalashvili), the importance of procedural guarantees of the accused in the coverage of criminal cases by the media (authored by Associate Professor Giorgi Tumanishvili), the perspective of reforming the rules governing prostitution (authored by Associate Professor Tamar Gegelia), legal analysis of the constitutional agreement concluded between the State of Georgia and the Georgian Orthodox Church (authored by Associate Professor Archil Metreveli) and problems of regulation of the title of a household in Georgia (authored by Irakli Leonidze and Giorgi Chikviladze).

In addition, this publication provides an overview of three landmark judgments of the Constitutional Court of Georgia in 2021 and 2022. In particular, the journal gives the overview of Judgment №3/2/1478 of December 28, 2021 ("Constitutional Submission of the Tetritskaro District Court on the constitutionality of the second sentence of Article 3(20), the third sentence of Article 25(2), Article 48(1) and (2), the first sentence of Article 48(5) and the first sentence of Article 48(7) of the Criminal Procedure Code of Georgia), Judgment №3/5/1341, 1660 of June 24, 2022 ("Constitutional Submission of the Tetritskaro District Court on the constitutionality

of the first sentence of Article 200(6) of the Criminal Procedure Code of Georgia") and Judgment №3/6/813 of December 22, 2022 ("Aleksandre Melkadze v. the Parliament of Georgia") of the Constitutional Court of Georgia.

In the first case, the Constitutional Court assessed the constitutionality of two different issues established by the Criminal Procedure Law. In particular, part of the disputed norms established the obligation of the accused to speak only the truth if he/she decides to testify in court, and on the other hand, the disputed rule was the one that excluded the possibility of asking a question by the judge hearing the criminal case, without the agreement of the parties. In Judgment №3/5/1341,1660 the Constitutional Court ruled on the constitutionality of the rule of applying bail to the detained accused. In particular, according to the contested norm of the Criminal Procedure Code, the provision of bail as a preventive measure against the detained person before applying the bail, in all cases, resulted in the accused being in custody. In Judgment №3/6/813 of December 22, 2022, the Constitutional Court evaluated the constitutionality of the norm established by the Election Code of Georgia, which determined the rules for forming the unified list of voters and established that the data of the voter will be included in the unified list of voters according to the place of his/her registration.

I hope that this edition of the "Journal of Constitutional Law" will make a valuable contribution to the process of raising legal awareness and leading a research-based discussion. Last year, as a result of the changes, several outstanding Georgian and foreign scientists and researchers from Europe and the United States of America joined the editorial board of the " Journal of Constitutional Law". The renewed and more representative editorial board creates an interesting opportunity for the development of the publication, the implementation of which will bring unequivocally positive results for both researchers in the field of law and the process of teaching the legal profession in Georgia.

Professor **Merab Turava**

President of the Constitutional Court of Georgia

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*Dimitry Gegenava**

*Paata Javakhishvili***

CONSTITUTIONAL PROCEEDINGS: A NEW CHALLENGE FOR GEORGIAN LEGAL EDUCATION

ABSTRACT

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

I. INTRODUCTION

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

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

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

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

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

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

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

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

II. THE PLACE OF CONSTITUTIONAL PROCEEDINGS IN THE EDUCATIONAL CURRICULUM

The legal profession is subject to regulation,[6] consequently, in Georgia legal education is also regulated[7] and academic qualifications in law are subject to special state supervision.[8] This implies relevant restrictions and additional standards at the level of both, the legislative acts and bylaws.[9] Within the framework of the higher education reform, in 2011, the "Characteristics of educational programs in the field of law" was approved[10], which defined the basic principles mandatory for legal education programs (especially undergraduate and graduate) in terms of knowledge, skills and values (broken down into 5 detailed criteria).[11] The mentioned document quite voluminously described the issues, that a Bachelor of Law should know after completing the educational program, although constitutional proceedings were not among them. There could be many reasons for this, starting with the developing, albeit relatively limited for that period, i.e. 15 years of experience of the Constitutional Court, ending with less interest towards this field, and the lack of knowledgeable practitioners or researchers. In 2020, a new characteristic of the field was approved, which qualitatively changed the existing standard in all directions, expanded the range of mandatory issues to be learned, and included constitutional proceedings as well (at a Bachelor of Law level).[12]

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

[6] Article 2(z2), The Law of Georgia on Higher Education <https://www.matsne.gov.ge/document/view/32830?publication=99> [last accessed on 15 November 2022].
[7] ibid, Article 2(z3) and Article 75(2)(a).
[8] ibid, Article 76(1).
[9] ibid, Articles 76 and 77.
[10] The characteristics of the field (with the learning outcomes established on their basis) describe the knowledge, skills and/or autonomy-responsibility related to the relevant qualification. see National Qualifications Framework Guide, National Center for Education Quality Enhancement (2022) 45 <https://eqe.ge/en/page/parent/787/erovnuli-kvalifikatsiebis-charcho> (in Georgian) [15.11.2022].
[11] Order N224 of June 11, 2011 of the Director of the National Center for LEPL – The National Center for Education Quality Enhancement on the "Approval of characteristics of educational programs in the field of law".
[12] "Characteristics of the educational program in the field of law", III, 3.1.1, approved by the Order of the Director of the National Center for Education Quality Enhancement of April 2, 2020 (MES 12000326937).

III. CONSTITUTIONAL PROCEEDINGS V. CONSTITUTIONAL REVIEW: THEMATIC DELIMITATION

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

The basis of the constitutional proceedings is the Constitution of Georgia, and additionally, procedural rules are determined by the Organic Law on the Constitutional Court of Georgia[18] and the Rules of Procedure of the Constitutional Court. The Constitutional Court of Georgia is a is a judicial body of constitutional review which ensures the supremacy of the Constitution of Georgia, constitutional legality and protection of

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

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

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

[16] Kakhiani, supra note 14, 289.

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

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

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

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

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

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

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

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

IV. CONSTITUTIONAL PROCEEDINGS: LEARNING OUTCOMES AND EVALUATION METHODS

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

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

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

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

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

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

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

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

V. CONCLUSION

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

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

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

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

Anna Phirtskhalashvili[*]

THE LEGAL DIMENSION OF THE SOCIAL FUNCTION OF PROPERTY

"Ownership obliges" - Hugo Sinzheimer[1]

ABSTRACT

The right to property is of special importance in a modern democratic society. In addition to its legal dimension, it has a political, social and, to some extent, moral dimension as well. That is why, when understanding the right to property, it is impossible to ignore its multifaceted nature. The social function of property especially well represents its role in shaping such important values for modern society, as social justice, general economic equality and fair social policy.

The article discusses the essence of the provision – "ownership obliges", the historical development of the idea of the social function of the property right in the light of the philosophy of law, as well as the entry in the first Constitution of Georgia, which reflects the social understanding of property, i.e., its social chaining theory. The present article discusses the notion of the social function of property rights. In addition, the article in general terms, compares the practice and approaches of the Constitutional Court of Georgia and the Constitutional Court of the Federal Republic of Germany regarding the social chaining effect of ownership.

In conclusion, the article supports the idea that the social function of property determines the guarantees of individual property rights, although, at the same time its limitations, which considers the social function of property as an institution, as well as the entire social order in the state.

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[1] Hugo Sinzheimer, a famous German social democrat, thinker and lawyer, whose words were enshrined in Article 153 of the Weimar Constitution of 1919. Upon the initiative of his student, the social democrat Carl Schmitt, the wording "Eigentum vermichtet" was written as the first sentence of the second paragraph of Article 14 of the German Basic Law of 1949.

I. INTRODUCTION - UNDERSTANDING THE NOTION

Private property is the main legal institution of modern society. Its rational definition for centuries has been the subject of consideration of social theory and philosophical deliberations and reasoning. Without the right to property existence of a democratic society is inconceivable. "The right to property is not only the basic foundation of human existence, but also ensures his freedom, adequate realization of his skills and abilities, and leading his life with his own responsibility. All this legitimately determines the individual's private initiatives in the economic sphere, which contributes to the development of economic relations, free entrepreneurship, market economy, and normal, stable civil turnover."[2]

Naturally, private property has its inherent social function. For an initial, simple understanding of the social function of property, it is sufficient to consider it against the backdrop of everyday life. Despite the considerable importance of the right to property, it is possible, that some types of property have a social bearing, that is contrary to the interests and/or will of its owner.

The Constitution of Georgia envisages, that it is permissible to restrict the right to property in the public interests, if it is provided for by the law. Its social function stems from the fact, that the owner has a connection with society, and his property has a certain influence on him. Certain types of private property have a special social function, for example, forest, land, real estate and other property of other designation, which may be vitally important for other members of the society.

Restriction of the right to private property may be considered constitutionally-legally justified due to its public and social importance, for example, dismantling of a specific building or structure in private ownership, or changing its appearance requires an appropriate permit, if it has a special cultural significance. The social function of property is to allow certain activities to be carried out through disposal of property, for the benefit of the society.

The provision "ownership obliges" is a powerful expression of its social function and this, alongside with the idea of social justice, has a pervasive effect on the entire legal system. For example, the financial standing of a person has a significant impact on the amount of a pecuniary penalty, imposed as punishment for criminal offence. If a certain amount of fine for one person may be a very heavy burden, the same amount of fine may not be a punishment at all for another person. Therefore, the property that a person possesses, obliges him to pay, to give more. For example, for the same reason, the tax law establishes differentiated taxes. A progressive tax system, in

[2] Judgment of the Constitutional Court of Georgia N1/2/384 "Citizens of Georgia - Davit Jimsheleishvili, Tariel Gvetadze and Neli Dalalishvili v. the Parliament of Georgia", 2 July 2007, II-5.

contrast to a proportional tax system, is more fair in the social context of taxation, and it promotes a fair distribution of public goods - private property. According to *Oliver Wendell Holmes-Jr.*[3] - "Taxes are the price we pay to have a civilized society." The social function of property is mirrored in the system of progressive taxation. The following argument is also interesting: taxes are necessary for establishing and maintaining the rule of law, which also guarantees the right to private property, and in a narrow sense, defines what should be considered as private property. Based on this argument, it is justified to require from a person, who owns more property and income, to contribute more for the purpose of financing of all this, because he receives more benefits from the rule of law and the system of private ownership, than the person who owns less property and income. The mentioned theory belongs to the German Social-Democrats.[4] In contrast to the above it should be noted, that equality before the law is recognized and safeguarded by the Constitution on social or any other basis. In the opposite case, it shall be considered as discrimination, which, in turn, contradicts the principle of non-discrimination guaranteed by fundamental rights. However, justification of progressive taxes is more solid and convincing not with the argument of preferential use of the benefits of the legal state, but with other arguments. Such argumentation is known in law by the term "positive discrimination" and it derives from the positive role of the state. This means, that the state has a system of privileges for the discriminated group of the society, which gives this group a chance to equalize. Therefore, the social function of property provides the basis for "positive action" of the state, which is an attempt of the state to achieve equality between social classes through targeted policies. It is important, that the state does not try to achieve total equality. In such a case, private property will lose its essence, the legal state will turn into a totalitarian regime, and instead of a welfare state, we will get a socialist regime. Accordingly, a balanced approach to property rights, and protection of the upper and lower thresholds of its impact by the state, determines the political regime established through property rights.

II. HISTORICAL DEVELOPMENT OF THE IDEA OF THE SOCIAL FUNCTION OF PROPERTY

The concept of the social function of property includes legal, social and philosophical foundations. In the constitutional-legal sense, the social chain, on the one hand, protects and, on the other hand, limits the sphere protected by property rights.

[3] US Supreme Court Justice.

[4] A Course in Social Democracy, The Welfare State and Social Democracy, Book 2 (Economics and Social Democracy 2009) Chapter 7, 19.

In legal and social philosophy, in addition to thematization, the foundations of social chain theory are clearly reflected in ancient philosophy.[5] Traces of the theory of the social function of property can be found, for example, in the works of such figures of antiquity as, for example, *Marcus Tullius Cicero.* His works are based on the theory of property occupation.[6] According to *Cicero*, "We must focus on the common and mutual benefits of property and material goods, and their giving and receiving promotes better relationships between people".

Roman law made an indeterminate contribution not only to the ideological development of private property, but also to its legal formation. However, the recognition of private property in Rome was preceded by guarantees of common (state, community, family) property. In ancient Rome there were several types of property, and they differed from each other by the social status of the owner. Accordingly, the degree of protection of property and the scope of the legitimacy of the restriction were also different. For example, *Dominium Quiritium* owners (i.e., unlimited/dominant property) were almost not restricted, while some social classes, for example *res mancipi*, were forbidden to own private property at all[7]. Roman private law shows how much influence state regulation can have on private property and how much inequality the unfair distribution of property between social classes can create.

As mentioned, the rational understanding of this institution is one of the main tasks of socio-philosophical thinking of the society since the early centuries. One of the most influential attempts at a modern, rational justification of the understanding of property can be found in the writings of *John Locke*, published in 1689.[8]

In the 19th century, the moral aspects of the social chain of property became very apparent. For example, *Friedrich Julius Stahl's* states the following in the "Philosophy of Law": "Property is the special and basic material for the moral performance of duties".[9]

[5] Anthony Arthur Long, From Epicurus to Epictetus Studies in Hellenistic and Roman Philosophy (Oxford University Press 2006) V-16.

[6] Peter Lebrecht Schmidt, interpretatorische und chronologische Grundfragen zu Ciceros Werk "De legibus" (Diss. Freiburg 1959) 330 ff.; Die Abfassungszeit von Ciceros Schrift über die Gesetze, Rom 1969.

[7] Marie Theres Fögen, Römische Rechtsgeschichten. Über Ursprung und Evolution eines sozialen Systems (Taschenbuch, Göttingen: Vandenhoeck & Ruprecht 2002) 18.

[8] John Locke, Zwei Abhandlungen über die Regierung (7. Auflage, Frankfurt/M 1998); HU: Versuch über den menschlichen Verstand. You can see the basic theory, which is still acceptable and justified as the social origin, and at the same time, the main strategic legitimation of the social chain of the modern private property right. Bde., Hamburg 2006; E: „Essays über das Naturrecht" in John Locke, Bürgerliche Gesellschaft und Staatsgewalt. Sozialphilosophische Schriften (Leipzig 1980); AL: „Plan zur Beseitigung der Arbeitslosigkeit".

[9] Friedrich Julius Stahl, Die Philosophie des Rechts nach geschichtlicher Ansicht. Band 1: Genesis der gegenwärtigen Rechtsphilosophie. Heidelberg 1830, zit. n. 3. Aufl. v. 1854. Band I: Geschichte der Rechtsphilosophie. S. 587.

III. THE SUBSTANCE OF THE SOCIAL FUNCTION OF PROPERTY RIGHTS

Interestingly, in light of the recognition of the institution of private property and the corresponding freedom of disposal, it is necessary that the use of property does not conflict with the common good, and moreover, private property should serve the public interest. In this case, of course, it is of great importance what type of property we are talking about. Not all types of property can be considered in this context.

In the case of private property, it means that at the same time, the property obliges the owner: "Its use must, at the same time, serve the common welfare." According to Art. 14 II. Of the German Basic Law, the type and size of the social obligation imposed on the owner, which the legislature must determine, essentially depends on how strong is the social burden of the respective property, and therefore, its social function. It should be noted, that this constitutional entry cannot be a social bond, and it does not justify such an excessive restriction of the right to property, which is not required by the broad interests of society.

A feature, that is particularly characteristic of this right, is the social obligation of ownership. The latter has a wide scope of legislative power. For example, in this regard, the Law on Residential Tenancy is worth mentioning. The Law imposes legal limitation on increase of the rent, and defines the terms of termination of the renting. In this case, the legal interests of the lessor, for example, in the case of personal use, are also constitutionally protected. The social function of the property, of course, does not justify an unsubstantiated restriction.

The right to property provided by the German constitution (Article 14, paragraph 2) is not only the right of the owner to own and dispose of the objects of the said property, but it also provides for the limitation of the right to freedom, because property of a person, in addition to bringing personal benefit, should also serve the general well-being. In this regard, legislation has a wide discretion to determine the scope of use of property in terms of private and public benefits.[10]

The social function of the property right does not imply only the material dimension. Just as the word "social" implies a multifaceted aspect of public relations, the social value of property rights also includes political, international legal, geostrategic, economic, state and ethical aspects as well. Taking into consideration these factors, private property is, on the one hand, a frequent object of restriction, but on the other hand, due to this restriction, it is worthy of protection. An example of expression of the moral aspect of the property right is a private law norm, which provides for the right of the grantor

[10] Walter Leisner, Sozialbindung des Eigentums (1972); Felix Leinemann, Die Sozialbindung des geistigen Eigentums (1998); Lehmann, Sachherrschaft und Sozialbindung? (2004).

to claim the gifted asset back from the owner of the asset due to his/her ingratitude or immoral actions. This reflects the link of transfer property with human relations.

The state policy in the sphere of alienating private property to citizens of foreign countries indicates to the state, or even strategic or political function of the property. Restrictions may be imposed on property, that has a special social and political impact. Thus, in case of Georgia, it can be said that agricultural land has an important social function.

Law cannot be indifferent to the social implications of property, because this is where the task to be performed by property, its place, role and importance are revealed. Therefore, the social and legal state requires both, the freedom of private property and the need to restrict this right for public purposes. Article 19 of the Constitution of Georgia also provides for the possibility of interference into property rights for public purposes, in particular, restriction of property rights and confiscation of property.[11]

Land is irreplaceable, non-renewable and "exhaustible" (limited) resource. Its price is a particularly relevant issue in the modern world. As the population grows and the demand for agricultural products increases, the uncultivated agricultural land decreases, and hence, the resource is depleted. That's why alienation of an indefinite amount of land to foreigners is incompatible with the country's vital tasks and public interest.

Alienation of agricultural land should always be a state-controlled process, because the land has not only an economic, but also a social and cultural value (Austrian Constitutional Court decision on the constitutionality of the law on the acquisition of real estate by a foreigner).[12]

The Federal Constitutional Court of Germany explained in one of its decisions: "Due to the fact that land is not subject to reproduction and is irreplaceable, it is forbidden to completely entrust its use and leave it to the indefinite play of free forces and the opinion of an individual. A fair legal and public system requires greater consideration and expression of the public interest in land, than in the case of other material goods."[13]

Not only in relation to this specific issue, but also in regard to all other issues, it should be taken into consideration, that without the existence of certain legal, social and economic security criteria, Georgia will face the threat of losing its statehood.[14]

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[11] Paata Koghuashvili, Ana Firtskhalashvili, Lack of land regulation is unacceptable, Internet Analytical Edition <https://for.ge/view/33385/miwis-regulaciis-uqonloba-dauSvebelia.html> (in Georgian) [last accessed on 8 July 2014].

[12] Landesgesetzblatt Nr. 88/1994.

[13] VerfGEG21, 73.

[14] Paata Koghuashvili, Ana Firtskhalashvili, 'Lack of land regulation is unacceptable' (Internet Analytical Edition "Liberal", 2014) <http://liberali.ge/blogs/view/5913/sasoflo--sameurneo-mitsa-utskhoelebze-isev-gaskhvisdeba> (in Georgian) [last accessed on 1 November 2020].

Over-restriction and prohibition of property rights is just as harmful as lack of regulation. Both of them can lead to dire consequences for the state and society. If too much restriction leads to autocracy and then dictatorship, the absence of law and legal regulation of private property rights leads to anarchy and ultimately the collapse of the state.

IV. GEORGIAN AND GERMAN CONSTITUTIONAL LAW AND JUDICIAL PRACTICE, PROPERTY RIGHTS

For the first time in the history of Georgian constitutionalism, private property was elevated to the constitutional rank and included in the Constitution of February 21 of 1921, namely, Articles 114 and 116. Article 116 of the Constitution contains provision, which is a manifestation of the social function of property. According to the second sentence of this article, "cultivation and use of the land constitutes the duty of the land owner to the society".

This provision of the first Georgian Constitution is a reflection of the social understanding of property, its social chain theory, which is also found in the Constitution of Weimar Republic of 1919[15], and is later also found in the Basic Law of Germany, which uses the term: "ownership obliges[16]", and which, in turn, as an ideological source, is based on the legal and social theory of property.[17]

The thirteenth chapter of the Constitution of February 21, of 1921, adopted by the Constituent Assembly of Georgia, is devoted to social and economic rights, and Article 114 states the following: "Forceful expropriation of property or restriction of private enterprise is admissible only for the state or cultural needs, in adherence with the rules defined in a separate law. In case of expropriation of property, corresponding compensation was to be paid, unless the law stipulates otherwise."[18]

In the philosophy of modern law, there are two understandings of the right to property (if we do not count the socialist understanding of property). In the legal literature we mainly find:[19] first - the concept of property based on liberal principles of natural law, and the second - the concept of property based on a positive and, at the same time,

[15] § 153, Abs. 3 Verfassung des Deutschen Reichs vom 11 February 1919, Leipzig 1919.

[16] Article 14, para 2, German Basic Law: <https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html> [last accessed on 2 November 2020].

[17] Friedrich Julius Stahl, Die Philosophie des Rechts. 2.Bd., Rechts- und Staatslehre auf der Grundlage christlicher Weltanschauung, 2.Abth: Die Lehre vom Staat und die Prinzipien des deutschen Staatsrechts (Heidelberg, Mohr 1846).

[18] The Constitution of the Democratic Republic of Georgia of 1921, and the Statute of the Senate of Georgia (GIZ 2014) 42 (in Georgian).

[19] Otto Depenheuer (Herausgeber) Eigentum, Ordnungsidee, Zustand, Entwicklungen (Berlin/Heidelberg. 2005).

social vision. In case of liberal approach, the concept of property is defined as[20] a human right, which existed even before the "statehood". Such rights exist independently of the state, because they were not created by the state (the natural theory of human rights). Right to property is one of the main components of personal freedom. According to this theory, if the state does not grant a person freedom, life or property, and these rights and freedoms are free, then their acquisition should not be dependent on the state, or regulated by it.

In contrast to this concept, the proponents of the theory of the positive social state define the right to property as follows: the right to property is the right of the owner to enjoy, possess and dispose of his/her property. Based on these functions of property rights, it is inherent to this process that one person's property rights, in themselves, affect those around them, i.e., other members of the society. This is the basis of the legislator's authority (or even his constitutional obligation) to regulate the legal side of ownership. The theory, developed by the Federal Constitutional Court of Germany throughout many years is bases on this reasoning.[21]

The view of the Constitutional Court of Georgia on the social chain of property rights and the peculiarities of its social function is noteworthy. According to the Court "The legislator cannot ignore the social function of property as the task, position, role and significance of property can be identified through this function. The Constitution has achieved a balance between private and public interests so that in cases of conflict of interests the public interest will prevail, and owners must tolerate certain interference with their property".[22]

In addition, according to the decision of the Constitutional Court, the state is obliged to find the most correct and effective way of limiting ownership in the public interest, which will put a heavy burden on only one participant in the economic turnover. It is unacceptable to refuse the guarantee of the ownership of one such participant in favor of the ownership of another participant of the turnover. According to the court "The public need and therefore the social function of property cannot be determined by who the owning entity is. Property, as a value, obliges any subject - be it the state or a private person. This obligation derives directly from property, therefore, no matter who owns the objects defined by the disputed norm, they cannot be freed from the social burden".[23]

[20] Johann Eekhoff, „Soziale Sicherheit durch Eigentum, Abwägung zwischen Eigentumsschutz und Sozialpflichtigkeit" in supra note 19, 51, 56.
[21] Hans-Jürgen Papier, „Der Stand des verfassungsrechtlichen Eigentumsschutzes" in supra note 19, 93.
[22] Judgment of the Constitutional Court of Georgia N1/2/384 "Citizens of Georgia - Davit Jimsheleishvili, Tariel Gvetadze and Neli Dalalishvili v. the Parliament of Georgia", 2 July 2007.
[23] Judgment of the Constitutional Court of Georgia N1/14/184,228 "Joint-stock companies – "Sakgazi" and "Anagroup" (formerly "Tbilgazoaparat") v. the Parliament of Georgia", 28 July 2005.

In the Weimar Constitution of 1919 (Art. 153, Clause 3 WRV) the social chain was reflected as follows: "Ownership obliges. At the same time, its use should serve public welfare".

According to paragraph 2 of Article 14 of the Basic Law: "Ownership obliges. At the same time, its use should serve the public good.".

In Germany, the guarantor of the social market economy is Article 14 of the Basic Law. However, Article 14, paragraph 2 of the German Basic Law directly emphasizes the social obligation of ownership, since ownership obliges and its use serves the common good. Therefore, the priority of public interests over individual interests derives from the social function of property.

One of the criteria for determining the social function of ownership depends on the extent, in which the means of production are in the public/state ownership. The state, as a representative of the interests of the people, supervises property.

In the relevant case -law of the Federal Constitutional Court, in addition to guarantees of ownership as a basic right, its social function is specified in the wake of liberal order. At the same time, the Federal Constitutional Court of Germany has found, that it is important to impose ownership regulations, but according to Article 14 (2) of the Basic Law, such restrictions are inadmissible only on the basis of administrative acts and case law, and they require legislative regulations.[24]

According to the practice of the Constitutional Court of Georgia, "the economic strength of a democratic, legal and social state is based on respect and protection of property rights." [25]

In spite of the above, the right to ownership is not absolute and unlimited right, which is due to its social function and meaning.[26] The owner is not isolated, he is an integral part of the community, which means that he can only satisfy his interests in confluence with the interests of others.[27]

V. CONCLUSION

The social function of the property determines not only the guarantees and restrictions of individual property rights, but also the social function of ownership, as well as the

[24] BVerfG, Urteil vom 10. März 1981, Az. 1 BvR 92/71, BVerfGE 56, 249.
[25] Judgment of the Constitutional Court of Georgia N2/1/382,390,402,405 "Citizens of Georgia - Zaur Elashvili, Suliko Mashia, Rusudan Gogia and others and the Public Defender of Georgia v. the Parliament of Georgia", 18 May 2007, para II-3.
[26] Judgment of the Constitutional Court of Georgia N1/2/384 "Citizens of Georgia - David Jimsheleishvili, Tariel Gvetadze and Neli Dalalishvili v. Parliament of Georgia", 2 July 2007, para II-8.
[27] ibid, para II-18.

social order of the state. The Constitution makes the individual property right a state policy. It is on the one hand, the guarantor of the property rights of a person, and on the other hand, its social function determines the social order and the orientation of the economic system of the state.

The state interferes into the distribution of revenues. It is quite clear, which values are superseding. The right to ownership does not mean much without the supremacy of democratic law, which safeguards this right, and the rule of democratic law, in its turn, is a condition of a dignified and independent life of citizens.

Intervention in the distribution of revenues, which in turn are generated through taxes and contributions, is needed to ensure protection of the freedom, safety and property of all people. Therefore, collection of revenues according to its priorities, and their subsequent distribution indicates the welfare orientation of the state. Consequently, for social market economy, protection of ownership is a prerequisite for contributing to the public welfare, and thus fulfilling its social obligations. This does not mean disregard of the right of property - it is only a denial of the absolute priority of property rights.

Giorgi Tumanishvili[*]

INFORMING THE PUBLIC ABOUT ONGOING CRIMINAL CASES AND PROCEDURAL GUARANTEES OF THE ACCUSED[**]

ABSTRACT

Public hearing of criminal cases is an important element of the state-legal criminal process. The public has a legitimate interest in being informed about ongoing criminal cases and in assessing the extent to which criminal justice is administered in accordance with their expectations. The openness of administration of criminal justice precisely serves the requirement of public awareness. Due to the fact that a large part of criminal cases may not even reach the stage of discussion on the merits in court, and it is terminated at the stage of investigation, therefore the public is interested not only in hearing criminal cases in the courtroom and their results, but also in the administration of criminal cases at the stage of investigation. Accordingly, both the media and investigative and criminal prosecution bodies ensure provision of information to the public on current criminal cases and the satisfaction of the latter's legitimate interest in providing information.

Incorrect and unbalanced public information about criminal cases may pose significant challenges and threats to the fairness of criminal proceedings, the rights of the accused and the interests of justice. In particular, the presumption of innocence and the right to privacy of the accused are at risk. Accordingly, the criminal law enforcement bodies and the media should be aware of the existing threats and pay special attention to the implementation of the correct information policy when informing the public about the criminal case and the accused persons.

This article discusses the role and influence of the media in the criminal justice process, reviews the risks that may threaten the procedural guarantees of the accused, the interests of justice, and develops separate recommendations in the direction of a balanced information policy.

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I. INTRODUCTION

In the era of mass information and communication means, the access of citizens to information is virtually unlimited. At the same time, the influence of the media on public opinion is constantly increasing. Due to the fact that the public shows a special interest in criminal cases, many media outlets pay a lot of attention to criminal chronicles and try to gain particular interest of the public. However, this can seriously jeopardize both the dignity of individuals and the independence of judges, and at the same time sacrifice the rules of procedural fairness.[1] As a rule, when informing the public about ongoing criminal cases, the participants of the process are identified and stigmatized, and/or as a result of the dissemination of prejudicial information, the accused is tried by the media, even before the court pronounces its judgement.

Threats that may endanger the criminal process and the procedural guarantees of the accused due to an unbalanced information policy should be of particular concern to the Prosecutor's Office and investigative bodies, which regularly provide information to the public about individual criminal cases. The present article reviews the importance and features of information policy in criminal cases, also emphasizes the above-mentioned threats and outlines the main principles of a balanced information policy as a recommendation.

II. THE ROLE AND INFLUENCE OF THE MEDIA IN THE CRIMINAL JUSTICE PROCESS

In a rule-of-law and democratic state, there is a high interest in providing information to the public on the activities of criminal justice bodies and implementation of justice. In case of committing a crime, members of society have special expectations for criminal prosecution and justice bodies, that the criminal should be identified and prosecuted as quickly as possible.[2] The universality of the implementation of criminal justice precisely serves the requirement of public awareness.

Criminal justice authorities in a democratic and rule-of-law state need public trust and recognition. To that end, the activities and results of the activities of the above-mentioned bodies should be understandable and acceptable to the population. Criminal law enforcement agencies can gain trust and recognition from members of society only through publicizing their activities. Thus, the prerequisite for gaining recognition

[1] Heiner Alvart, 'Principle of Publicity According to the German Criminal Procedure' in Giorgi Tumanishvili and others (eds), The Influence of European and International Law on Georgian Criminal Procedure Law (Meridian Publishing House 2019) 440.

[2] Patrick Schul, Kriminalberichterstattung und Stigmatisierung aus strafrechtlicher und medienpsychologischer Sicht: Vorverurteilung und Öffentlichkeit (Freie Universität Berlin 2017) 99.

and trust is to communicate with and provide information to members of society.[3]

Public criminal proceedings in a democratic and rule-of-law state are important not only at the trial, but also at the investigation stage. The public is interested not only in the discussion of criminal cases in the courtroom and their results, but also how diligently the criminal prosecution body performs its function. The mentioned interest is completely understandable, because a large part of the cases may not even reach the stage of discussion on the merits in the court and be terminated at the stage of the investigation within the prosecutor's discretionary powers. Therefore, the transparency of the investigation process can satisfy the legitimate interest of public awareness. To that end, the Prosecutor's Office must ensure that the investigation process is not kept secret and beyond public control. The Prosecutor's Office should ensure transparency of the investigation process by regular provision of information to the population, in order to gain the trust of the members of the public along with the criticism of its activities and the decisions made. Therefore, the active relationship of the Prosecutor's Office with the public and the transparency within the permissible limits of the investigation process represent a kind of democratic national necessity.[4] The public Prosecutor's Office communicates with the public not directly, but through indirect, intermediary ways, more precisely, through the media. In the current conditions, the media is the main means of communication between the population and the criminal justice authorities. Of course, the court proceedings are usually public, but the media is still the main and often the only source of information for the population. Only a few people are able to attend public court proceedings. Most people get information through the media. Consequently, the criminal justice authorities, from the beginning of the investigation to the trial of the case, depend on the media as the main disseminator of information to gain the trust and recognition of the public.

The dissemination of information on criminal law cases by the media is also of great importance in the direction of implementation of the goals of the punishment. Media plays a particularly significant role in the implementation of the general prevention of punishment. Without media, the general preventive goals of punishment would be difficult to realize. Consequently, criminal law enforcement agencies are essentially dependent on the media for the successful performance of their functions.[5]

Based on the above, media pays special attention to the activities of the criminal justice bodies and informing the public about criminal cases. Media interest is even higher

[3] Winfried Hassemer, „Grundsätzliche Aspekte des Verhältnisses von Medien und Strafjustiz" (2005) 3(25) Strafverteidiger 167.
[4] Ralph Alexander Lorz and Julia Bosch, „Rechtliche Parameter für die Öffentlichkeitsarbeit der Justiz – Eine aktuelle Analyse aus Anlass des sog. „Mannesmann" - Verfahrens" (2005) Archiv für Presserecht 97.
[5] Anna Reike, Die Rolle der Staatsanwaltschaft in der Mediengesellschaft: Möglichkeiten und Grenzen staatsanwaltschaftlicher Öffentlichkeitsarbeit im Ermittlungsverfahren (Verlag Dr. Kovac 2012) 137.

in high-profile criminal cases. The provision of information to the public about the criminal proceedings by the media is understood as part of the implementation of its public function, because in this way the activities of the state bodies come under public control.[6] In addition, media also fulfills the function of spreading legal awareness in the society by covering the ongoing processes in the law enforcement and justice bodies.[7] In general, the activities of the media are aimed at influencing the process of individual and public opinion formation by providing information on current criminal cases to a wide range of addressees.[8] Of course, media is the main means of disseminating information on ongoing criminal cases, but it should also be noted that media does not disseminate publicly information with the content and form that the criminal justice authorities want and imagine. Media creates an image of law enforcement bodies in the society according to its own idea. Media is not a "notary of justice"[9] because media operates according to its own rules. The image publicized by the media in many cases is in accordance with the views of a large part of society regarding the said bodies. In order for the public to have a real idea and picture of the criminal justice bodies and their activities, the aforementioned bodies cannot remain in a passive role and depend only on what information the media disseminates. They are forced to actively communicate with the public through the media and thereby actively influence the formation of public opinion. If the criminal justice authorities want the information about their activities not to be distorted by the media, they should actively contribute to informing the public about current cases and provide all important information about the current processes to the public. They must provide information to the public in such a way that it is understandable to any non-lawyer ordinary citizen.[10]

It should be noted that intensive media dissemination of information about ongoing criminal proceedings can seriously jeopardize not only important constitutional and procedural guarantees of the accused (e.g., the right to a fair trial, the presumption of innocence, the right to privacy), but also harm the goals and principles of the criminal justice process itself. Therefore, media can play a dangerous role for the criminal justice process.[11] For example, with excessive media activity at the investigation stage and media coverage of the details of the ongoing criminal case, the right to privacy of the accused and other persons participating in the process may be violated. The risks of

[6] ibid, 119.

[7] Christine Danziger, Die Medialisierung des Strafprozesses: Eine Untersuchung zum Verhältnis von Medien und Strafprozess (BWV, Berliner Wissenschafts-Verlag 2009) 26.

[8] Reike, supra note 5, 119.

[9] Winfried Hassemer, Warum Strafe sein muss: Ein Plädoyer (2. Auflage, Ullstein 2009) 111.

[10] Thiesmeyer Heinrich, „Anzeige von Strafjustiz vs. Medien und Öffentlichkeit" (1964) Deutsche Richterzeitung 73; Reike, supra tnote 5, 140.

[11] Claus Roxin, „Strafprozess und Medien in Einheit und Vielfalt der Rechtsordnung" in Festschrift zum 30 jährigen Bestehen der Münchener Juristischen Gesellschaft, Vorstand der Münchener Juristischen Gesellschaft e.V. (C.H.Beck 1996) 97.

such interference arise when the identity of individuals participating in the investigation process is made public by the media and they are referred to as defendants.[12] For the media, it is the personal component that plays the main role, because the identification of a person is an important journalistic way of attracting the attention of the public.[13] Identification of the accused by the media may result in their stigmatization in society. At the stage of the investigation, there is only speculation on the part of individuals regarding the commission of a crime. This is the early stage of the criminal process, which should usually be followed by a discussion of the case on the merits in court. According to the stories spread by the media, sometimes even at the stage of the investigation, the accused is actually declared guilty, which causes great damage to the personal and business reputation of the accused. In some cases, even the termination of the criminal prosecution against the accused cannot fix the damage caused to the accused by the media, because the "public inquisition" of the accused has already been carried out through the media."[14]

In addition to the above, media can harm the investigation process by covering the facts in a tendentious and biased manner. For example, media can force law enforcement agencies to start an investigation.[15] Due to exaggerated media coverage of certain circumstances in society and dissemination of information based on their own sources the Prosecutor's Office may fail to withstand public pressure and initiate criminal prosecution against a specific person, even when in reality there were no sufficient prerequisites to initiate criminal prosecution.[16] Also, the effective conduct of the investigation and the establishment of the truth may be hindered by making the investigative actions and their results public by the media, and the public announcement of the names of the persons identified as a result of the investigation. In addition, when the details of the criminal case are widely publicized in the media and the public opinion about the guilt or innocence of the person is formed, this may have a serious impact on the impartiality and independence of the judge hearing the criminal case or the witnesses participating in the case.[17]

[12] Reike, supra note 5, 115; on the constitutional protection of personal data, see Judgment of the Constitutional Court of Georgia N1/3/407 "Georgian Young Lawyers Association and Citizen of Georgia - Ekaterine Lomtatidze v. the Parliament of Georgia", 26 December 2007.

[13] Ewald Behrschmidt, Kriminalberichterstattung in der Tagespresse (Kriminalistik Verlag 1998) 337.

[14] Roxin, supra note 11, 97; Christian-Alexander Neuling, Inquisition durch Information: Medienöffentliche Strafrechtspflegeim nichtöffentlichen Ermittlungsverfahren (Duncker & Humblot 2005) 30.

[15] Tilmann Job, Prozessführung der Staatsanwaltschaft und Medien (2005) 3(25) Strafverteidiger 175.

[16] Sabine Sasse, „Justiz und Medien" in Thomas Schuler and Christian Scherz (Hrsg.), Rufmord und Medienopfer (Ch.Links Verlag 2007) 69.

[17] Reike, supra note 5, 118.

III. RIGHT TO A FAIR TRIAL

The right to a fair trial is the most important principle of the criminal process and, at the same time, one of the main procedural guarantees of the accused (the convicted as well as the acquitted). The right to a fair trial is granted to the accused by the first part of Article 8 of the Civil Code. Also, the first paragraph of Article 6 of the European Convention on Human Rights provides for the right to a fair trial. The principle of fair process originates from the first paragraph of Article 9 of the Constitution of Georgia, that is, from the constitutional requirement of inviolability of human dignity. It follows from the principle of inviolability of human dignity that it is not allowed to degrade a person to a mere object of state or public activity. Human dignity will be violated if the person becomes a means to achieve some goal. The obligation to protect dignity falls on the state, especially during criminal prosecution. Therefore, in the criminal process, the accused must have the status of an active subject of the process, which, first of all, means having legal opportunities to actively influence the course of the process and its outcome. Therefore, fairness of the process involves giving the accused a chance to effectively defend himself/herself against the charges presented by the prosecution, which is materially and personally much better equipped than the accused. The above-mentioned guarantee applies both during the discussion of the case on the merits in court and during the investigation stage,[18] so the prosecutor must take care of ensuring the guarantees based on the principle of fair process at the investigation stage itself.

At the stage of the investigation, the sentiments created by the excessive information policy of the Prosecutor's Office and the tendency of the media to inform the public about the ongoing investigation can deprive the accused of the ability to effectively protect his/her rights and influence the process. Public sentiments caused by such information policies usually affect the objectivity and independence of prosecutors, courts and witnesses, which jeopardizes ensuring a fair trial.[19] At the same time, the European Court of Human Rights also recognizes that an inappropriate (insulting the accused) media campaign, in certain circumstances, may cast a shadow on the fairness of the trial process by influencing public opinion and, therefore, on the composition of the jury,

[18] Judgment of the European Court of Human Rights N50541/08, 50571/08, 50573/08, 40351/09 "Ibrahim and others v. The United Kingdom, 13 September 2016; Judgment of the European Court of Human Rights N42371/02 "Dvorski v. Croatia, no. 25703/11, 20 October 2015; Judgment of the European Court of Human Rights, Pavlenko v. Russia", 4 October 2010.

[19] Joachim Bornkamm, Pressefreiheit und Fairneß des Strafverfahrens: die Grenzen der Berichterstattung über schwebende Strafverfahren im englischen, amerikanischen und deutschen Recht (Nomos 1980) 207; Christian Altermann, Medienöffentliche Vorverurteilung – Strafjustizielle Folgerungen für das Erwachsenen- und für das Jugendstrafverfahren? Eine rechtsdogmatische Analyse auf der Grundlage einer empirischen Erhebung (Experteninterviews) (Duncker & Humblot 2009) 32.

which is invited to make a decision related to the guilt of the accused.[20] The principle of a fair process can be violated even if the Prosecutor's Office provides media with information about the criminal prosecution initiated on the fact of a crime committed by a particular person, without first informing the accused about the charges. If the accused learns from the media for the first time that he/she is known as an accused, it will be difficult for him/her to give reasoned answers to the media regarding the charges against him/her, which will actually eliminate the opportunity for him/her to properly defend himself/herself against the charges presented.[21] Accordingly, the principle of a fair trial should protect the accused not only from the excessive information policy of the Prosecutor's Office, but it gives rise to the obligation of the Prosecutor's Office to inform the accused about the current investigation, its results and the existing accusations, before he/she provides information about the aforementioned to the media.

IV. PRESUMPTION OF INNOCENCE

The presumption of innocence as the most important procedural guarantee is based on the principle of the rule of law. Paragraph 5 of Article 31 of the Constitution of Georgia states that a person shall be presumed innocent until proved guilty, in accordance with the procedures established by law and the court's judgment of conviction that has entered into legal force. At the same time, no one shall be obliged to prove his/her innocence. The burden of proof shall rest with the prosecution (Paragraph 6 of Article 31 of the Constitution of Georgia). The presumption of innocence as an essential component of the right to a fair trial is also found in the European Convention on Human Rights; according to Article 6, Paragraph 2, every person accused of a crime is presumed innocent until proven guilty according to law. The requirement of presumption of innocence should be considered both at the stage of investigation and during the judicial review of the case. Until the court makes a final decision regarding a person's guilt, the representatives of the criminal justice authorities, as well as the court, should refrain from making statements that create the impression that the person's guilt has already been established.[22] Therefore, it will be inconsistent with the presumption of innocence if the judge starts the case with the attitude that the accused is already guilty. In addition, the judge should not express an opinion regarding the guilt of the accused

[20] Judgment of the European Court of Human Rights N1 "Mustafa Kamel Mustafa (Abu Hamya) v. The United Kingdom", 18 January 2011; Judgment of the European Court of Human Rights N30971/12 "Abdulla Ali v. The United Kingdom", 14 December 2015.

[21] Reike, supra note 5, 96.

[22] Judgment of the European Court of Human Rights N9043/05 "Natsvlishvili and Togonidze v. Georgia", 24 April 2014; Judgment of the European Court of Human Rights N39820/08, 14942/09 "Shuvalov v. Estonia", 19 May 2012; Judgment of the European Court of Human Rights N20899/03 "G.C.P. v. Romania", 20 December 2011; Giorgi Tumanishvili, Criminal Law Process, overview of the general part (Publishing House "World of Lawyers" 2014) 80-81 (in Georgian).

during the hearing of the case. Also, even if the court acquits the accused or terminates the criminal prosecution, it should not create the impression that the accused is guilty.[23]

As mentioned, the requirement of presumption of innocence should also be taken into account by the representatives of the criminal prosecution body. In public statements based on their factual circumstances, they should not convince the public that the accused is already guilty prior to the court decision.[24]

Regarding the extent to which the requirements of the presumption of innocence apply to private individuals and media, there is a difference of opinion in the legal literature. Some of the authors believe that the presumption of innocence protects the accused not only from inappropriate statements of representatives of state bodies, but also from inappropriate information policy of the media and, thus, they extend the principle's effect to the activities of the media as well. The mentioned authors believe that public dissemination of information about a criminal case is as sharp a weapon against the accused in the hands of the media as the authority to punish the offender in the hands of the state authorities.[25] However, such an opinion is rejected by most authors. There is no shared opinion that recognizes the purpose of the presumption of innocence as well as the protection of the accused from the media. The purpose of the mentioned principle is seen only in the protection of the accused from the representatives of state bodies and not from third (private) persons.[26]

In addition, it should be noted that the presumption of innocence cannot prevent the criminal prosecution body from informing the public about the ongoing investigation. The presumption requires only that statements surrounding a criminal case must be made with great care and in an appropriate manner. Moreover, the European Court of Human Rights recognizes the obligation in a democratic society, on the part of the relevant authorities, to inform the public when it comes to serious allegations or when an investigation is initiated into the alleged criminal activities of high political officials. However, even in such a case, officials need to make statements to the media in a measured way and respect the requirements of the presumption of innocence.[27] When speaking about the ongoing investigation, the representatives of the Prosecutor's Office should refrain as much as possible from publicizing the details of the case, and it should be clear from the statements made to the media that the case concerns only the alleged commission of a

[23] Judgment of the European Court of Human Rights N57435/09 "Paulikas v. Lithuania", 24 April 2017; Reike, supra note 5, 99-100.
[24] "G.C.P. v. Romania", supra note 22.
[25] Florian Stapper, Namensnennung in der Presse im Zusammenhang mit dem Verdacht strafbaren Verhalten (Berlin-Verl. Spitz 1995) 67.
[26] Walter Berka, Medienfreiheit und Persönlichkeitsschutz: Die Freiheit der Medien und ihre Verantwortung im System der Grundrechte (Springer-Verlag 1982) 352; Winfried Hassmer, Vorverurteilung durch die Medien? (1985) 33 Neue Juristische Wochenschrift 1921.
[27] Judgment of the European Court of Human Rights N57435/09 "Paulikas v. Lithuania", 24 April 2017.

crime by a person. As already mentioned, the statements of the Prosecutor's Office cannot be formulated as if the person's guilt has already been proven.

Based on the presumption of innocence, the accused cannot suffer socio-ethical discrimination in the ongoing criminal process. There is a danger of this when the identity of the accused is revealed in the media. Accordingly, some scholars believe that publicly revealing the identity of the accused contradicts the requirement of the presumption of innocence, because it stigmatizes the accused in the society.[28] In their opinion, the disclosure of the identity and image of the accused, together with the information exposing the crime of the accused through the media, contains a clear danger of stigmatizing the accused. Even when the Prosecutor's Office does not call a person guilty in public statements, the public identification of the accused provides a basis for the public to consider the person guilty due to insufficient objective information about the criminal case.[29] This opinion is not shared in the legal literature, and many authors believe that the above-mentioned opinion is an attempt to inappropriately expand the scope of the presumption of innocence, which does not have appropriate dogmatic foundations.[30] According to the prevailing opinion in the legal literature, the principle of presumption of innocence should exclude only that a person is considered guilty before the court's guilty verdict enters into legal force, and not that the Prosecutor's Office communicates with the media and informs the public about current criminal cases. When the prosecution provides information to the public in a measured and appropriate way, even if it reveals the identity of the accused, the presumption of innocence is not violated. The identification of a person by indicating that he/she has the procedural status of the accused and there is only an assumption about the possible commission of a crime by him/her, does not constitute a declaration of guilt of the person by the Prosecutor's Office. Such a declaration, to a certain extent, even if it creates the impression of a person's guilt to the public, it will still fall within the framework of the presumption of innocence. Therefore, in the legal literature, it is considered that the disclosure of the identity of the accused in public statements by the Prosecutor's Office does not in itself constitute a violation of the principle of presumption of innocence, if it is not accompanied by an indication of the person's guilt and the disclosure of such personal data of the accused, which makes the person an obvious criminal in the eyes of the public.[31]

[28] For example, Peter Zielemann, Der Tatverdächtige als Person der Zeitgeschichte (Duncker & Humblot 1982) 80-81.

[29] Klaus-Dieter Höh, Strafrechtliche Anonymitätsschutz der Beschuldigten vor öffentlicher Identifizierung durch den Staatsanwalt (Diss. Bonn 1985) 13; Kristian Kühl, „Persönlichkeitsschutz des Tatverdächtigten durch die Unschuldsvermutung" in Hubmann Heinrich (Hrsg.) Festschrift für Heinrich Hubmann zum 70. Geburtstag, Hans Forkel (Metzner Verlag 1985) 253.

[30] Neuling, supra note 14, 248; Brigit Dalbkermeyer, Der Schutz des Beschuldigten vor identifizierenden und tendenziösen Pressemitteilungen der Ermittlungsbehörden (Peter Lang 1993) 112.

[31] Reike, supra note 5, 105.

V. THE RIGHT TO PRIVACY

As mentioned, the public statements of the Prosecutor's Office about the ongoing investigation and the information disseminated through the media about the accused person contain substantial risks of violating the right to privacy of the accused. The information policy of the Prosecutor's Office and the active coverage of information by the media can lead to the stigmatization of the accused in the society and harm both his/her business reputation and personal relationships.

In this context, it is important to specify the content of the right to privacy. According to the first paragraph of Article 15 of the Constitution of Georgia, personal and family life shall be inviolable. This right may be restricted only in accordance with law for ensuring national security or public safety, or for protecting the rights of others, insofar as is necessary in a democratic society. According to the definition of the Constitutional Court of Georgia, "in general, private life refers to the private sphere of an individual's life and development. The right to private life, on the one hand, means the ability of an individual, personally, at his/her own discretion, to independently create and develop his/her private life, and, on the other hand, to be protected and secured in his/her private sphere from the interference of the state, as well as any other persons."[32] It should be noted that the individual aspects of the mentioned right are very broad. According to the definition of the European Court of Human Rights: guaranteed by Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, "the right to private life extends to all aspects of personal identity, such as: a person's name, photo, or physical and moral inviolability; the main goal of the guarantee defined in Article 8 of the Convention is to ensure the personal development of every person without interference, which is manifested in his/her relations with other people. Accordingly, there are points of intersection with other persons, including in public contexts, that are protected by private life, and the publication of a photograph may invade a person's private life, even when he/she is a public figure."[33]

Thus, a person's right to anonymity derives from the guarantee of inviolability of private life. Anonymity means that individuals independently decide to remain unrecognizable, unidentified in public space.[34] Therefore, a person should be protected from arbitrarily informing the public about the important circumstances of his/her life by state bodies or the media. Accordingly, it is an interference with the right to private life of a person when the identity of the accused is made public by the media or the

[32] Judgment of the Constitutional Court of Georgia N1/3/407 "Georgian Young Lawyers Association and citizen of Georgia Ekaterine Lomtatidze v. the Parliament of Georgia", 26 December 2007, II-4.
[33] Judgment of the European Court of Human Rights N40660/08, 60641/08 "Von Hannover v. Germany", 7 February 2012.
[34] Gerald Neben, Trivale Personenberichterstattung als Rechtsproblem. Ein Beitrag zur Grenzziehung zwischen Medienfreiheit und Persönlichkeitsschutz (Duncker & Humblot 2001) 161.

Prosecutor's Office.[35] The interest of the accused in being protected from the disclosure of his/her identity derives from his/her right to anonymity. However, in order to identify a person, it is not mandatory to make his/her identity public. In some cases, to identify a person, it is completely sufficient to name his/her place of residence, profession or age. Identification of a person takes place even when he/she is identifiable only in his/her immediate surroundings.[36]

A person's right to his/her own photo is part of the right to anonymity. With the guarantee of inviolability of personal life, a person is protected from taking photos or videos without his/her permission, as well as from the distribution of such materials.

Another aspect of the guarantee of privacy is the right to socialize. Any convicted person should have the chance to regain his/her place in the society as a full member of society after serving his/her sentence. The media, by intensive coverage of information about the person who committed the crime, can create a threat to the resocialization of the person, because the process of resocialization involves the participation of society. Creating a negative image of the accused (convict) by the media strengthens the distance of society from the latter.[37] The right to socialize is also particularly important for the accused. The dissemination of information that a person has the procedural status of the accused can also jeopardize the socialization process of the accused. As a rule, members of the society who are not familiar with the law, even at the stage of investigation, equate the accused with the criminal. Accordingly, the state bodies are obliged to show maximum attention when making statements about the committed crime and avoid the threat of encroaching on the basic rights of a person arising from the disclosure of information.[38]

It is important to note that the right to privacy is not absolute. Democracy relies on the existence of a reasonable balance between private and public interests, "restriction of the majority of rights is inevitable, because their realization often creates a conflict of values... while the conflict of interests is inevitable, the need for their harmonization and fair balancing arises."[39] "One of the most important conditions for the stability of the modern state is the correct and fair determination of priorities between private and public interests, the creation of a reasonably balanced system of relations between the government and people. This, first of all, finds expression in the adequate legislative

[35] Peter Kotz. „Strafrecht und Medien" (1982) 1 Neue Zeitschrift für Strafrecht 14.

[36] Udo Branahl, Medienrecht, Eine Einführung (5. Auflage, VS Verlag für Sozialwissenschaften 2006) 124.

[37] Decision of the Federal Constitutional Court of Germany N35, 202 (234, 235, 237) so-called "Lebach decision", 5 June 1973.

[38] Friedrich Kübler, „Sozialisationsschutz durch Medienverantwortung als Problem richterlichen Normierens" in Friedrich Kübler Medienwirkung und Medienverantwortung, Überlegungen und Dokumente zum Lebach-Urteil des Bundesverfassungsgerichts (Nomos-Verlagsgesellschaft 1975) 12.

[39] Judgment of the Constitutional Court of Georgia on case N1/1/477 "Public Defender of Georgia v. the Parliament of Georgia", December 22, 2011, II-45.

determination of the content and scope of each specific right." "The right to inviolability of private life can be limited in a democratic state in order to achieve the legitimate goals provided for by the Constitution, with the mandatory observance of the condition that the interference with the right will be necessary and proportionate to the achievement of the legitimate goals."[40]

It should also be taken into account that the European Court of Human Rights recognizes the public interest in providing information about the progress of the criminal proceedings to the public. When there is an assessment of the public interest in disseminating information and the resulting interference with the right to privacy of the accused, the public interest in informing the public about the crime usually takes precedence. The one who violates the law and by his/her actions harms the individual legal good of another person or infringes on the collective legal good, along with criminal sanctions, he/she must also accept that the interest of awareness aroused in the society by his/her actions will be satisfied by different ways of communication in the society existing in the conditions of free communication. However, the preference of the public interest for public awareness does not operate without limitation. The interference with the right to privacy of the accused caused by the dissemination of information about the crime and the person who committed the crime should be done taking into account the principle of proportionality. The interference with the right to privacy of the accused cannot be more intense than is necessary to satisfy the public's interest in information. In addition, by disseminating information, the harm caused to the accused should be proportionate to the gravity of the crime committed. Accordingly, disclosing of the identity of the accused or the perpetrator, sharing his/her picture or other identification is not always allowed. This is especially to be considered in cases of minors or less serious crimes.[41]

The Prosecutor's Office must assess in each specific case which interest should be given priority. At the same time, the intensity of interference in the personal life of the accused caused by the dissemination of information and all the negative consequences that his/her public statements may have for the accused should be taken into account.[42] Among the evaluation criteria is the gravity or particularity of the crime charged. The more the

[40] Judgment of the Constitutional Court of Georgia N1/1/625,640 "Public Defender of Georgia, Citizens of Georgia - Giorgi Burjanadze, Lika Sajaia, Giorgi Gotsiridze, Tatia Kinkladze, Giorgi Chitidze, Lasha Tughushi, Zviad Koridze, Non-entrepreneurial (Non-commercial) Legal Entity "Open Society Georgia Foundation", Non-entrepreneurial (Non-commercial) Legal Entity "Transparency International – Georgia", Non-entrepreneurial (Non-commercial) Legal Entity "Georgian Young Lawyers' Association", Non-entrepreneurial (Non-commercial) Legal Entity "International Society for Fair Elections and Democracy" and Non-entrepreneurial (Non-commercial) Legal Entity "Human Rights Center" v. the Parliament of Georgia", 14 April 2016, II-29.

[41] Decision of the Federal Constitutional Court of Germany N35, 202 (234, 235, 237) so-called "Lebach decision", 5 June 1973.

[42] Reike, supra note 5, 75.

crime is distinguished by its serious consequences, the way it was committed or the particularity of its victim, the higher the public interest in information and, therefore, the more justified is the interference with the right to privacy of the accused.

The next evaluation criterion is the degree of suspicion against a person regarding the commission of a crime, that is, how relevant and convincing evidence exists against a person. The higher the probability of a person committing a crime, the more justified it is to restrict his/her right to privacy in order to satisfy the public interest. However, based only on the mentioned criterion, it is unjustified for the Prosecutor's Office to publicize and identify the accused. Along with the mentioned criterion, there should be other evaluation criteria that jointly justify the limitation of the basic rights of the accused.[43]

When evaluating the interests, the personality of the accused should also be taken into account. When there is a special public interest in the identity of a person, this circumstance may justify the identification of the accused in the media. Thus, the public identification of the accused depends on the extent to which he/she is a recognizable person. Famous persons are those who lead a public life and are in the center of public attention. In the legal literature, absolutely and relatively recognizable persons are distinguished from each other. Absolutely famous persons include such persons who attracted public interest not because of a one-time event, but due to their status and importance, they are specially treated in the center of public attention. Such persons are, for example, heads of state, politicians, famous scientists, artists, actors and prominent sportsmen, as well as other persons who have gained a special place in society by their activities and status.[44] Although the right to privacy of such persons is protected, they usually have to tolerate the public distribution of photos and facts about their private life.[45] Accordingly, absolutely well-known persons should also tolerate the fact of their alleged crime along with disclosing their identity being spread to the world by means of media. The higher the trust and status of such persons in the society, the less their right to privacy is protected.[46] This approach is justified by the argument that absolutely famous people make public the individual details of their personal life in different ways and try to gain recognition in the society by using the media. Those who, by their behavior, public function or distinguished public status, attract the interest of the public

[43] Sabine Schröer-Schallenberg, Informationsansprüche der Presse gegenüber Behörden (Duncker & Humblot 1987) 136.

[44] Peter von Becker, Straftäter und Tatverdächtige in den Massenmedien. Die Frage der Rechtmäßigkeit identifizierender Kriminalberichte. Eine Untersuchung zur beispielhaften Konkretisierung von Medienverantwortung im demokratisch-sozialen Rechtsstaat (Nomos 1979) 155; Dalbkermeyer, supra note 30, 67.

[45] Zielemann, supra note 28, 102.

[46] Helmut Kerscher, Gerichtsberichtertattung und Persönlichkeitsschutz, Eine empirisch-rechtspolitische Studie über Entstehung und Wirkung identifizierender Gerichsberichtertattung (Universität Hamburg 1982) 338.

in a special way, are obliged to tolerate the existing public interest towards them.[47]

In contrast to absolutely famous persons, relatively famous persons include such persons who have received public interest from an event, based on the fact that it happened. Therefore, in their case, public interest is captured not by the person himself/herself, but by a certain event.[48] In this regard, the question arises as to how well-known persons are those who were not known to the public before committing the crime, and the committed crime and its status as a defendant drew the attention of the public. There are no uniform positions in this regard. In the legal literature, some of the authors do not consider the accused person to be a relatively well-known person, while some recognize them as such.[49] The third, intermediate opinion is recognized, which considers the accused persons to be relatively known persons, taking into account individual circumstances, in individual cases and not always. In this case, each specific case and the special circumstances that attracted public interest are acceptable. Therefore, the relative recognition of the accused depends on the special interest of the public in the specific crime.[50]

VI. BALANCED INFORMATION POLICY STANDARDS

As mentioned above, the reporting of information about a criminal case is associated with certain risks in terms of ensuring a fair criminal process and important guarantees for the accused. Therefore, the media and law enforcement agencies, as a result of the assessment and analysis of individual risks, should correctly conduct their information policy in this area. The standards developed for the correct planning and implementation of the information policy will help them in this regard.

When it comes to media coverage of crime, the code of conduct of broadcasters[51] should be considered in this regard, which provides guidelines to media outlets. An important obligation that the Code imposes on the media is to ensure the provision of accurate information. According to Article 13, Part 2 of the Code, the broadcaster is

[47] ibid, 339; Neben, supra note 34, 243; Christoph Degenhart, „Das allgemeine Persönlichkeitsrecht, Art. 2 I iV mit Art. 1, I GG" (1992) Juristische Schulung 361.

[48] Kerstin Gronau, Das Persönlichkitsrecht von Personen der Zeitgeschichte und die Medienfreiheit (Nomos 2001) 46; Kerscher, supra note 46, 336.

[49] Joachim Bornkamm, „Die Berichtserstattung über schwebende Strafverfahren und das Persönlichkeitsrecht des Beschuldigten" (1883) Neue Zeitschrift für Strafrecht 102; Dalbkermeyer, supra note 30, 73; Neuling, supra note 14, 235.

[50] Gronau, supra note 48, 338; Herwigh Engau, Straftäter und Tatverdächtige als Personen der Zeitgeschichte, Ein Beitrag zur Problematik identifizierender Mediendarstellungen (Peter Lang 1993) 192.

[51] Resolution of the National Communications Commission of Georgia on the approval of the "Code of Conduct for Broadcasters", "Code of Conduct for Broadcasters" <https://matsne.gov.ge/ka/document/view/82792?publication=0> [last accessed on 15 December 2022].

obliged to provide the audience with reliable and accurate information, not to allow the dissemination of false or misleading information. Accordingly, the media should refrain from disseminating unverified and unreliable information. The information provided by them to the public about the criminal case should be based only on verified and real factual circumstances. At the same time, the media should be especially careful about the right to privacy. It is obliged to maintain a balance between freedom of information and the legitimate expectation of privacy.[52] When reporting a crime, the broadcaster should not identify the accused, unless his/her name is known to the public or the case is of public interest.[53] Thus, the circumstances belonging to the sphere of private life can become known to the public only if the public's interest in providing information clearly outweighs the interest of the privacy of a person.[54] At the same time, there must be the minimum evidence that confirms the correctness of the disseminated information and gives it a high value for informing the public.[55] It is not allowed to disseminate information in such a way that the accused person is clearly guilty. It is also not allowed to cover clearly one-sided or incorrect information in order to impress the public. When reporting information, the arguments and facts presented by the defense side should also be taken into account.[56]

When media does not cover the information obtained based on its own sources, but the information disseminated by the criminal justice bodies, in this case, the criminal justice body itself is responsible for the reported information, not the media. At this time, the media appears to us only in the role of an information carrier, it plays the role of a sort of mediator in relation to informing the public.[57] Media has every reason to trust the information released by the Prosecutor's Office and to cover it with the assumption that the Prosecutor's Office acts in good faith and does not provide the public with information that is not sufficiently supported by the evidence in the case. Media can rely on the data of the Prosecutor's Office and not conduct a journalistic investigation themselves, if they have no reason to doubt the legality of the actions of the Prosecutor's Office. In the same way, journalists can disclose the identifying information of the accused, if such information is disclosed to the journalists by the representatives of the judicial bodies. Media can have confidence in the state bodies that the judicial bodies provide such information to the public only as a result of the high public interest in the case, the seriousness of the committed crime, the sufficient evidence in the case, the identity of the accused and the rights of the accused.[58] Criminal

[52] ibid, Article 34.
[53] ibid, Article 49, part 3.
[54] Karl Egbert Wenzel, Das Recht der Wort- und Bildberichterstattung (5. Auflage, Verlag Dr. Otto Schmidt 2003) 151.
[55] Decision NVI ZR 51/99 of the German Federal Supreme Court, 7 December 1999.
[56] ibid; Reike, supra note 5, 216.
[57] Wenzel, supra note 55, 136; Dalbkermeyer, supra note 30, 213.
[58] Reike, supra note 5, 217.

justice authorities should take into account the fact that media may not disseminate the information provided by them in exactly the same form and volume. It is characteristic of the media to disseminate information in such a way that it will have a greater effect on the society. Therefore, before disseminating information, criminal justice authorities must correctly assess the existing risks and then take responsibility for disseminating information.[59]

As mentioned, the active cooperation of the Prosecutor's Office with the media and informing the public about ongoing criminal cases is permissible and even desirable, if, at the same time, personal identifying data of the accused is not made public. This not only satisfies the public's awareness, but also provides the opportunity for the members of the public to evaluate, control and criticize the activities of the criminal prosecution body. Therefore, public relations of the Prosecutor's Office is the most important achievement of democracy.[60] The problem and the risks of violating the most important guarantees of the person arise when the prosecution and investigative bodies identify the accused. In this case, public and private interests are in conflict with each other. In such cases, the state authorities are obliged to properly assess the conflicting interests and take into account all the legal and factual circumstances. It has to be determined to what extent the public interest exceeds the interest of protecting a person's right to private life, how intense the disclosure of a person's identity will be, interference in his/her private life and what negative consequences this will have for ensuring the important guarantees of a person.[61]

In order to inform the public, as a rule, it is sufficient to disseminate information about the course of the investigation and the measures taken, in particular, it is sufficient to disseminate information about the detention, arrest, search and indictment of a person. In contrast, public disclosure of investigation details should be avoided in the first place.[62] In addition, information about the charges presented to the person should be disseminated in a measured and correct way, so as to avoid making premature and incorrect conclusions about the guilt of the person by the members of the society. Therefore, the Prosecutor's Office and the investigative body should limit themselves to talking only about the actual circumstances of the committed crime and should refuse to evaluate the results of the investigation, the personality of the accused and his/her guilt, since such evaluations are related to the risks that the simple suspicion of a person's guilt will be perceived by members of the society as unmistakable evidence of his/her guilt.[63]

[59] ibid, 218.
[60] Lorz and Bosch, supra note 4, 110.
[61] Berlin Administrative Court Decision N27A262.00, 5 October 2000.
[62] Roxin, supra note 11, 108.
[63] Reike, supra note 5, 229.

It is important that the investigative body or the Prosecutor's Office does not conduct an information campaign unilaterally, only with the involvement of the media. The accused and his/her lawyer must also be involved in the communication process. Before providing information related to the accused to the media, the accused or his/her lawyer must be informed about it. When the accused is aware of the information spread about him/her in the media, he/she has the opportunity to prepare in advance for public response and statements to be made to the media. Also, the accused should be given the opportunity to influence the process of publicizing such information that affects him/her. Without the involvement of the accused or his/her lawyer, the issue of making public relevant information about the personality of the accused should not be decided unilaterally and easily. The latter should also have the opportunity to present their own positions and arguments.[64]

VII. CONCLUSION

In summary, it can be said that the criminal justice authorities and the media must pay special attention to the implementation of the correct information policy when informing the public about the criminal case and the accused. Despite the high public interest in individual criminal cases, it is necessary to inform them in a balanced way, which also means taking into account the guarantees given to the accused and the interests of justice. In addition, when making statements, be especially careful with the representatives of investigative bodies and the Prosecutor's Office, because media informs the public based on this information, and in this case, the criminal justice body itself is responsible for the information, not the media.

[64] ibid, 235.

Tamar Gegelia[*]

GEORGIAN REGIME OF REGULATION OF PROSTITUTION AND ITS WATCHDOGS

ABSTRACT

Prostitution is prohibited by Georgian regime of prostitution, and a sex worker is punished, but not a client. The actions of third parties are also criminalized. Even today, the sex work is still considered in the moral context, and the addressee of criticism is both, the buyer of this service, and the sex worker, and all critics judge them from the standpoint of their subjective moral prism of admissibility or inadmissibility, and require the punishment of either one, or another. The purpose of the article is to review the regimes of prostitution and to select the best experience. Consideration of these issues is important for revision of Georgian regime of prostitution, which is the source of violation of human rights and unjustified police repression.

The purpose of this article is not to romanticize prostitution, but rather to identify the source of the harm (that is inherent to this work) and seek ways to reduce it in order to make the environment safe for sex workers, so that they enjoy all of the rights that are guaranteed to all by the Constitution.

The question of the constitutionality of the legislation defining prostitution in Georgia was brought to the Constitutional Court in 2018, although the claim has not been considered yet. Against this background, in this article, we will try to make our small contribution to the identification of the problem and the ways to solve it.

I. INTRODUCTION

To decide with whom and under what conditions an individual will have sexual relations, is only up to the participants in this relationship. Interference by the state in personal relationships, which are based on the will of people, is unjustified and violates the right of a person to dispose of his/her own life and make decisions about it. Even today the sex work is considered from a moral point of view, and the addressee of criticism is both, the buyer of this service and the sex worker, and all critics judge them from the standpoint of their subjective moral prism of admissibility or inadmissibility, and require the punishment of either one, or another.

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In Georgia, the question of constitutionality of the legislation defining prostitution arose, when the plaintiffs filed a claim in the Constitutional Court to review the constitutionality of the prohibition of prostitution,[1] although the claim has not been considered yet. Public Defender of Georgia submitted his amicus curiae opinion to the Court regarding the constitutional claim and supported recognition of the prohibition of prostitution as unconstitutional.[2] Against the background of the above, with this article we will try to make our small contribution into identifying the problem and searching its solutions.

The Georgian regime of prostitution, which is defined in the law of 1984,[3] has never become the subject of criticism and discussion in Georgian academic texts and circles. This article aims to criticize the regime and show the harm caused by the regulation of prostitution itself, and not the prostitution.

In the 60s of the 20th century, the law of many countries was reformed.[4] In this process, one of the most urgent issues of scientists was the reach the agreement on the criteria for restriction of criminalization. The *Hart-Devlin* debate also addressed this issue.[5] *Hart's* view that moral crimes, including prostitution, should be decriminalized, also received strong support in criminal law doctrine.[6]

Norms prohibiting circulation of adult pornographic materials were also criticized, and conservatives and radical feminists were among those, who supported punishment of pornography,[7] while liberal scholars, on the other hand, opposed to punishment, because they saw no legal interest in protection against pornography, and neither did they see the harm that would justify criminalization.[8] Today, circulation of pornography is regulated in the US and European countries, although there is no longer such an absolute and

[1] Constitutional claim N1354 "S.M. v. the Parliament of Georgia", 3 October 2018 <https://www.constcourt.ge/ka/judicial-acts?legal=1426> [last accessed on 16 May 2022].

[2] Amicus curiae opinion: Author - Public Defender of Georgia N1354 "A. S.M. v. the Parliament of Georgia", March 4, 2020 a <https://www.constcourt.ge/ka/judicial-acts?legal=10230> [last accessed on 16 May 2022].

[3] Article 1723, Code of Administrative Offenses of Georgia, <https://matsne.gov.ge/document/view/28216?publication=511> [last accessed on 16 May 2022].

[4] Group of Authors, edited by Tamar Gegelia, The Scope of Criminal Justice (Open Society Foundation, 2021) (in Georgian).

[5] Herbert Lionel Adolphus, Law, Liberty, and Morality (Stanford University Press 1963); Patrick Devlin, The Enforcement of Morals (Oxford University Press 1959).

[6] Tamar Gegelia, 'The Real Impact of the Harm Principle on the Liberalization of Criminal Law' (2021) 2 Central and Eastern European Legal Studies 171-203 <https://eplopublications.eu/publication/digital-edition/real-impact-harm-principle-liberalization-criminal-law> [last accessed on 15 December 2022].

[7] Catharine A. Mackinnon, Butterfly Politics, Hanging the World for Women (2nd edition, Belknap Press, An Imprint of Harvard University Press 2019) 96-108.

[8] Camille Paglia, Fee Women Free Men (Canongate Canons; Main - Canons edition 2018) 85-91.

comprehensive ban, as it used to be years ago.[9] Regardless of moral concepts, societies have come to the realization, that a person should not be punished for using marijuana, for having different sexual tastes or orientation, for sadomasochistic sexual relations, etc[10]. Similar moral crimes have been removed from the catalog of crimes defined by modern criminal law[11]. The process of abolishing moral crimes is moving forward, albeit slowly.

The fundamental transformation of the criminal law of Georgia took place with the abolition of the 1960 USSR Code and the adoption of the independent Georgian Criminal Code in 1999. The Criminal Code of 1999 was revised several more times, decriminalizing a number of offences (e.g., verbal abuse, defamation) and criminalizing many other offences (e.g., torture, trafficking, child pornography, domestic violence, etc.). Despite these changes, Georgian criminal law still faces major challenges in being in harmony with international human rights standards.[12]

The Code of Administrative Offenses of 1984, which is a ghost of the Soviet totalitarian regime in modern Georgia, has not been revised, and as of today, it is still an effective mechanism of police repression against citizens. This law has the lion's share in strengthening the militia regime of prostitution in Georgia.[13] There are two main norms, that prohibit prostitution and disobedience/insulting the police.

Criminal law in liberal democracies is subject to constitutional control. Criminal law should be based on the principle of individual autonomy and respect human freedom, therefore, it should only establish minimum prohibitions, which are necessary to protect the legal interest from the encroachment of others.[14] The harm principle[15] applies to administrative offenses as well, especially since the sanctions provided by the law of 1984 are largely criminal by their nature. For example, in Georgia, the punishment of a person for the use of marijuana has been decriminalized, and punishment either by criminal or administrative law is not justified, because personal use of the drug does not harm others.[16]

[9] For critical analysis of existing pornography regulations, see Paul Kearns, 'The Judicial Nemesis: Artistic Freedom and the European Court of Human Rights' (2012) 1 Irish Law Journal 56-92.

[10] For history and analysis of abolition of moral torts in various jurisdictions, see Group of Authors, supra note 4, Section 1 of Chapter 2.

[11] ibid.

[12] ibid. Ushangi Bakhtadze, Criminological Analysis of the Criminalization Process (Sabauni 2021) (in Georgian).

[13] Tamar Dekanosidze, Gender-Based Violence against Sex Workers and Barriers to Access to Justice (Open Society Foundation/GYLA 2018) (in Georgian).

[14] John Stuart Mill, On Liberty (1st edition 1859, Batoche Books Limited 2001)13; Andrew Ashworth and Jeremy Horder, Principles of Criminal Law (Oxford University Press 2013) 28.

[15] For an analysis of the harm principle, see Group of Authors, supra note 4, Section 1 of Chapter 2. Bakhtadze, supra note 12.

[16] The Constitutional Court of Georgia established the incompatibility of criminalization of marijuana

According to Georgian legislation, prostitution is punished administratively, and facilitating it is punished criminally. The arguments provided to justify criminalization/ decriminalization vary depending on whether the proponent is a conservative, radical, or liberal feminist group. Liberal opinion supports its decriminalization, which is also supported in this article.

The purpose of the article is to review the regimes of prostitution and select the best practice model, which can serve as a guide for changing Georgian regime of regulation of prostitution, which is a source of human rights violations and unjustified police repressions. The purpose of this article is not to romanticize prostitution, but rather to identify the source of the harm (which is inherent to this work) and seek ways to reduce it in order to make the environment safe for sex workers and ensure, that they enjoy all rights granted by the Constitution. The purpose of the article is to discuss the issue of criminalization of prostitution and some actions related to it from the perspective of liberal philosophy, to question legitimacy of criminalization of such actions, and to show the reader, that the harm related to these actions is not necessarily linked with the sex work, but with the regime that prohibits prostitution. However, when the article talks about the position supporting complete decriminalization of prostitution, it keeps in mind only voluntary activities of an adult sex worker.

II. PROSTITUTION REGIMES

The essence of prostitution varies from country to country, which is explained by the historical, social or cultural contexts of a specific country.[17] The most common definition of prostitution is buying sexual services.[18] *Amnesty International* refers to prostitution as sex work and offers the following definition: ‘’sex work is the exchange of sexual services (involving sexual acts) between consenting adults for some form of remuneration, with the terms agreed between the seller and the buyer”.[19]

Legal regulation of prostitution varies from country to country. In some countries it is punishable, while in others it is not, although the approaches differ here as well.[20]

use with the Constitution of Georgia. see Judgment of the Constitutional Court of Georgia N1/13/732 “Citizen of Georgia Givi Shanidze v. Parliament of Georgia”, 30 November 2017 <https://matsne.gov.ge/ka/document/view/3875278?publication=0> [last accessed on 12 December 2022]; Judgment of the Constitutional Court of Georgia N1/3/1282 “Citizens of Georgia - Zurab Japaridze and Vakhtang Megrelishvili v. the Parliament of Georgia”, 30 July 2018, <https://matsne.gov.ge/ka/document/view/4283100?publication=0> [last accessed on 12 December 2022].

[17] Stuart P. Green, Criminalizing Sex: A Unified Liberal Theory (Oxford University Press 2020) 296.

[18] ibid, 298.

[19] Amnesty International Policy on State Obligation to Respect, Protect and Fulfil the Human Rights of Sex Workers (Amnesty International 2016) 3 <https://www.amnesty.org/en/documents/pol30/4062/2016/en/> [last accessed on 28 August 2022].

[20] Green, supra note 17, 295.

The scope of punishability is wider or narrower depending on what serves as basis for making certain actions punishable and what is the purpose of prohibition.[21]

Several models of regulation of prostitution can be distinguished: 1) According to one approach prostitution is illegal and punishable, and sex work is punished;[22] 2) Different regimes is established by the so-called Swedish[23] model, which is also referred to as neo-abolitionism.[24] Prostitution is illegal, though for sex work is punishable not a sex worker, but by buyers and other persons, who facilitate of prostitution.[25] According to this model, sex workers are victims of the circumstances, that a buyer exploits.[26] The lobbyists of this model are radical feminists; [27] 3) According to another approach, the sex work and actions of persons engaged in it are fully decriminalized, and sex work is minimally regulated by law, while the rights of sex workers are fully protected[28] (for example, New Zealand, Australia - New South Wales[29]); 4) Regulationism is an approach, where prostitution is legal and activities are strictly regulated by law (e.g., Germany, the Netherlands).[30]

[21] ibid, 315-323.

[22] Countries where this regime is introduced: Georgia, Russia, China, the United States. The exception is the state of Nevada where prostitution is legalized. For the analysis of the US model, see: Ronald Weitzer, 'Sex Work, Gender, and Criminal Justice' in Rosemary Gartner and Bill McCarthy (eds), The Oxford Handbook of Gender, Sex, and Crime (Oxford University Press 2014) 514-518; Cecilia Benoit et al., 'Unlinking Prostitution and Sex Trafficking: Response to Commentaries' (2019) 48 Archives of Sexual Behavior 1973-1980.

[23] Countries where this regime is introduced: Sweden, Norway, France.

[24] For criticism of Swedish model see: Gillian M. Abel, 'A Decade of Decriminalization: Sex Work 'Down Under' but not Underground' (2014) 14(5) Criminology & Criminal Justice 588; Mariana Valverde, 'The Legal Regulation of Sex and Sexuality' in Rosemary Gartner and Bill McCarthy (eds), The Oxford Handbook of Gender, Sex, and Crime (Oxford University Press 2014) 642-644; Janet Halley and others, 'From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work and Sex Trafficking: Four Studies in Contemporary Governance Feminism' (2006) 29(2) Harvard Journal of Law & Gender 396-397, 400; Polina Bachlakova, 'How the Nordic model in France changed everything for sex workers' (Open Democracy 2020) <https://www.opendemocracy.net/en/beyond-trafficking-and-slavery/long-read-how-nordic-model-france-changed-everything-sex-workers/> [last accessed on 28 August 2022].

[25] Katie Beran, 'Revisiting the Prostitution Debate: Uniting Liberal and Radical Feminism in Pursuit of Policy Reform' (2012) 30(1) Law & Inequality 49-52.

[26] Benoit and others, supra note 22, 1910.

[27] E.g., Mackinnon, supra note 7, 162-179. For criticism of this approach see: Benoit, supra note 22, 1918; Also see: Alan Collins and Guy Judge, 'Client Participation in Paid Sex Markets Under Alternative Regulatory Regimes' (2008) 28(4) International Review of Law and Economics 297; Prabha Kotiswaran, 'Beyond the allures of Criminalization: Rethinking the regulation of sex work in India' (2014) 14(5) Criminology & Criminal Justice 570; Jane Scoular, 'What's Law Got to Do with It? How and Why Law Matters in the Regulation of Sex Work' (2010) 37(1) Journal of Law and Society 16-17.

[28] For the analysis of New Zealand model, see: Abel, supra note 24, 580-587; Green, supra note 17, 295.

[29] Benoit, supra note 22, 1916.

[30] Molly Smith and Juno Mac, Revolting Prostitutes, The Fight for Sex Workers' Rights (Verso 2018) 176-189.

Although different regimes of prostitution are established, such as, for example, the so-called Swedish model, that punishes a client and third parties (facilitators), and a legalization model (for example, the Netherlands, Germany, Austria), as demonstrated by various studies, they have similar results in reality, including the marginalization of street prostitution and leaving of vast majority of sex workers beyond regulation of the legal system.[31]

The regime of legalization (regulation) of prostitution legalizes only certain types of sex work, and at strictly defined conditions.[32] The criticism expressed towards this regime is multidimensional. It is criticized for normalizing the sex industry,[33] leaving the sex workers beyond regulation by law, and failing to provide them with a safe environment.[34] Regulations impose on sex workers compulsory taxes and require conducting of routine medical examinations, which creates an unbearable environment for sex workers,[35] due to which they are forced to go back into illegal environment. This system is also criticized, as it still serves the interests of others and not the sex workers,[36] and they are still neglected.

As for the Swedish model of prostitution, many studies have proved, that the situation of sex workers has worsened. This is caused by disappearance of a safe environment. A client for fear of strict sanctions is trying to avoid showing up for a long time, a sex worker no longer has the time to check a client, talk to him and agree to service him. In such an environment, a client himself offers specific terms to a sex worker. A client also sets a fee, which is much smaller than it was before.[37] According to studies, sex workers are forced to work longer in exchange for less pay.[38] For example, in Norway, where exists the so-called Swedish model of prostitution, sex work at home, as well as renting a room jointly with other sex workers, is prohibited by law, namely a provision, which prohibits brothels.[39] Under such prohibitions, a sex worker, without having opportunity of a friendly supervision of other sex workers, has an intercourse with a client in an isolated place, which, as practice has shown, encourages robbing of sex worker and

[31] Laura Agustín, 'Sex and the limits of enlightenment: The irrationality of legal regimes to control prostitution' (2008) 5(4) Sexuality Research and Social Policy 74, 76, 82; Beran, supra note 25, 50-52; Valverde, supra note 24, 642-644; Lenore Kuo, 'Prostitution Policy: Revolutionizing Practice Through A Gendered Perspective' (2003) 30(3) The Journal of Sociology & Social Welfare 132.

[32] Smith and Mac, supra note 30, 178-179.

[33] ibid, 188.

[34] Kuo, supra note 31, 134.

[35] Smith and Mac, supra note 30, 176-184. For analysis of discrimination as a result of introduction of mandatory medical tests see Kuo, supra note 31, 129. In the same work, the author states that, for example, medical tests in the Netherlands are not mandatory, although there is the lowest rate of spread of venereal diseases, which the author ascribes to aggressive information campaigns. ibid, 131.

[36] Smith and Mac, supra note 30, 184-185.

[37] ibid, 148.

[38] Scoular, supra note 27, 20.

[39] Smith and Mac, supra note 30, 146-163.

committing of various forms of violence against them.[40] Other sanctions, that can be imposed on sex workers for sex work, are eviction of home, confiscation of money and acquired items as illegal income, and deportation[41]. In such a legal environment, to claim, that the Swedish model decriminalizes actions of a sex worker and punishes only a client, is not true.

According to another study, for example, in Sweden, sex work in the indoor space is less likely to be under police control[42], in contrast to street prostitution.[43] Therefore, according to researchers, the Swedish government's statement, that prostitution has decreased, is not accurate, as it simply has become more disguised, and this is promoted by modern technologies and Internet.[44] However, even the decrease of prostitution cannot be a solid argument for justifying criminalization of sex work. To justify the Swedish model and to counter the arguments of opponents, those, who support legalization of prostitution, along with increase of trafficking also point to correlation between these regimes[45], but this is not supported by the obvious evidence of causality.[46] A regime that leaves sex workers unprotected, or forces them to circumvent strict regulations, creates fertile ground for exploitation. It should be noted, that New Zealand model was not subjected to similar criticism. An outstanding radical feminist, McKinnon[47] considers pornography and the sex industry as absolute evil, and in her latest works she praises the Swedish model, and in order to illustrate how trafficking and the number of sex workers have decreased in the countries with this regime, she refers for confirmation of this opinion to very old studies, reliability of which has already been doubted many times.[48] Georgian academic texts, when trying to show link between legalized prostitution and the increase in trafficking, either do not refer to any studies at all, or refer to unreliable sources.[49]

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[40] ibid, 146-163.

[41] ibid, 146-163; Kuo, supra note 31, 126.

[42] A total of 500 clients have been punished for buying sex in Sweden during 10 years. See Scoular, supra note 27, 19.

[43] Scoular, supra note 27,18-19. For analysis also see Agustín, supra note 31, 76; Beran, supra note 25, 52-53.

[44] For analysis of this issue see: Beran, supra note 25, 51-52.

[45] Max Waltman, Prohibiting Purchase of Sex in Sweden: Impact, Obstacles, Potential, and Supporting Escape, Working Paper No. 2010:3, Stockholm University Department of Political Science 21-22.

[46] Max Waltman, Prohibiting Purchase of Sex in Sweden: Impact, Obstacles, Potential, and Supporting Escape, Working Paper No. 2010:3, Stockholm University Department of Political Science 21-22.

[47] Catherine McCinon considers the term sex work incorrect, and she mentions it ironically in public speeches. According to her academic texts, in her opinion, there is no equal sex in heteronormative relationships, and especially, if a woman is paid for sex. According to her assessment of prostitution, a woman is exploited. For example, see her public lecture <https://www.youtube.com/watch?v=zpYegz1OqHA> [last accessed on 17 May 2022].

[48] Mackinnon, supra note 7, 177.

[49] For example, see Irine Sarkeulidze, "Supply - Demand Market in the sphere of Trafficking - Reality, Threats and Trends to Reduce It" (2018) 2 German-Georgian Journal of Criminal Law 40-41, note 21.

It is noteworthy, that New Zealand, where prostitution is fully decriminalized, has not become a hotbed of trafficking[50]. A number of other studies have also found that jurisdictions where prostitution is criminalized, it has not declined.[51]

Based on the above facts and analysis, it can be said that finally, the reality in the countries, which follow Swedish model is, that in the regime supported by carceral feminism, whose stated goal is to protect sex workers from sexual exploitation, the regulations weaken and degrade those, whom they are supposed to protect. Therefore, this regime is counterproductive and does not deserve support.

As for the model of full decriminalization of prostitution - the New Zealand model, this regime is focused on creation of a safe environment for sex workers, and reduction of social stigma and resulting harm,[52] it is neither focused on economic benefits, nor does it envisage medical testing, which undermines personal autonomy of a person (as in the legalization model). It also does not cause harm to sex workers' safe environment by criminalizing a client and third parties (as is the case with the Swedish model). In case of full decriminalization regime, sex work is decriminalized, and neither the provider of sex services, nor the recipient of these services, or third parties are punished. Under this regime, there is almost no interest to facilitate sex work, the sex workers organize their own activities without any fear, as there is no police terror.[53] The regime sets regulations in a small dose, and that too is in the interests of sex workers, as such regulations focus on sex workers, who plan to leave the sex industry, and in such a case they are entitled to immediately receive social assistance.[54] Also, the regulation obliges clients to use condoms. Although social stigma and stigmatization of street sex work remains a challenge, the researchers point to examples of reduction of stigma and better protection of rights of sex workers, which would not have occurred under the old regime.[55] Of course, New Zealand regime is not perfect either, and it is also

[50] To show the viciousness of New Zealand model, Catherine McKinnon only points to the fact, that it has not reduced violence and social stigma, and points to a 2008 report as evidence. Mackinnon, supra note 7, 178. It should be noted, that in New Zealand the new regime came into force in 2003 and 5 years later new studies (see note 52) show, that situation has improved.

[51] Kuo, supra note 31, 125.

[52] Smith and Mac, supra note 30, 198.

[53] In New Zealand, studies conducted after the Prostitution Reform Act (2003) revealed, that verbal and physical abuse of sex workers by passers-byes in the street still occurs, but an important finding is, that more and more sex workers apply to the police to protect their rights, and the police adequately responds to such requests. See Lynzi Armstrong, 'Who's the Slut, Who's the Whore?: Street Harassment in the Workplace Among Female Sex Workers in New Zealand' (2016) 11(3) Feminist Criminology 295-296. The author of the study points out, that despite many benefits, that decriminalization model has brought to sex workers, there is still much to be done in terms of changing social norms. Strengthening policies to change entrenched stereotypes about women and their sexuality, is essential to making streets completely safe for (and not just) sex workers. ibid, 298.

[54] Smith and Mac, supra note 30, 196.

[55] Fraser Crichton, Decriminalizing Sex Work in New Zealand: Its History and Impact, 21 August 2015

criticized for ignoring migrants, but it is more humane than all other regimes and it causes less harm[56]. In addition, the drawback of this regime is not something inherent, which cannot be corrected.

III. LEGAL INTEREST PROTECTED BY PROHIBITION OF PROSTITUTION

Different reasons are provided as justification of criminalization of prostitution, depending on the ideology or philosophical view of the author.[57] According to one of the opinions, punishment of prostitution is justified from the point of view of protecting the health of the population,[58] which is important for prevention of spread of venereal diseases.[59] To justify punishment, they also point to the threat of weakening of the institute of family, propaganda of promiscuity and etc.[60] These views are moralistic, which indicates to prohibition of prostitution on the moral basis, and that it does not protect from encroachment of legal interest by others.

According to radical feminists, prostitution should be punished to protect women's rights, because the impunity of prostitution normalizes violence against women and their abuse.[61] Supporters of this opinion are a part of feminists, who consider sex workers as victims and support prohibition of prostitution for this reason.[62] According to them, as long as gender-based, social and economic inequality exists, sex work will always be a form of women's oppression and objectification.[63] According to their assessment, exploitation, oppression, degradation[64] and causing other harm to women are inherent in prostitution.[65] That is why they support criminalization of

<https://www.opendemocracy.net/en/beyond-trafficking-and-slavery/decriminalising-sex-work-in-new-zealand-its-history-and-impact/> [last accessed on 21 January 2023].

[56] Smith and Mac, supra note 30, 199.

[57] Green, supra note 17, 313; Peter de Marneffe, Liberalism and Prostitution (Oxford University Press 2009) 3.

[58] Matthew Lippman, Essential Criminal Law (SAGE Publications 2013) 271; Green, supra note 17, 313.

[59] According to studies, the initiative to use safe sex, specifically condoms, comes from sex workers, and if they have to compromise, it is only to retain clients. see Beran, supra note 25, 27.

[60] Lippman, supra note 57, 271; Green, supra note 17, 313.

[61] Catharine A. MacKinnon, Only Words (Harvard University Press 1996) 37.

[62] The mentioned model has been criticized for unjustified paternalism. See Halley, supra note 24, 400.

[63] For the arguments of radical feminists, see Benoit, supra note 22, 1908.

[64] Andrea Dworkin, 'Prostitution and Male Supremacy' (1993) 1(1) Michigan Journal of Gender & Law 5-6; Catharine A. MacKinnon, 'Prostitution and Civil Rights' (1993) 1 Michigan Journal of Gender & Law 13-14.

[65] For analysis of the mentioned arguments, see Joanna N. Erdman, 'Harm Production: An Argument for Decriminalization' in Alice M. Miller and Mindy Jane Roseman (eds), Beyond Virtue and Vice (University of Pennsylvania Press 2019) 253; Marneffe, supra note 56, 3-4; Scott A. Anderson, 'Prostitution and Sexual Autonomy: Making Sense of the Prohibition of Prostitution' (2002) 112(4) Ethics, the University of Chicago Press Journals 752-754; Beran, supra note 25, 36-43.

the actions of the facilitators of prostitution (clients, pimps). It must be noted, that the Swedish model, supported by them does not empower women, as mentioned above; on the contrary, in such setting a client sets the terms of sex services, and thus is empowered further.

The second group of feminists - liberal feminists, do not deny the problem of inequality between the sexes and the influence of patriarchal culture. They also do not deny the harm and dangers associated with prostitution, although they link the harm with the regime regulating prostitution, declaration of sex workers as outlaws, and establishing control over them, and according to them the solution would be changing of environment, and not criminalization of this activity.[66] Also, according to the supporters of this position, putting all sex workers under one umbrella and not seeing their free will is wrong.[67] Free will in the ideal sense of the word is rare, which does not in itself exclude free decision[68]. As many authors have rightly noted, the decisions we make in life are often not desirable, but that in itself does not preclude us from having free agency to make a choice.[69]

Radical feminists' demand to criminalize prostitution under the pretext of protecting the collective good – "women's dignity" - ignores the desire and choice of an individual, even if it is one sex worker, which again and again hurts, damages and humiliates this individual, which is wrong. Defending women on the grounds of "their own best interests" is inherently anti-feminist.[70] Such special care for women has also historically been counterproductive.[71] Sexual exploitation is associated with harm, no one doubts the legitimacy of its criminalization, and it is true that, whether it is trafficking or other forms of sexual crimes, it is prohibited in Georgia, as well as in those countries where prostitution is legal. It is also legitimate to prohibit buying sexual services from victims of trafficking. But when we talk about prostitution, we are talking about free sex work for pay, not coercion. Sex workers are subjected to violence precisely because of the bad regime, which also reinforces the social stigma towards them. However, not all sex workers' decisions are driven by economic hardship (although many are), and this depends on the country and the context. Studies have shown, that even when the main

[66] For arguments and analysis of liberal feminists, see Anderson, supra note 64, 757-758; Beran, supra note 25, 30-36.

[67] Suzanne Jenkins, 'Exploitation: The Role of Law in Regulating Prostitution' in Suzanne Shelley and others (eds), Regulating Autonomy: Sex, Reproduction and Family (Hart Publishing; 1st edition 2009) 21-22.

[68] Nora Scheidegger, 'Balancing Sexual Autonomy, Responsibility, and the Right to Privacy: Principles for Criminalizing Sex by Deception' (2021) 22 German Law Journal 773.

[69] Robin West, 'Sex, Law, and Consent' in Franklin Miller and Alan Wertheimer (eds), The Ethics of Consent: Theory and Practice (Oxford University Press 2010) 237-238; Alan Wertheimer, 'What is Consent? And Is It Important?' (2000) 3 Buffalo Criminal Law Review 564.

[70] Kuo, supra note 31, 121.

[71] Paglia, supra note 8, 124.

motivator for performing sex work is economic problems, sex workers have a choice to opt for another job[72]. And if they have no other choice, will this choice appear by tightening the prostitution regime?

Combining the concepts of sex work and sexual exploitation is wrong, as this trivializes sexual exploitation and other violent practices, and does not help to improve the situation of sex workers, but on the contrary, it worsens it. It is artificial and false to equate voluntary sex work with trafficking or rape. Even if the radical feminists themselves believed this, why would they find it sufficient to fine a buyer/client of sex work, as envisaged by the Swedish model? This is not an adequate punishment for trafficking and rape.

The Swedish model up to today returns moral interests into the concept of harm, at the expense of expanding the protected good[73] (health, dignity and other rights) or by referring to the harm, that is not related to sex work itself, but to the prostitution regime.

Harm should not be seen where the action takes place with the consent of the participants, and therefore, there is no victim. The causes of prostitution - social, economic or cultural factors - can be changed by other alternative efforts, such as empowering women economically, socially and etc. The use of criminal law as the first, and not the last resort in the politics of defeating patriarchy, is counterproductive over and over again for the group, that the law intends to protect.

More or less, all prostitution regimes have problems, but empirical studies have shown, that in countries where legislation of prostitution is based on the health and safety of the sex workers themselves, there is no policing of behavior, because the act is fully decriminalized and regulations are minimal, and sex workers are autonomous agents, who control working hours and conditions themselves.[74]

IV. GEORGIAN REGIME OF PROSTITUTION

As for the Georgian legal environment, prostitution is prohibited in Georgia under Article 172[3] of the Code of Administrative Offenses, and Article 254 of the Criminal Code prohibits facilitation of prostitution. Thus, Georgian regime is not a model of legalization of prostitution, nor of its decriminalization, or partial criminalization like the Swedish model. According to the Georgian regime, a sex worker and the facilitator

[72] Ronald Weitzer, Legalizing Prostitution: From Illicit Vice to Lawful Business (NYU Press 2011) 15; Nicola Mai Final Policy-Relevnt Report, Migrant Workers in the UK Sex Industry, Institute for the Study of European transformations (London Metropolitan University 2010) 43.

[73] Michal Buchhandler-Raphael, 'Drugs, Dignity and Danger: Human Dignity as a Constitutional Constraint to Limit Overcriminalization' (2013) 80 Tennessee Law Review 301.

[74] Abel, supra note 24, 590; Valverde, supra note 24, 644-645.

of prostitution, i.e. a third party, are punished for prostitution, while a client is not punished.[75] In addition, prostitution is not defined in the Georgian legislation, and at first glance, the subject of the administrative offense provided for in Article 1723 can be both, the seller and the buyer of sex work, although practically, only the seller or the sex worker is punished.[76] In conditions, where prostitution is not defined, it is impossible to foresee, what activities are prohibited under it, only sex-work that involves sexual penetration, or other types of sexual activities are also included in it. It is unclear whether the ban covers cases, where a third party buys sex services for another person, rather than for themselves.[77] In practice, the term is broadly defined, and not only sexual intercourse is considered prostitution, but also preparatory actions, such as trying to persuade a client and agreeing on terms. Against the background of such terminological vagueness, there is a huge danger of discriminatory police and judicial practice, which will lead to unjustified restriction of human freedom in even more cases.

What does the Georgian model protect by prohibiting prostitution? Clearly not the sex worker's sexual autonomy, dignity or health, because in such case not the sex worker, but the client would be punished for prostitution. The Georgian model is rather based on the ideology, that sex work is against "society's morals", and this is also evidenced by the systematic interpretation of Georgian legislation. According to the Code of Administrative Offenses, prostitution is an act that undermines public order, and facilitation of prostitution is punishable under Article 254 of the Criminal Code, although it protects not the sex worker's right not to be subject to exploitation, but public morals and health. Such approach is a reflection of the social disposition, that considers sex work to be "promiscuous", "undermining the family values" and spreading "diseases".

As for the elements of offence, provided for in Article 254 of the Criminal Code - facilitation of prostitution, as mentioned above, it is included in the chapter dedicated to crimes against public health and morals, which directly indicates the interest protected from this crime.

When prostitution is a form of coercion, there is no doubt that it should be prohibited, as it violates the sexual freedom and other rights of a person involved in prostitution. But when it comes to prohibiting of prostitution (administrative offense), voluntary activity is implied here[78], and in such a case, protecting a person and even more so, punishing him/her, is a despotic paternalism, which infringes on the personal autonomy of a person to dispose of his/her own life and decide what is best for him/her.

[75] Article 1433 of the Criminal Code of Georgia criminalizes using the services of a victim of trafficking, and not prostitution.

[76] Dekanosidze, supra note 13, 22-23.

[77] For more on ambiguity of terminology related to prostitution and the variety of acts that are likely to be covered under it, see Green, supra note 17, 299-303.

[78] Amnesty International Policy, supra note 19.

The purpose of Article 254 of the Criminal Law Code is to protect sex workers from exploitation by pimps and organized criminals[79], although such norm performs totally opposite function in Georgian reality. Above, when analyzing different regimes, a number of studies were indicated, which have shown, that the right regime of prostitution protects sex workers from exploitation by pimps.

The situation of sex workers in Georgia is difficult, as their work is not safe due to prohibitions, and they often become victims of deception and violence committed by clients, but they cannot turn to police for help, because their activities are illegal and they are afraid of exposure, and another reason is, that they do not trust the police.[80]

Studies have established that sex workers in Georgia often become victims of police terror and violence, tools of police control.[81] The Georgian regime of prostitution puts the sex worker in a helpless position, as she/he is completely vulnerable to threats coming from both, a client and violent policemen. It is noteworthy, that the Public Defender of Georgia in the *amicus curiae* assessment expresses suspicion, that administrative fines are applied selectively, and for confirmation refers to statistics, which shows small number of those, who were fined under this norm during 2016-2019.[82] It should be noted, that the most common method of punishing sex workers in Georgia is under the pretext of non-compliance with the police order[83], and the sanction for this administrative offense is greater (Article 173 of the Code of Administrative Offenses provides for a fine from 2,000 to 3,000 GEL or up to 15 days of imprisonment) than for prostitution, and perhaps that is why this norm has become an effective mechanism of police terror. In the same document, the Ombudsman supports cancellation of provision, prohibiting prostitution due to its incompatibility with human rights. He assesses the unconstitutionality of the norm in reference to legal certainty (because prostitution is not defined) and the right to free development of an individual.

As for acts related to prostitution, which is an offence under Article 254 of the Criminal Code, the element of the objective party - facilitation, is so broad that it covers all actions that may be related to the promotion of prostitution. According to this norm, a sex worker cannot hire a personal bodyguard, a driver, or rent an apartment for safe

[79] For criticism of Article 254 of the Criminal Code of Georgia, see Group of Authors, edited by Bachana Jishkariani, Sex Offenses (World of Lawyers 2020) 135-136.

[80] Dekanosidze, supra note 13, 31.

[81] ibid, 30; Giorgi Chubinidze and Soso Chauchidze, Sex-work in Tbilisi: Informalization, Agency and Different Experiences, in the compendium Voices of the Oppressed: Research, Art and Activism for Social Change (EMC 2014) 51. 'Research of Sex-Workers' Needs and Factors Causing Discrimination' (Social Research and Analysis Institute 2014) 18-19. Nino Tarkhnishvili, Prostitution - what are sex workers afraid of? (Radio Liberty, May 10, 2019) <https://www.radiotavisupleba.ge/a/29933421.html> [last accessed on 11 May 2022].

[82] Amicus Curiae opinion, supra note 2.

[83] Dekanosidze, supra note 13, 28.

working conditions. Persons who are financially dependent on sex workers may be prosecuted.[84] Because of so many prohibitions and threats, sex workers fall under the supervision of pimps, who run the business according to a well-organized scheme, and a sex worker is often forced to work for them.[85] I.e. Prohibitive norms do not prevent involvement of prostitutes in the activities of sex workers, but on the contrary, they facilitate it. In Canada, where prostitution is legal, its facilitation was prohibited under criminal law until 2013, when the Supreme Court of Canada ruled it unconstitutional in its decision on the case *Bedford v. Canada*[86]. The court stated, that a rule prohibiting a sex worker to communicate with a client, rent an apartment, hire a bodyguard for personal security, or other similar actions, violated the sex worker's right to care for her/his own health and safety.[87]

Thus, it is safe to say that police terror and violence against sex workers are common features of those regimes, where prostitution is criminalized or strictly regulated. It is necessary to reform the prostitution regime in Georgia. By observing the experiences of other countries, it is possible to consider replication of New Zealand's legislation and practice, which were developed with the interest of sex workers in mind, their real needs, and not the biased and moralistic ideology of some populist group. This is why sex workers in New Zealand often talk about improved environment when evaluating the regime[88]. Prostitution should be fully decriminalized in Georgia, effective mechanisms should be created to protect the rights of sex workers, and the police should respond adequately to the harassment of sex workers.

V. CONCLUSIONS

Thus, it can be said that Georgian regulation related to prostitution cannot protect the health and personal safety of sex workers. All it does with "success" is discredit the police and marginalize sex workers. Georgia, like other countries, should comprehensively understand current situation, challenges, and taking into account the real interests of sex workers, implement the right policy, which will be focused on protecting their health and safety. As for the elements of offence, provided for in Article 254 of the Criminal Code of Georgia (facilitation of adult prostitution), the form and scope of punishment of these actions needs to be revised, because it is a moral offence and this cannot serve as basis to justify such punishment, and the said norm does not protect anyone's interest,

[84] For a similar critical analysis, see Authors Group, supra note 78, at 135-136.
[85] Criminal subculture is a concurrent result of prohibition of prostitution, for an analysis of the issue, see Lippman, supra note 57, 270.
[86] Canada (Attorney General) v. Bedford, SCC 72, 3 S.C.R. 1101. 2013 <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/13389/index.do> [last accessed on 16 May 2022].
[87] For analysis of decisions see Erdman, supra note 64, 252-259.
[88] Crichton, supra note 54.

except for protection of a very abstract notion - morality of the population. For the same reason, the norm prohibiting prostitution, which is a tool of police control and humiliation of sex workers, should be abolished too.

Archil Metreveli[*]

ONE GOAL OF TRANSFORMING THE IDEA OF A TREATY BETWEEN THE STATE OF GEORGIA AND THE ORTHODOX CHURCH OF GEORGIA INTO A "CONSTITUTIONAL AGREEMENT"

ABSTRACT

In 2001, a new legal institution that appeared in the legislation of Georgia - the "Constitutional Agreement of Georgia" received significant criticism both at the national level and from competent international institutions. One of the main targets of these critical evaluations was the "constitutional" status assigned to it. Within the framework of this article, the author offers his own observations about one goal of transforming the idea of an "treaty between the state of Georgia and the Orthodox Church of Georgia" into a "Constitutional Agreement".

The structure of the article is as follows. The first introductory chapter briefly describes the chronology of the transformation of the idea of an "treaty" into a "Constitutional Agreement" (1994-2001) and, by referring to various landmark legal acts (drafts) or documents, offers essential guidelines for the central discussion. The second chapter presents the formal arguments supporting the idea of assigning a "constitutional" status to the agreement between the state and the church and their critical analysis, which frees up the necessary space for the author's theory. In the third chapter, with appropriate sources, the central thesis of the present article is substantiated, according to which one of the goals (actual result) of granting the "constitutional" status to the agreement between the state and the church was to avoid the exclusive legislative power of the state for this legal act and the corresponding relationship. In the final part of the article, all presented facts and developed reasoning are systematically summarized.

It should be noted that the article was prepared within the framework of the current research, which aims to study the legal dimension of the Constitutional Agreement between the State of Georgia and the Apostolic Autocephalous Orthodox Church of Georgia. Sources found and processed at this stage of the said research were used directly for this article. Accordingly, the author assumes that it may not fully indicate all sources, including those documents that the author did not consider appropriate for the discussion developed here, and those that have not yet been searched and processed.

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Nevertheless, the author believes that the presented sources are essentially sufficient to support the issue raised within the scope of this article and its supporting arguments.

I. FOR AN INTRODUCTION - BASIC FACTS AND A BRIEF CHRONOLOGY

In order to determine the legal status of the Apostolic Autocephalous Orthodox Church of Georgia[1] and regulate its relationship with the state of Georgia, the idea of concluding an agreement between these two subjects appeared publicly for the first time in 1994. In the early 1990s, the frequent manifestation of religious extremism and intolerance in Georgia and, at the same time, the absence of appropriate legislation in the relevant field, prompted the Georgian authorities to adopt a special law on freedom of religion and religious associations.[2] Work on the draft law was started[3] in 1992, and two years later, in 1994, the Parliament of Georgia published the draft law of the Republic of Georgia "On Freedom of Belief and Religious Associations".[4] According to Article 6 of the draft law, the relationship between the state and the church was regulated by *a separate agreement.*[5]

It should be noted that the Parliament of the convocation of 1992-1995 did not discuss the mentioned draft law, and in 1996, the record about the agreement disappeared altogether from the new draft law "On Freedom of Conscience and Religious Organizations", already significantly modified by the Ministry of Justice of Georgia.[6] Later, in 1997, the Ministry of Justice made amendments to the specified draft law and in order to determine the legal status of the church, presented the initiative of a special law "On the Georgian Orthodox Church" (Article 8).[7]

Thus, in 1996, the idea of an agreement, which emerged in 1994 as part of the effort to develop national legislation on freedom of religion and religious associations in order to regulate the relations between the state and the church, was rejected in 1996, and

[1] In order to simplify the text, the term "Church" will be used everywhere, except for special citations or references, to denote the "Apostolic Autocephalous Orthodox Church of Georgia".

[2] The basis for this, in turn, was the Resolution N183 of the Council of Ministers of the Georgian SSR of April 12, 1990 "On Religious Affairs".

[3] Paata Zakareishvili, 'Why an agreement and not a law?' in Gia Nodia (ed), Church, State and Religious Minorities in Georgia: Are we threatened by religious fundamentalism (published by the Caucasus Institute for Peace, Democracy and Development (CIPDD) 2000) 16 (in Georgian).

[4] Draft Law of the Republic of Georgia "On Freedom of Belief and Religious Associations", Republic of Georgia (5 May 1994) 1-2.

[5] ibid, 1.

[6] Zakareishvili, supra note 3, 17.

[7] Letter from the Deputy Minister of Justice of Georgia to the Deputy Minister of State of Georgia, Annex: Draft Law of Georgia "On Freedom of Conscience and Religious Organizations", N01/52-3113, 17 November 1997.

in 1997, it was replaced by the initiative of a special law on the church. However, in the end, the Parliament of Georgia did not adopt either the general law on freedom of conscience and religious organizations, or the special law on the Georgian Orthodox Church.

In 1997, the idea of regulating the relationship between the state and the church on the basis of a bilateral treaty - this time *an agreement (concordium)* - appeared again in the Georgian legislation. In particular, the new law of Georgia "On Culture" determined the list of normative acts, which were necessary to be adopted in connection with this law, including *the agreement (concordium)* between the state and the church. It should be noted that the Law of Georgia "On Culture" still contains this norm.[8]

In 2000, the Ministry of Justice of Georgia directly indicated the corresponding norm of the Law of Georgia "On Culture" as the legal basis for the development of the draft "Agreement (concordium) between the State of Georgia and the Georgian Orthodox Apostolic Autocephalous Church".[9] We can consider as justified the point of view that the *agreement (concordium)* stipulated by the law of Georgia "On culture" is the current Constitutional Agreement (2002), the "constitutionality" of which was not provided by the law of 1997, nor by the draft agreement (concordium) prepared in 2000 based on it. It should be noted here that it is the 2000 draft of the agreement (concordium) and the remarks expressed around it that are, within the framework of this article, the main basis and source of our central reasoning, which we will refer to later.

As the next stage of development of the idea of regulating relations between the state and the church on the basis of a bilateral agreement, the period of working on the draft of the agreement can be distinguished. In particular, on January 9, 1998, the National Security Council of Georgia recommended the development of an appropriate document to the Ministry of Justice of Georgia in order to regulate the issues of church ownership.[10] In this case, resolution N183 of the Council of Ministers of Georgia dated April 12, 1990 was indicated as the basis of the bilateral agreement. According to the draft developed by the Ministry of Justice, - "Constitutional Treaty for Defining the Foundations of the Relationship Between the State of Georgia and the Georgian Orthodox Church"

[8] Article 40, Law of Georgia "On Culture" <https://www.matsne.gov.ge/ka/document/view/31402?publication=13> [last accessed on 15 October 2022].

[9] Letter of the Deputy Minister of State of Georgia to the Heads of Ministries and Departments of Georgia, Annex: Draft Agreement (Concordium) between the State of Georgia and the Orthodox Apostolic Autocephalous Church of Georgia and Annex: Explanatory note on the Draft Agreement (Concordium) between the State of Georgia and the Orthodox Apostolic Autocephalous Church of Georgia, N45/2, 14 March 2000.

[10] Letter of the Deputy Minister of Justice of Georgia to the National Security Council of Georgia, N02.11/91, 14 May 1998.

was elaborated.[11] Chronologically, this is the first time when the term *constitutional* appeared in the name of the treaty between the state and the church.[12]

It should be noted that the term constitutional, according to the presented draft, actually considered the corresponding hierarchical position of the agreement among the normative acts of Georgia. Article 34 of the draft gave it superior legal effect in relation to the Organic Law of Georgia, decree and subordinate normative acts.[13] It is worth to mention that the given draft did not consider the superior legal force of the Constitutional Treaty in relation to the international treaties and agreements of Georgia, as it is established by the Constitution of Georgia (Article 4) in the case of the current Constitutional Agreement.[14]

Accordingly, it can be said that the idea of giving a "constitutional" status to the treaty between the state and the church first appeared in 1998 but was soon rejected. In the process of working on the draft agreement in the Ministry of Justice of Georgia, its name was changed and it was first called "Concordat" (1999)[15], and later again – "Agreement (Concordium)"[16]. This process of searching for the nature, status and rank of the agreement continued for another year and officially ended on December 8, 2000, when the draft of the Georgian Constitutional Law "On Amendments and Additions to the Constitution of Georgia" was published for public consideration. According to the initiated changes, the Constitution of Georgia defined a completely new normative act for the legislation of Georgia – "Constitutional Agreement", the purpose of which was to regulate the relationship between these two parties at the constitutional level.[17]

The purpose of the sources cited here is to chronologically describe the process by which the idea of an "treaty" between the state and the church was transformed into a "Constitutional Agreement". In this way, we have made clear the two facts of the doctrine necessary for the central argument of the present article. Firstly, a bilateral treaty was conceived from the beginning as an act regulating the relationship between

[11] President/State Office of Georgia, Incoming Correspondence, "Constitutional Agreement to define the basis of relations between the state of Georgia and the Orthodox Church of Georgia", N86/4, 1 April 1998.
[12] On the agreement between the state and the church, about the term "constitutional", see Valery Loria and others, Human Rights and Religion (Tobalis Publishing House, 2006) 158-159 (in Georgian); see also: Dimitri Gegenava, Legal Models of Church-State Relations and the Constitutional Agreement of Georgia (publisher House David Batonishvili Institute of Law, Publishing House "World of Lawyers" 2018) 116-117 (in Georgian).
[13] President of Georgia/State Office, Incoming Correspondence, supra note 11.
[14] On the relationship between the Constitutional Agreement of Georgia and the international treaties and agreements of Georgia, see Konstantine Korkelia, Application of the European Convention on Human Rights in Georgia (Institute of State and Law of the Georgian Academy of Sciences 2004) 84-90 (in Georgian).
[15] Letter of the Minister of Justice of Georgia to the State Minister of Georgia, N08-22/69, 18 March 1999.
[16] Supra note 9.
[17] Republic of Georgia (8 December 2000) 3.

the state and the church and determining the legal status of the latter (the idea of a special law on the church existed only for a short time and parallel to the idea of the agreement, without principal dominance). Secondly, the legal status of the treaty (agreement, concordat, or concordium) was "constitutional" neither during the initial nor during the active discussions of the drafts (except for the weak and short episode of the "Constitutional Agreement"), it acquired a similar status only at the final stage of this process. Therefore, our goal is to answer the question - what essentially led to the granting of "constitutional" status to the treaty between the state and the church.

II. FORMAL ARGUMENTS FOR GRANTING "CONSTITUTIONAL" STATUS TO THE AGREEMENT BETWEEN THE STATE AND THE CHURCH

On March 30, 2001, during the consideration of the draft of the Georgian Constitutional Law "On Amendments and Additions to the Constitution of Georgia" in the Parliament of Georgia, the state justified the granting of "constitutional" status to the agreement between the state and the church on the following grounds:

„[...] why is this agreement called constitutional? It is called constitutional to the extent that the conclusion of this agreement and the circle of contracting parties is determined only by the Constitution, and only the Constitution determines, so to speak, the manner of its conclusion, as well as the circle of contracting parties, and, therefore, this institution of the constitutional agreement is used only in this case and not to regulate other, so to speak, similar relations. [...] As you know the most optimal form of defining the relationship between two independent parties is an agreement. [...] because in case of an agreement, the parties express their autonomous will and by mutual agreement determine the manner of solving these matters to be settled. Another advantage of this form is that the state will not be allowed to unilaterally change the legal status [...] of the church by adopting legislative acts unilaterally. [...] The more important the social relations that are regulated by the legal act are, all the more, it should be regulated by acts of higher and higher legal force and, at the same time, there is a protective mechanism here so that it does not become easy to make changes to the constitutional agreement."[18]

At the session of the Parliament of Georgia, the purpose of quoting this extensive excerpt from the Parliamentary Secretary of the President of Georgia, Prof. *Johnny Khetsuriani's* speech is to clearly present the state's official position and formal arguments in relation to the mentioned issue. It should be noted that Prof. *Khetsuriani*

[18] Stenographic record of the session of the Parliament of Georgia of March 30, 2001 (Central Historical Archive of Georgia, F. N1165, or 8) 5-7.

substantiated the above cited grounds of the "constitutionality" of the agreement between the state and the church in a number of author's works,[19] which gives us the right to discuss them not only as the political vision of the state announced by the Parliamentary Secretary of the President of Georgia, but also as, Prof. *Khetsuriani's* personal academic point of view.

To justify the "constitutionality" of the agreement between the state and the church, we will group the extensive argumentation offered by Prof. *Khetsuriani* to the Georgian Parliament and academic space into two parts. First, the arguments that support contractual rather than legislative regulation in order to regulate the relationship between the state and the church and to determine the legal status of the latter, and second, the arguments supporting the "constitutional" status of the agreement itself.

1. ADVANTAGE OF CONTRACTUAL SETTLEMENT

Arguments supporting the idea of the superiority of contractual regulation can be summarized as follows: the agreement is the most optimal legal mechanism for regulating the relationship between two independent parties, because it ensures each contracting party from the risk of unilaterally changing the conditions agreed by the other party. In a general sense, this means that once the agreement is concluded, neither the state nor the church will have any kind of legal instrument that would give one of them the ability to unilaterally change the agreed terms. However, in this particular case, essentially only the state had to refuse such a legal instrument, because the church did not have such a possibility anyway. This one-sided superiority of the church is directly pointed out by Prof. *Khetsuriani*: "The advantage of this form compared to the usual legislative regulation is that the state government is limited by the agreement and lacks the possibility to unilaterally change the legal status of the church with legislative innovations."[20] In addition to the fact that such an approach shows a preliminary negative attitude towards the legislative power democratically granted to the relevant state institution, it also leaves open the question why this legislative institution deserves distrust in determining the legal status of only one religious association, and not also in relation to all religions? We think this question is rhetorical enough to make it difficult to answer.

[19] Johnny Khetsuriani, State and Church (2001) 1 Individual and the Constitution 9-13 (in Georgian); Johnny Khetsuriani, 'Constitutional Foundations of the Georgian Church' (2002) 2 Individual and the Constitution 9-15 (in Georgian); Johnny Khetsuriani, 'Constitutional Agreement and Some Issues of the Legal Status of Religious Unions in Georgia' in Johnny Khetsuriani, Searches in Georgian Jurisprudence (Favorite Print Publishing House 2011) 48-90 (in Georgian); Johnny Khetsuriani, State and Church. Legal aspects of the relationship (Publishing House "Favorite Print" 2013) (in Georgian).

[20] Khetsuriani, supra note 19 (2013), 16.

On the other hand, the contractual settlement of a number of issues essentially deprives the Parliament of Georgia of the legislative power granted by the Constitution. For example, the state practically does not have the legal mechanism to unilaterally cancel the tax exemption provided by the constitutional agreement (Article 6) for the church. According to the Constitution of Georgia (Article 67), exemption from taxes is allowed only by law, which is the constitutional basis of the exclusive power of the state legislature in this area. However, the Parliament of Georgia lacks the ability to adopt such a law that contradicts the constitutional agreement of Georgia.[21] Accordingly, the legislator is obliged to always consider the tax exemption granted to the church by the constitutional agreement in the tax legislation of Georgia. In this way, the contractual regulation of the relationship between the state and the church in the form defined by the current Constitutional Agreement unjustifiably cut off the constitutional power of the state in two directions - first, the exclusive authority to set taxes and exempt from taxes, and second, the exclusive authority of law-making activity itself. This is an extremely important issue and we will return to it in more detail in the future, within the framework of an independent article.

In general, the contractual regulation of the relationship, insofar as it is based on the independence, free will and equality of the contracting parties, can indeed be considered a "better" democratic legal mechanism than the legislative regulation. However, the existing Constitutional Agreement makes it clear that when an agreement is granted constitutional status, it is not only freed from the obligation to comply with national legislation, but also threatens, if not directly contradicts, the constitutional norms and principles themselves. Therefore, from this point of view, the object of our criticism is not so much the idea of "contractual" regulation of the relationship between the state and the church, as its "constitutional" status, in essence, the combination of the two.

2. THE NEED TO ASSIGN "CONSTITUTIONAL" STATUS TO THE AGREEMENT

The need to assign a "constitutional" status to the agreement and the corresponding arguments, in fact, emerged only after a political agreement was reached between the state and the church to regulate the relationship at the level of the constitution. The general argument sounded like this: the importance of the relationship between the state and the church is so high that it can only be regulated by a legal act of the rank of the constitution. And, according to a more direct argument, the conclusion of the "constitutional agreement" between the state and the church was conditioned by the

[21] Article 7, Organic Law of Georgia "On Normative Acts" <https://matsne.gov.ge/ka/document/view/90052?publication=37> [last accessed on 15 October 2022].

fact that the subjects of this agreement, the possibility of its conclusion and the relevant procedures were determined by the constitution.[22]

First of all, it should be clearly noted that we do not completely reject the general argument about the interconnection between the importance of relationship and the rank of the legal act regulating it. Indeed, it is generally recognized that freedom of religion and belief, as a universal and fundamental human right, is the subject of constitutional provision. In turn, constitutional guarantees of this right always include its collective dimension. However, this usually implies general, universal and equal guarantees, which, by itself, cannot be equal to the obligation of constitutional provision of institutional guarantees of a particular religious association. Accordingly, the necessity of granting constitutional status to the legal act regulating the relationship between the state and the church does not directly follow from the fact that the constitution provides the most important value of freedom of religion and belief.[23]

Regarding the second – "direct" argument, first of all, it should be noted that when the idea of concluding a "constitutional agreement" between the state and the church was born, the possibility or procedures for concluding it were not determined by the Constitution of Georgia. These conditions appeared only as a result of the amendments to the Constitution of Georgia on March 30, 2001. It should be noted that Prof. *Khetsuriani* directly refers to them as not already existing, but as conditions to be created in the future, in his later works.[24] Accordingly, it is clear that the mandatory conditions for concluding a "constitutional" agreement with the Church were not established by the Constitution, as it was stated in the parliamentary report quoted above, but on the contrary, they were created only to strengthen the political agreement reached between the State and the Church.

It also should be noted that the constitutional guarantees[25] of the independence of the Church and the State and the freedom of belief and confession in that period already represented a solid basis for the relationship between the State and the Church and for providing the latter with a legal status that would be in full compliance with the universally recognized modern democratic standards.

[22] Comp. Sources between the 19th and the 20th notes.

[23] For criticism of the relationship of the Constitutional Agreement of Georgia with the Constitution of Georgia and its "constitutionality", see: Comments on the draft of the Constitutional Agreement between the State of Georgia and the Georgian Orthodox Church (by Mr. Antonis Manitakis, Commission Expert). VENICE COMMISSION. CDL (2001) 64. 28.06.2001; see also: Comments on the draft Constitutional Agreement between the State of Georgia and the Georgian Apostle Autocephalous Orthodox Church (by Mr. Hans-Heinrich VOGEL, Member, Sweden). VENICE COMMISSION. CDL (2001) 63. 28.06.2001.

[24] Comp. Khetsuriani, supra note 19 (2011) 58, (2013) 17.

[25] Articles 9 and 19, the edition of the Constitution of Georgia valid until 30 March 2001 <https://matsne.gov.ge/ka/document/view/30346?publication=5> [last accessed on 15 October 2022].

Considering the mentioned, together with others, this last formal argument also can be fairly considered not sufficiently convincing. Thus, the only legitimate goal underlying the "constitutionality" of the agreement between the State and the Church is the maximum avoidance of the influence of the constitutional power of the legislature on the legal status of the church.

III. THE "CONSTITUTIONAL" STATUS OF THE AGREEMENT AS A MECHANISM FOR AVOIDING THE LEGISLATIVE POWER OF THE STATE

In this chapter, on the example of the discussion of one of the drafts of the positive agreement between the state and the church in the state institutions of Georgia, we present the central thesis of the present article - by assigning a "constitutional" status to the agreement concluded between the state and the church, strong arguments emerge for evading the legislative power of the state for this legal act and for the relationship regulated by it.

On March 14, 2000, the draft "Agreement (concordium) between the State of Georgia and the Orthodox Apostolic Autocephalous Church of Georgia" (which consisted of 12 chapters and 50 articles) developed by the Ministry of Justice of Georgia was sent to the Ministries and State Departments of Georgia in order to present their opinions on it.[26] It should be noted that according to the "explanatory note" attached to the correspondence, the agreement was not assigned a "constitutional" status, which is clearly demonstrated by the reference to other legislative acts and by-laws, along with the Constitution of Georgia, as the basis of relations with the church. However, it was also mentioned that according to the legislation of Georgia, this type of normative act was not provided for, which, in case of approval of the draft, would lead to appropriate changes in the legislative acts of Georgia without direct reference to the Constitution of Georgia. In addition, the preamble of the "Concordium" draft provided for the compliance of the agreement with international agreements on human rights in the field of religion (conventions, pacts, agreements, etc.).

From the critical comments made in the return correspondence, we will focus only on those whose content indicates the contradiction of the agreement (the idea and specific norms) with the national legislation. In particular, the relevant notes sound like this:

Ministry of Foreign Affairs of Georgia – "Regarding the provision formulated in the explanatory note of the draft, as if the legal basis for the preparation of the draft of the presented agreement is the Law of June 12, 1997 "On Culture" (Article 40, paragraph 1, subparagraph "o"). It should be noted that this paragraph envisages the adoption of various normative acts in connection with the entry into force of the Law "On Culture",

[26] Supra note 10.

among which the agreement (concordium) between the State of Georgia and the Georgian Orthodox Church is mentioned. This provision of the law essentially contradicts the special legislation of Georgia, in particular, the law of Georgia "On normative acts", in which an exhaustive list of normative acts is given, and when classifying normative acts, only international treaties and agreements are considered among other acts".[27]

The Ministry of Culture of Georgia – "In general, the draft should be processed in accordance with the Law of Georgia on "Protection of Cultural Heritage".[28]

The Ministry of Economy of Georgia - „[...] as for the extension of the rights of a legal entity under public law to the Patriarchate of Georgia, it is not fully justified (the status of the Patriarchate does not comply with Articles 2, 3, 4, 5 and other articles of the Law on Legal Entities under Public Law). [...] paragraph 3 of Article [11], according to which the ecclesiastical service of Georgian clergy is equated with public service, also does not comply with the Law of Georgia "On Public Service"."[29]

The Ministry of Finance of Georgia – "Article 37 should be removed from the draft.[30] Since in accordance with Article 4, Part 7 of the Tax Code of Georgia, it is prohibited to regulate issues related to taxation by non-tax legislation."[31]

The Ministry of Environment and Natural Resources Protection of Georgia – "In paragraph 2 of Article 26, we believe that the Patriarchate should neither give permission nor approve projects for the restoration of temples with cultural-historical value. Here we can talk only about the agreement [...]. [...] The option given in the draft directly contradicts the "Law on the Protection of Cultural Heritage" and the "Law on Culture"."[32]

The State Archival Department of Georgia - "Article 41 of the draft agreement (concordat) between the State of Georgia and the Georgian Orthodox Apostolic Autocephalous Church contradicts the current law "On the National Archives Fund" (02.05.95), according to Article 4 of which, "it is not allowed to alienate a document of the national archive fund of state property".[33]

[27] Letter of the Deputy Minister of Foreign Affairs of Georgia to the Deputy Minister of State of Georgia, N3-17/256, 4 April 2000.

[28] Letter of the Minister of Culture of Georgia to the Deputy State Minister of Georgia, N01/887-19, 1 June 2000.

[29] Letter of the Deputy Minister of Economy of Georgia to the Deputy Minister of State of Georgia, N3/1-2/11, 30 March 2000.

[30] Article 37 of the agreement (concordium) draft: "The Patriarchate of Georgia (dioceses, churches, theological institutes included in it) and the enterprises created by it are exempted from property and land taxes."

[31] Letter from the Deputy Minister of Finance of Georgia to the Deputy State Minister of Georgia, N13-02/76/435, 12 April 2000.

[32] Letter of the Minister of Environment and Natural Resources Protection of Georgia to the Deputy State Minister of Georgia, N08-14/309, 11 April 2000.

[33] Letter of the Chairman of the State Archival Department of Georgia to the Deputy State Minister of Georgia, N01-11/42, 22 March 2000.

Even this small source clearly shows the legal reality that threw the authors of the idea of the agreement into a dilemma. In particular, they should either bring the developed draft - the form of the normative act and each of its norms into compliance with the current legislation of Georgia or overcome the influence of the latter on the former by some mechanism. It is clear that the first way would be the most difficult, long and largely fruitless, as evidenced by the long-term process of working on drafts of the constitutional agreement. And the second way, under the legislation in force before March 30, 2001, simply did not exist. It is against this reality and to change it that "a completely new institution of constitutional agreement in Georgian law" appears.

Thus, it is quite clear that the "constitutional" rank was not given to the agreement between the state and the church based on the importance of the relationship, as the formal arguments presented by the state claim, but for the maximum exemption from the constitutional legislative power of the legal act regulating the legal status of the church and its relationship with the state. For a full assessment of this fact, it should be noted that this decision, at the initial stage, was only a tactical mechanism for avoiding the legislative power of the state, however, in the form as it was formed under the conditions of the current constitutional agreement, it thoroughly coincided with the ideological aspiration of the church to establish and implement legal-political parallelism with the state and it became the most favorable constitutional model of its implementation. It should be noted that, in addition to the "constitutional" status of the agreement and the general experience of its twenty-year period of validity, this model is also directly indicated by the definition of the first article of the constitutional agreement, which recognizes the church as a historically formed public law subject - a full-fledged public law legal entity, which makes it, in fact, a constitutional institution equal to the state.

IV. CONCLUSION

The summary of the sources, arguments and counterarguments presented here, we think, clearly enough confirms the validity of the thesis we have formulated. Despite the fact that the "constitutional agreement" concluded between the state and the church of Georgia is unacceptable in many ways, this article only aims at criticizing its "constitutional" status. In particular, we tried, on the one hand, to invalidate the formal arguments that the state presented in support of this idea (the second chapter) and on the other hand, to substantiate the real reason we found at the basis of this idea (the third chapter). Considering all the above, we can, as a conclusion, single out two issues of fundamental importance:

Firstly, assigning this act a "constitutional" status does not actually derive from the nature of the relationship regulated by it, but rather it serves the tactical purpose of

overcoming principled legislative contradictions and inconsistencies in drafts of the agreement, as the remarks made on the above-mentioned "Concordium" draft make it clear. If it had a hierarchically lower status, its change would automatically become mandatory following the changes of hierarchically higher normative acts - in accordance with the general principle of ensuring compliance with legislation. The "constitutional" rank, on the contrary, obliges all national legislation subordinate to the constitution to comply with the Constitutional Agreement itself. Thus, the only way to unilaterally revise the existing Constitutional Agreement is to introduce changes in the Constitution that would result in a direct obligation to comply with the Constitutional Agreement. However, the nature and structure of the Constitution actually precludes this, as its text does not include such detailed norms as those contained in the Constitutional Agreement (for example, the issue of tax exemptions discussed above, etc.).

And secondly, despite the unambiguously pragmatic beginning, the Constitutional Agreement essentially reflects the ideological aspiration of the church to obtain equal constitutional legitimacy of the state - legal-political parallelism, and by guaranteeing maximum freedom from it, it is the most favorable model for the implementation of this idea. From this point of view, it is impossible not to agree with the formal argument that under the conditions of the constitutional agreement, the state is deprived of the opportunity to unilaterally change – "worsen" - the legal status of the Church through legislative mechanisms. However, in the background of twenty years of experience, this argument has actually become more justified from the opposite perspective. Indeed, in 2002, the church rightly used the unprecedented political consensus that existed in that period and entered into such a legal relationship with the state, which, despite a number of fundamental inconsistencies and contradictions, cannot be easily unilaterally changed today – "improved" by the state, despite its exclusive legislative power.

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THE IMPORTANCE OF ELIMINATING THE LEGAL GAP OF TITLE TO A HOUSEHOLD AND THE ROLE OF THE CONSTITUTIONAL COURT

ABSTRACT

Only one article in the Civil Code of Georgia is dedicated to the issue of title to a household regulation, and the problem unresolved from the first years of independence up to now, which shows the lack of legal status of the owners, is echoed by many decisions of the Constitutional and Common Courts of Georgia. The question as to why title to a household has lost its function should normally be investigated by the legislator, but the practice of Common Courts did not capture the scope of the problem that actually existed. It is very important to make a correct definition of the norm, but when the legislator repeals the norms regulating the household, the problem becomes unsolvable and acquires a prolonged nature.

I. INTRODUCTION

The goal of the current land registration reform is to eliminate the difficulties that landholders have faced for many years in the process of property registration.[1] From 2022, the National Agency of Public Registry has clearly expressed the will of the administrative body - about the necessity of land registration, for further protection of property rights of owners and economic development of the state. In order to achieve this goal, the legislator formulated several norms of the Civil Code in a new edition to comply with the state reform of land registration and reflected the content of the repealed norm in the new norm[2] so that the process would be conducted *Prior in tempore* [first in time]. Changes have been made to other normative acts, but the question arises, since the registration of ownership has been simplified, why do household members and non-members litigate?

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[1] Comp. Besarion Zoidze, Reception of European Private Law in Georgia (Publication of the Publishing Training Center 2005) 34 (in Georgian).
[2] Article 1, Law of Georgia "On Amending the Civil Code of Georgia". June 25, 2019. Legislative Herald of Georgia, 4851-IIs, 02.07.2019.

No one denies that the desire of private owners to overlap land plots, register them with an incorrect plan, changed area and incomplete household record, appropriate the outer perimeter and access roads to adjacent plots, arbitrarily take possession of the estate and many other private property desires is characteristic of our citizens, however, similar cases should not create a presumption of error and incompleteness of the registry data.[3] Protection of a title of member and non-member heirs of household through mediation, which implies the use of alternative dispute resolution means to resolve complex legal cases, should be considered.[4] It should be noted that the legislator did not try to improve the legal regulation of the household, waiting for the natural death of the members of the household for years, as a kind of end of the legal form of the household.[5] The expectation of the legislator was not justified, therefore the National Courts of Georgia, still review and will probably review in the future, disputes between the surviving members of the household and non-member heirs of the household, as well as among other owners of household land plots.[6]

The goal of the research is to conduct a systematic study of title of a household, to find out how the gap in the legislation turned into a challenge to the Constitutional Court. Historical, normative, comparative and analytical research methods have been used to achieve the goal of the research.

II. NORMS GOVERNING TITLE OF A HOUSEHOLD

Article 15131 of the Civil Code of Georgia is the only one in the Code that regulates the opening of the estate on common property of the household, and it is reasonable that the rights of members and non-members of the household are protected by the mentioned norm.[7] The norm comprises three parts. The first and second of them establish formal compliance, and the third one extends the legal content to it. The provision and scope of Article 1513 should be considered. Both norms are used together with other normative acts regulating land law.[8]

[3] Article 312, Civil Code of Georgia. June 26, 1997. Parliamentary Gazette, 31, 24.07.1997.

[4] Comp. Irakli Leonidze, 'The Notary Mediator at the Edge of Public and Private Law Systems' (2021) 2(1) Challenges of Contemporary Science 109.

[5] Comp.: Authors, 'State Property Management in the Republic of Kazakhstan' (2016) 5(19) Journal of Advanced Research in Law and Economics 1180-1190; Jordan Gans-Morse, Property Rights in Post-Soviet Russia: Violence, Corruption, and the Demand for Law (Cambridge University Press 2017) 20; Paul Babie, 'Ukraine's Transition from Soviet to Post-Soviet Law: Property as a Lesson in Failed Regulation' (2016) 3(1) Journal of Ukrainian Studies 5.

[6] The scale of the problem varies according to the number of citizens, but overload as a result occurs regardless of the number of citizens. Comp. Robert Heuser, 'The Role of the Courts in Settling Disputes between the Society and the Government in China' (2003) 49 Journal of China Perspectives 6.

[7] Comp. Nino Meskhishvili, Bona Fide Purchase of Property from an Unauthorized Person (Caucasus University Publishing House 2018) 23-25 (in Georgian).

[8] Comp. Article 1.109 and 6.590, Civil Code of the Republic of Lithuania. July 18, 2000. XI-1254.

The mentioned norm represents the continuation/result of the law-making that was not implemented and not fully implemented by the legislator in the past, which sets August 1, 2019 as the time delimiter. It is likely, that no one investigated whether the rights of the household members were violated by the establishment of this date, nor did they determine how many households exist throughout Georgia and how many people [household members] are registered in it [also, it would be impossible to calculate the number of heirs who are not members of the household in advance and, in the future, consider the risk of the inheritance disputes]. The legislator is wise,[9] but the definition: if it regulates the issue, it should protect the legal status of the addressees of this issue,[10] turned out to be forgotten. Accordingly, the task of regulating title of a household and the purpose of registration went beyond the means of protecting the rights of the interested person.[11]

The norms regulating the household can be classified in the following order: a) the effect of the norms in the Soviet Socialist Republic of Georgia at the end of the 80s, b) the effect of the norms from the time of independence to the adoption of the Civil Code of Georgia, c) the effect of the norms from the adoption of the Civil Code of Georgia to the cancellation of the possibility of registering and de-registering members in the household, d) the effect of the norms from the cancellation of the possibility of registering and de-registering members in the household until the legislative change of 2019, e) the effect of the norms from the legislative change of 2019 until now.

At the moment, it is not allowed to register a member in the household, de-register a member from the household, and the registering authority cannot correct the data independently.[12] The correctness of the household record, in case it is considered disputed by the parties, will be considered by the Common Courts of Georgia. The legislator set the limit for the issue of opening the estate on the common property of the household before and after August 1, 2019, thereby establishing the general rule for opening the household estate and a new criterion for the fact of the death of a household member, which in its form opposes the interest of maintaining family relations between the surviving members of the household and accelerates the manifestation of private ownership interest of household members and non-members after August 1, 2019.[13]

[9] Contradictory statement in the book: Marina Garishvili, Introduction to the Philosophy of Law - Course of Lectures (TSU Publishing House 2010) 33. It is stated: "A wise man does not need the law at all, for a wise person and a good soul, the motherland is the whole world."

[10] Zoidze, supra note 1, 34.

[11] See the question of historical origin.: John N. Hazard, 'Soviet Property Law' (1945) 4(30) Cornell Law Review 467; Peter B. Maggs, 'The Security of Individually-Owned Property under Soviet Law" (1961) 4 Duke Law Journal 526-527; Kimura Hiroshi, Personal Property and Private Property (Hokkaido University Collection of Scholarly and Academic Papers 1970) 66-68.

[12] Ekaterine Lapachi, The Impact of Registration of Property Rights on Immovable Property on the Implementation and Protection of Property Rights (TSU Publishing House 2016) 47 (in Georgian).

[13] Tamar Zarandia, Property Law (Meridian 2019), 196 (in Georgian).

Norms regulating the household are not equipped with the function of effective and equal protection of the property of household owners. Legal insecurity was felt during and after the adoption of the 1993 and 1996 legislative acts. At the local level, the municipal and registration authorities were inconsistent [incomplete] in the maintenance of land recognition or household records and registration of rights.

With its decision, the legislator again put at risk the long-standing social relationship that was respected by household members and non-members/heirs, and with the new normative agenda the legislator turned out to be in the mode of waiting not for the death of household members [which used to be an early practice], but for litigation between household members and non-members. The legislator and registration body being in the waiting mode violate the constitutional rights of household owners by unequal treatment and essentially heterogeneous litigation with negative results.[14] It should be noted that the notary norms do not correspond to the readiness to solve the problem that we will discuss in this paper.[15] Template-based and narrow-procedural norms do not include the need to respond to cases typical for private relations[16] and to assess the special needs of interested persons.[17]

Regarding the title of a household, the legal expectations towards the administrative body based on the establishment of a new vision and procedure of this body are at threat.[18] The legal requirements [registration services], which have become a novelty for citizens, do not at all represent an innovation in the regulation and protection of the legal status.[19]

It is desirable that the norms governing title of a household be interpreted with an equal assessment of the legal interest of household members and non-members [which implies that "laws adopted for the benefit of society should be well interpreted"[20]], and not based on the principle: *Prior in tempore, potior in iure*.[21] A challenge has been

[14] See Besarion Zoidze, 'Constitutional and Legal Order of Values as a Basis for the Restriction of Basic Rights in the Conditions of the COVID Pandemic (on the Example of Georgia)' (2021) 2 Review of Contemporary Labor Law 70 (in Georgian).

[15] Davit Sukhitashvili, Notarial Law (Publishing House Tbilisi [G. G.], 2012) 191-193 (in Georgian).

[16] Richard Bock, 'Some Thoughts on the Future of Notarial System' (2022) 2 Georgian-German Journal of Comparative Law 1-2.

[17] Comp. Mikheil Bichiya, "Peculiarities of Determining the Regime of Property Relations of Spouses according to the Judicial Practice of Georgia" (2019) 1(61) Justice and Law 85 (in Georgian).

[18] Judgement of the Constitutional Court of Georgia N2/14/879 "Georgian citizen Zurab Svanidze v. the Parliament of Georgia", 8 September 2017, I-6.

[19] Comp. Antanas Maziliauskas and others, 'Economic Incentives in Land Reclamation Sector in Lithuania' (2007) 11 Journal of Water and Land Development 18.

[20] Indicated: Statuta pro publico commodo late interprentatur in the book Giorgi Nadareishvili, Civil Law of Rome (Publishing House "Bona Causa" 2005) 189 (in Georgian).

[21] Comp. Diana Mizaraite and others, Forest Land Ownership Change in Lithuania (European Forest Institute Central-East and South-East European Regional Office - University of Natural Resources and Life Sciences 2015) 7-8.

identified that calls for the owners of the households to protect their rights through a dispute in the court, and not through an appeal to the registration authority.[22]

It should also be assessed that the division of the household into groups of surviving and non-members is conditional, and the issue becomes questionable when the household record is substantially flawed, incomplete and erroneous or all members of the household are deceased. Over time, the unfair regulation of title of a household gave rise to a social outcome, when there is no surviving member in the household, because registration and de-registration from the household is not allowed, the household record unduly limits the legal interest of the household owners [creates an unnatural expectation about who will be the first to die after August 1, 2019 or already died, which is usually unnatural for the field of family and inheritance law].[23]

It is commonly known that land registration is an important event for the state,[24] but it is unacceptable to distort its essence at the background when the land fund of the state is not universally registered and the system of the laws of civil legislation is deficient in relation to the occupied territories.[25] The current reform not only simplified the legal situation of the owners, but also accelerated the detection of threats of unjustified encroachment on the property right and inheritance right. The title of a household lost in time and space turned from a flaw in the legislation into a challenge to the proceedings of the Constitutional Court of Georgia,[26] and the proprietary interest of members and non-members of the household was based on an unforeseeable, vague and possibly flawed household record.[27] The only way to prevent a "forced" result is litigation.[28] The existing family relations between the members of the household worsened and the cases of improper intervention of non-members of the household in the family-economic relations of the household increased.

[22] Decision of the Civil, Entrepreneurial and Bankruptcy Chamber of the Supreme Court of Georgia Nas-684-1014-07, 31 January 2008.

[23] Comp. Sjef van Erp, European and National Property Law: Osmosis or Growing Antagonism? (Europa Law Publishing 2006) 9.

[24] Monika Gabunia, The Social Function of Ownership in the Context of the Implementation of Property Rights to Land (Davit Batonishvili Law Institute Publishing House 2016) 6 (in Georgian).

[25] Article 5, Law of Georgia "On Occupied Territories", October 23, 2008. Legislative Herald of Georgia, 28, 30.10.2008.

[26] Author's note: Refers to the Judgment of the Constitutional Court of Georgia N1/4/258 "Georgian citizen Dina Popkhadze v. the Parliament of Georgia", 22 February 2005.

[27] Irakli Leonidze, 'Peculiarities of Receiving the Estate by Actual Possession in Georgian Law and Legal Guarantees of Legal Heir Protection' (2020) Alternative Dispute Resolution - Annual Special Edition 14-16 (in Georgian).

[28] Comp. Paul Martens, Conference of European Constitutional Courts XIIth Congress: The Relations between the Constitutional Courts and the other National Courts, Including the Interference in this Area of the Action of the European Courts (Report of the Constitutional Court of the Federal Republic of Germany 2002) 34.

III. COMPOSITION OF TITLE OF A HOUSEHOLD

The Civil Code of Georgia does not define a household. The question is why the legislator forgets the proprietary and inheritance interests of its citizens in connection with the household. The first and second instances[29] of the Common Courts of Georgia interpret the household ultimately, unnaturally and in different ways, as if the surviving member or non-member heir does not even have a constitutional right or interest in the property of the household. So, members and non-members of the household were lost in time and space.[30]

According to Article 147 of the Civil Code of Georgia, "Property, according to this Code, is all things and intangible property, which may be possessed, used and administered by natural and legal persons, and which may be acquired without restriction, unless this is prohibited by law or contravenes moral standards".[31] Title of a household usually consists of immovable and movable property. In different municipalities of Georgia, the number of properties per household is different, considering the general ratio of the existing land fund, social habits established before and after the period of independence.[32] Therefore, for the purposes of the research, household should be interpreted correctly considering legal form and content. Regardless of the sense in which this term is used in private law, the household, which we consider within the scope of this paper, is not characterized by a filling function and is a socio-legal entity that is immovable/unregistered and/or registered in the name of the last or any member of the household [in the household record], which combines property goods: plots of land and buildings on it, in rural areas and in cities [the expansion of cities included households in rural areas].

According to Article 19, paragraph 4 of the Constitution of Georgia: "As a resource of special importance, agricultural land may be owned only by the State, a self-governing unit, a citizen of Georgia or an association of citizens of Georgia...". The constitutional record does not specify the household, against the background that agricultural land plots on the territory of Georgia still exist in the form of outdated and unregistered legal records, including in the occupied territories, where the household record is usually the only document establishing the right. It should be noted that the constitutional record contradicts the social reality in which it establishes a normative order.[33]

[29] Decision of the Civil Affairs Chamber of the Supreme Court of Georgia Nas-7-2019, 11 June 2020.

[30] Additionally, see Roman Shengelia, Ekaterine Shengelia, Family and Inheritance Law (Meridian Publishing House 2015) 410 (in Georgian).

[31] Article 147, Civil Code of Georgia. June 26, 1997. Parliamentary Gazette, 31, 24.07.1997.

[32] Aleko Nachkebia, Definitions of Civil Law Norms in the Practice of the Supreme Court (2000-2013) (German Society for International Cooperation 2014) 83.

[33] Additionally, see Besarion Zoidze, 'The Impact of Fundamental Rights on Private Autonomy: Expansion or Limitation of Private Autonomy (Review of the Practice of the Constitutional Court of Georgia)' in Tamar Zarandia and Evgenia Kurzinski-Singer (eds.), Private Autonomy as a Basic Principle of Private Law (TSU Publishing House 2020) 101.

For the completeness of this record, it is important to evaluate the title of a household under the condition that it is fully included in the provision: owned by a citizen of Georgia or an association of citizens of Georgia.[34] Otherwise, the agricultural land constituting the household, as a resource of special importance, due to certain reasons and factual circumstances, may be owned only by the state. In this case, protecting the property rights of heirs who are members of the household and who are not members of the household will no longer be a common challenge of the legislator, the Public Registry and the Common Courts, but will turn into the burden of proof of the person who is a member or non-member of the household.[35]

An interesting definition of the composition of title of a household can be found in the practice of the Common Courts of Georgia. Distortion and confusion of concepts is one of the challenges when the court examining the case, contrary to the legal interest of the parties, interprets the legal regulation of the household in accordance with the legislative provisions in force before and now. The definitions are interesting from the point of view of the concept of property.

On case №as-7-2019 of the Supreme Court of Georgia dated June 11, 2020, the court of the first instance determined that a collective household was represented, after the cancellation of which the title of a household belonged to the plaintiff and the defendant by the right of co-ownership [fathers of the plaintiff and the defendant were brothers who were registered in the same household].[36] In this case, the composition of the household was defined by the agricultural plot of land and the building that existed on it earlier [proved by the record], although the court limited itself to the legal circumstances presented in the case so that the legal status of the parties with regard to the title of a household was not investigated. The position of the court of the first instance was based on the scope of the plaintiff's claim and excluded the expected legal consequences from it.

The Chamber of Appeals reversed the legal reasoning of the first instance regarding the existence of the household and found that it was not a collective household but a worker-servant household and the property was co-owned by the plaintiff and the defendant, however, since the structure belonging to the household no longer existed on the plot of land, and the right of ownership was not registered in the Public Registry by the members of the household, according to the Civil Code, the Chamber of Appeals explained that the agricultural land was the property of the state based on Article 19, paragraph 4 of the Constitution. The court denied the legal status of the parties with regard to the household and determined the following: based on Article 1513 of the

[34] Giorgi Khubua and Koba Kalichava, Handbook of Administrative Science (Petit Publishing House, 2018) 235-236 (in Georgian).

[35] Comp. Roman Shengelia, 'The Necessity of Improving the Mechanism for Protecting the Interests of the Subjects of Inheritance Law Relations' (2022) 1-2(57-58) Life and Law 95 (in Georgian).

[36] Decision of the Supreme Court of Georgia on case Nas-7-2019, 11 June 2020.

Civil Code, the plaintiff could not become the owner of the title of a household.[37]

The reasoning of the Chamber of Appeals directly and grossly infringes on the rights of household owners. The aforementioned contradicts the goal of the legislator to regulate the issue and the function of protecting the legal status of citizens, and subsequently the state/public and private interest. According to this reasoning, there is an unfair idea that unregistered agricultural land plots of the household throughout the entire territory of the state will be owned by the state, including titles of a household in occupied territories that cannot be physically disposed of by citizens and buildings are destroyed on said unregistered land plots.

The Supreme Court of Georgia isolated itself from the reasoning of the Chamber of Appeals regarding the exclusion of the legal form of the household and the legal status of members/non-members of the household. The Court of Cassation determined: a) the need for a correct definition of the household and applicable norms, b) the inseparability of the household property from the legal status of the household members, c) the special needs of setting a specific case for the applicable norm and protecting the legal status of the household owners.

The reviewed decision confirms the problems that household owners may face. The owners, rejected by the registration authority, continue the dispute in court,[38] where the question arises that they cannot be the owners of the title of a household where they have lived for more than half a century. Composition of ownership: property and the rights to it are often misjudged by the Common Courts and harm the legal position of the owners. The registration body and the notary are not focused on the special needs of householders. The question of how difficult it is for the court to perceive and evaluate the special needs of the owners is clear.[39]

[37] ibid.

[38] Tamar Zarandia, 'Bona Fide Acquisition of Immovable Property from an Unauthorized Alienator in Georgian Judicial Practice' in Collection Dedicated to Luarsab Andronikashvili – "Current Issues of Georgian Law" (2014) 72-73 (in Georgian).

[39] Author's note: It should be noted that this issue requires special attention regarding the civil procedural nature of household disputes. Let's review one of the sample decisions. The Court of Cassation, on February 24, 2021, on case №as-186-2019, reconciled the issue of the definition of a household, which should be formulated in accordance with Article 15131 of the Civil Code: "With the abolition of collective farms, the existence of a collective household lost its legal basis and it ceased to exist. Accordingly, the property, which was the property of the household and at the same time the common property of the household members, is no longer the property of the household and is the common property of the persons who are members of the household in equal shares. The general regime of ownership stipulated by the Civil Code of Georgia applies to the said property." The definition has its historical significance, which was reflected in Article 15131 after the repeal of Article 1323 of the Civil Code.

Title of a household has acquired characteristic and negative socio-legal definitions, such as: unspecified, unregistered, non-functional and disputed.[40] It is not enough to apply to the Public Registry to settle complex and acute family-inheritance conflicts. The legislator should remember that *Georgia is a social state*[41] that "takes care of strengthening the principles of social justice, social equality and social solidarity in society."[42] In relation to the household, everything is the other way round, a clear example of which is the question of the inefficient and undue regulation of the title of a household and the acquisition of ownership rights over it.[43]

Title of a household does not conflict with the provisions of Article 147 of the Civil Code of Georgia, although it imposes different provisions for the possession, use and disposal of this property.[44] The progress of the state reform of land registration and the achieved results are welcome, but within the framework of this reform, the special needs of household owners should be taken into account.[45] Non-uniform proceedings are accompanied by wrong practices about registration of title of a household,[46] which undermines the legal status of household owners.[47] It is unacceptable to deny the proprietary interest of Georgian citizens in a similar way. Legislators, registration bodies and notaries must interpret the laws passed for the benefit of society.[48]

[40] Comp. Tamar Zarandia, 'The Concept of Ownership and Its Exclusive Character, a Comparative Legal Study according to Georgian and French Law' (2008) 5 Works of Sukhumi State University 758-759 (in Georgian).

[41] Article 5, para 1, the Constitution of Georgia, August 24, 1995. Gazette of the Parliament of Georgia, 31-33, 24.08.1995.

[42] ibid, paragraph 2.

[43] Additionally, see Collective of authors, Commentary on the Civil Code of Georgia/Book Five, Family Law. Inheritance Law. Transitional and Final Provisions of the Civil Code (Publishing House "Law" 2000) 378-379.

[44] Nana Chigladze, 'Basic Rights in a Democratic State and Georgian Challenges' in Tamar Zarandia and Ana Tokhadze (eds), European Security and the Modern Constitutional State (Georgia's Example) (Publishing House Samshoblo 2021) 188-189 (in Georgian).

[45] Comp. Ketevan Meskhishvili, Commentary on Article 3 of the Civil Procedure Code of Georgia in the book Commentary on the Civil Procedure Code - Selected Articles (German Society for International Cooperation 2020) 71.

[46] Comp. Katherine Verdery, 'The Property Regime of Socialism' (2004) 2(1) Conservation & Society 190-191.

[47] Louise I Shelley, Privatization and Crime: The Post-Soviet Experience (The National Council for Soviet and East European Research 1995) 2-5; Zvi Lerman and others, Land Policies and Evolving Farm Structures in Transition Countries (World Bank Research 2002) 83-84.

[48] Author's note: Determining the fact of receiving the household estate by actual ownership is a subject of judicial, notarial and mediation practice in Georgian law. In the decisions of the Supreme Court of Georgia, the judicial knowledge related to this issue is collected, although it is not enough to eliminate the existing problems. It is a fact that the issue of receiving the household estate by actual possession is still relevant and problematic.

IV. ANALYSIS OF THE PRACTICE OF THE CONSTITUTIONAL COURT OF GEORGIA IN RELATION TO THE HOUSEHOLD

The analysis of the practice of the Constitutional Court of Georgia can be divided into two parts: decisions related to the right of ownership and cases where a direct or indirect definition of a household was established. The second case is important, because the first, in itself, includes an indivisible and unified field of right of ownership, where title of a household is considered regardless of form.

In 2005, in the judgement of the Constitutional Court of Georgia, it was noted for the first time that "at the Preliminary Session and during the preparation period for the discussion of the merits of the case, the need to improve the legal regulation of the relations stipulated by the disputed norm - Article 1323 of the Civil Code of Georgia ("Opening of an estate in a household") was highlighted."[49] Before the discussion of the merits of the case, the aforementioned explanation was preceded by a notice of the plaintiff's death, and the subject of the dispute was the constitutionality of Article 1323 of the Civil Code of Georgia in relation to the first paragraph of Article 21 of the Constitution of Georgia.[50] Who knows how much the course of this case could have caused fundamental legislative changes, however, due to the circumstances, the Constitutional Court of Georgia suspended proceedings on the constitutional lawsuit of citizen *Dina Popkhadze*. After 2005, in the practice of the Constitutional Court of Georgia, the constitutionality of Article 1323 of the Civil Code of Georgia in relation to the property right was never considered, nor was the title of a household evaluated so unambiguously.

The Constitutional Court of Georgia renewed the indirect evaluative reasoning on household from 2012 in the case of "*Danish citizen Heike Kronqvist v. the Parliament of Georgia*", where while evaluating the words "foreigner" and "constitutionality" of paragraph 11 of Article 4 of the Law of Georgia "On ownership of agricultural land" the court explained the norm disposition and the obligation of a "foreigner" [51] stipulating that "the agricultural land in his/her possession should be alienated to a Georgian citizen, household or legal entity within 6 months from the date of origination of title to it."[52] It should be noted that the household in this case does not refer to the legal form provided

[49] Judgment of the Constitutional Court of Georgia N1/4/258 "Georgian citizen Dina Popkhadze v. the Parliament of Georgia", 22 February 2005.

[50] Article 1323, Civil Code of Georgia. June 26, 1997. Parliamentary Gazette, 31, 24.07.1997, as of February 25, 2005, "In a household, the estate will be opened on the common property of the household from the date of death of the last member of the household." The disposition of the norm did not change, until the mentioned norm was completely repealed by the legislative change of 2019.

[51] Additionally, see Judgment of the Constitutional Court of Georgia №1/2/563 "Austrian citizen Matthias Hutter v. the Parliament of Georgia", 24 June 2014, II-5.

[52] Judgment of the Constitutional Court of Georgia N3/1/512 "Danish citizen Heike Kronqvist v. the Parliament of Georgia", 26 June 2012, II-73.

for by Article 1323 of the Civil Code. As of 2021, the Law of Georgia "On ownership of agricultural land" is invalid, and Article 1323 of the Civil Code is repealed.

In 2013, in case "*Joint and several liability company "Grisha Ashordia" v. the Parliament of Georgia*" it was noted that "the plots of land to be transferred to the ownership can have a vitally important purpose for certain categories of individuals". For example, the law, along with the plots of land designated for other purposes, in the plots of land to be transferred to the ownership of individuals, includes the plots of land reserved for the use of the household for living and for meeting other minimum subsistence needs.[53] The court based the explanation on the purpose of the disputed norms of the law of Georgia "On recognition of ownership rights on land plots owned (used) by natural and private legal entities", which was reflected by the legislator when determining the possibility of receiving a document confirming the right within the proceedings of the land recognition commissions, on the basis of which the citizen could register the right in the Public Registry. The concept of the household in this case is ambiguous, because the legal purpose of the term is not defined, and it is combined in the main area of recognition of ownership of land plots.[54]

In the constitutional claim on case "*Citizen of the Hellenic Republic Prokopi Savvidi v. the Parliament of Georgia*", the plaintiff "applied to the Public Registry of Georgia for the purpose of registering the house and croft, built by himself and listed in his name according to the Household Book, however, he received a verbal refusal to accept documents, referring to the disputed norm."[55] The disputed norm was Article 22, paragraph 33 of the Law of Georgia "On Agricultural Land Ownership". The course of the mentioned case took place with consideration of constitutional claims №1267 and №1268. The court additionally examined the consequences of the Cronquist case and the unconstitutionality of alienation of a plot of land to a household by a foreigner.[56] According to the decision of the Constitutional Court, constitutional claims №1267 and №1268 ("*Citizens of the Hellenic Republic - Prokopi Savvidi and Diana Shamanidi v. the Parliament of Georgia*") were not accepted for review.").[57] Accordingly, the statement in the constitutional claim that the plaintiff's right to be confirmed according to the household record was rejected. Other legal circumstances in the case should be considered here, however, the fact that the special needs of the owners of the

[53] Judgment of the Constitutional Court of Georgia N2/3/522,553 "Grisha Ashordia" v. the Parliament of Georgia", 27 December 2013, II-26.

[54] Comp. Authors, Real Property Cadaster in Baltic Countries (Estonian University of Life Sciences, Latvia University of Agriculture, Aleksandras Stulginskis University 2012) 151-153.

[55] See constitutional claim №1267.

[56] Judgment of the Constitutional Court of Georgia N3/1/1267,1268 "Citizens of the Hellenic Republic - Prokopi Savvidi and Diana Shamanidi v. the Parliament of Georgia", 19 October 2018.

[57] Judgment of the Constitutional Court of Georgia N3/10/1267,1268 "Citizens of the Hellenic Republic - Prokopi Savvidi and Diana Shamanidi v. the Parliament of Georgia", 7 December 2018.

household are forgotten is really clear and perceptible. For example, before and after the consideration of the case in the Constitutional Court, according to the Household Book, title of a household was registered in the name of the plaintiff, although by the "verbal" refusal of the Public Registry to accept the documents and referring to the disputed norm, a special need of a household member was neglected. If a Georgian citizen submitted a similar request to the Public Registry, it is unlikely that the Registry would have given a "verbal" refusal. While the norms related to the regulation of the household have not changed over the years, even the constitutional grounds for justifying unequal treatment by the Public Registry are strange.[58]

It's worth to note the dissenting opinion of the members of the Constitutional Court of Georgia - *Irine Imerlishvili, Giorgi Kverenchkhiladze, Maya Kopaleishvili* and *Tamaz Tsabutashvili* on the decision №3/7/679 of the Plenum of the Constitutional Court of Georgia dated December 29, 2017, where the decision of Tbilisi Court of Appeals on the invalidity of the gift agreement was cited as an example of the non-uniform interpretation of the disputed norm.[59] The subject of the gift agreement was the title of a household [property], which was disposed of by the donor alone to the detriment of the legal interest of other members of the household. According to the members of the Constitutional Court of Georgia, in this case, "the court considered that the dishonest deal, which was concluded between the family members, in this case, violated the norms of public order and morality provided for in Article 54. However, the court did not explain the content of "public order" and "morality" norms. It is also not known whether, in this case, "public order" and "morality" should be understood with identical content.".[60] The feedback of the members of the Constitutional Court of Georgia on the significance of the decision of Tbilisi Court of Appeals is a special case that serves to outline and assess the special needs of household owners.

In another constitutional claim, on case "*Archil Pulariani v. Baghdati Gamgeoba*", the plaintiff indicated that Baghdati Sakrebulo was not authorized to transfer ownership of the plot of land lawfully owned by "Baghdati Cinema" to an individual, because the said individual was not registered as a household and did not own the plot of land within the norm established by the law. The Constitutional Court did not accept the constitutional claim №1431 ("*Archil Pulariani v. Baghdati Municipality Gamgeoba*") for consideration.[61] The judgment did not make any reservation or discussion about

[58] The dissenting opinion of the members of the Constitutional Court of Georgia, Eva Gotsiridze, Merab Turava and Manana Kobakhidze, regarding judgment №3/10/1267,1268 of the Plenum of the Constitutional Court of Georgia dated December 7, 2018, para 2.1.

[59] Decision of Tbilisi Court of Appeals N2 /3321-14, 8 April 2015.

[60] The dissenting opinion of the members of the Constitutional Court of Georgia - Irine Imerlishvili, Giorgi Kverenchkhiladze, Maya Kopaleishvili and Tamaz Tsabutashvili on the decision №3/7/679 of the Plenum of the Constitutional Court of Georgia dated 29 December 2017, para 89.

[61] Judgment of the Constitutional Court of Georgia N1/7/1431 "Archil Pulariani v. Baghdati Municipality Gamgeoba", 30 April 2020.

title of a household [no examination of the validity of the household record was carried out], but the issue was related to the progress of the land reform without mentioning the household.[62]

The Constitutional Court of Georgia did not accept constitutional claim №1454 ("*Ketevan Lapiashvili v. the Parliament of Georgia*")[63] for discussing the merits of the case. The problems mentioned in the constitutional claim were related to: a) the issue of the death of the last member of the household, b) the possibility of receiving title of a household by a non-member of the household, who is the heir of different ranks of the last member of the family, c) the terms of receiving the estate, the challenges of receiving the estate by sequence and actual possession.

There is a perception that the court avoids considering the problems of title of a household to the extent necessary to protect the rights of owners of the household. Of course, the Constitutional Court will not be able to perform the functions of Common Courts, however, the rejection of other constitutional claims of similar content in recent years is worrying. From this point of view, not only the special needs of the owners of the household, [64] but the right of ownership of all those persons, who are neglected by a kind of interpretation of the norm, are called into question.[65]

Limitation of the rights of household owners becomes uncontrolled and harms the constitutional rights of Georgian citizens. The legislator changes the legislation related to the issue of land law in such a way that the rights of household owners are not considered at all. For example, the constitutional claim №1627 mentions the legislative change that unjustly limited the rights of household members, because "from January 1, 2021, introduction of the implemented changes led to cancellation of the mentioned legislative regulations and the state forest is no longer subject to privatization, except in case of transfer to the ownership of the Apostolic Autocephalous Orthodox Church of Georgia.".[66]

The analysis of the practice of the Constitutional Court of Georgia confirms that the legislator, registration authority and courts are not ready to regulate the issue of land ownership in the entire territory of Georgia, after the full restoration of Georgian jurisdiction, because one of the main documents confirming the property right in the

[62] Comp. For determining the civil procedural nature of the issue: Ekaterine Gasitashvili, Commentary on Article 18 of the Civil Procedure Code of Georgia in the book Commentary on the Civil Procedure Code - Selected Articles (German Society for International Cooperation 2020) 181-182.

[63] Judgment of the Constitutional Court of Georgia N1/11/1454 "Ketevan Lapiashvili v. the Parliament of Georgia", 30 April 2020.

[64] Constitutional claim №1455 (Gogi Gvidiani, Badri Gvidiani, Bidzina Gvidiani and Jamlat Gvidiani v. the Parliament of Georgia).

[65] Comp. Nika Arevadze, 'The Principle of the Social State: The Practice of the Constitutional Court on Social Issues' (2021) 2 Journal of Constitutional Law 188-189.

[66] Constitutional claim №1627 (Public Defender of Georgia v. the Parliament of Georgia).

occupied territories is the household record. This is at the background when in the territory of Georgia, where the jurisdiction of the state extends, there is an institutional campaign against the owners of the household and a deliberate attempt to eliminate the legal form of the household, by distorting the concepts, misinterpreting the norm, and establishing legal practices that limit rights.

V. LITHUANIAN LAND REGISTRATION REFORM AND THE CONCEPT OF RESTORATION OF PRIVATE PROPERTY

After gaining independence, Lithuania managed to maintain its territorial integrity and establish a constitutional order throughout the territory.[67] The original intention of the legislator was to restore historical justice, because the history of Lithuania's independence in the first half of the 20th century combined the constitutional significance of private property and the documentary authenticity of the property right,[68] however, the restoration of the property form in the new reality should not lead to the destruction of the post-Soviet socialist ownership composition/property. By adapting the form, the legislator protected the property of strategic and economic importance and extended the private interest of individuals only to a part of it. A significant part of the territory of Lithuania is made up of agricultural plots of land, part of which was previously owned by individuals, and a large part - by the collective farm.

The actions to be implemented at the legislative level were planned in advance so that the rights of citizens were not limited before the introduction of any regulation.[69] The main task of the legislator was the preservation of agricultural farms and the legal transformation of the socialist form. In the first years of independence, the need for control was felt the most, because the legal self-determination of citizens was not yet complete. In this process, properties of strategic importance for the development of the state had to be transformed in such a way that the new owners could continue to operate the enterprise or other facilities.

According to the Constitution of Lithuania, the normative concepts[70] of the property right were established, and more specific provisions for the definition of these concepts were formulated in various acts. The state limited as much as possible in time the operation of the principle of first priority and supported the principle of legal equality. Of course, agricultural farms and enterprises temporarily suspended functioning while waiting for

[67] Claes Levinsson, 'The Long Shadow of History: Post-Soviet Border Disputes-The Case of Estonia, Latvia, and Russia' (2006) 5(2) Journal of Partnership for Peace Consortium of Defense Academies and Security Studies Institutes Connections 98.

[68] Vytautas Pakalniškis, 'The Doctrine of Property Law and the Civil Code of the Republic of Lithuania' (2004) 42(50) Jurisprudencija 56-57.

[69] Valentinas Mikelenas, National Report: Lithuania (Supreme Court of Lithuania 2008) 3-4.

[70] Article 23, Constitution of the Republic of Lithuania, 25 October 1992.

the legal transformation, but their property was not confiscated until the appearance of a new owner, and the employed persons continued to take care of the property.[71] The concept of property restoration was based on the chronological review of the documents submitted by the citizens, followed by the determinations with political, legal and social characteristics.

Obviously, the new legal form established by the state included the content of economic importance, because the products that the transformed enterprises had to receive had to comply with the standards of the market that would carry out its sale. The state supported the initiatives of citizens and citizens' associations with a corresponding commitment to receive agricultural plots of land and enterprises.[72] By transferring agricultural plots of land to private ownership, the plot of land kept its agricultural value. Therefore, the desire to join the European Union was facilitated by the wide discretion of economic development opportunities in the daily life of citizens, which was also reflected in the quality of well-being and benevolence of the population.

The success of the transformation of the legal form was due to historical reality, because with this transformation, the said property, to some extent, returned to the legal regime existing before the Second World War, and the form of socialist ownership was never the primary source of the legal status of the owners.[73] In the process of transformation of the legal form, the socialist property was part of the process, the property and value of which did not decrease, but turned into a subject of civil circulation.

Lithuania's land registration reform never went beyond the constitutional scope of the right to property and was a guarantee of this right.[74] The functional load of the land plots found in civil turnover was more or less preserved. Accordingly, the reform was carried out with a common content, although in different periods of time. In this way, each subsequent person who acquired the power to govern continued the reform started in the past without changing the content and main goals of the reform. That is why personnel changes did not have a negative impact on the legal status of citizens. Citizens could own unregistered plots of land until the state ensured the development of an effective registration policy.[75]

With the strengthening of the economic importance, the establishment of the legal form became connected to the public interest, which was not an event similar to the private

[71] William Valetta, Completing the Transition: Lithuania Nears the End of Its Land Restitution and Reform Program (Fao Legal Papers №11, 2000) 1-8.

[72] World Data Atlas, "Lithuania - Agricultural Area Organic" <https://knoema.com/atlas/Lithuania/topics/Land-Use> [last accessed on 14 July 2022].

[73] Jolanta Valčiukienė and others, 'Changes of Land Users in Interwar Lithuania' (2015) 2 Journal Baltic Surveying 2, 13.

[74] Giedre Leimontaite, Land Consolidation in Lithuania (Fao Legal Papers 2006) 1-3.

[75] Authors, Spatiotemporal Patterns of Land-Use Changes in Lithuania (2021) <https://www.mdpi.com/2073-445X/10/6/619/htm> [last accessed on 14 July 2022].

property interest, and it was not aimed at seizing state property. The good will of the state to restore the forms of ownership in civil law took some time to ensure that the economic purpose of the issue did not change from the establishment of basic norms in the Lithuanian Civil Code to the registration process.[76] This represented a kind of call for ownership for economic development and did not only have the narrow purpose of transferring ownership. The adopted normative acts on land established the means of practical implementation of the provisions of the constitutional record of the state and the Civil Code. A correctly developed strategy from the beginning led to the systematization and regrouping of the legal status of citizens in relation to the new legal reality.[77] The state started to complete the cadastral surveying measurement data at an early stage.[78]

The implementation of the legislator's idea was facilitated by the development[79] of essentially equal practice by the Constitutional Court, the definition of concepts was connected to the support of the restoration of the legal status of citizens. The Constitutional Court objectively explained the cause-and-effect relationship between the old and new regulations.[80] The subject of assessment was not only property rights, but also the course of land reform in different periods of time and its constitutionality. Let's consider some solutions.

Decision[81] №12/93 of May 27, 1994 established the fiction of state ownership after gaining independence. Private property, which was illegally confiscated from citizens by the Soviet authorities since 1940, was considered conditionally controlled and de-facto property by the state immediately after the independence of Lithuania until the right of the private owner was restored to this property, based on the presentation of an appropriate request. The court determined the negative consequences of the actions carried out by the Soviet authorities in terms of restricting the rights of private owners, including forced collectivization and the use of confiscated property for other purposes.

The decision raised questions about the full and partial nature of the concept of restoration of private property. It was clear from the beginning that the complete

[76] William Valletta, 'The Hesitant Privatization of Lithuanian Land' (1994) 18(1) Fordham International Law Journal 214-217.

[77] Petrulyte, 'Elements of Land Cadaster in Lithuania' (1998) 24(1) Geodesy and Cartography 37; Real Property Law and Procedure in the European Union General Report Final Version (European University Institute (EUI) Florence/European Private Law Forum Deutsches Notarinstitut 2005) 9.

[78] Aniceta Šapoliene, Agricultural Surveys and Censuses in Lithuania (Statistics Lithuania) 2-5 <http://www.stats.gov.cn/english/icas/papers/P020071114297505163007.pdf> [last accessed on 14 July 2022].

[79] Irmantas Jarukaitis, Lithuanian Experience in the Field of Restoration of Property Rights to Former Owners (Round Table Organised with Financial Support from the Human Rights Trust Fund) 2.

[80] Egidijus Jarašiūnas, Ernestas Spruogis, Problems of Legislative Omission in Constitutional Jurisprudence (The Constitutional Court of the Republic of Lithuania, Prepared for the XIVth Congress of the Conference of European Constitutional Courts 2007) 25.

[81] Constitutional Court of the Republic of Lithuania N12/93, 27 May 1994 Judgment on the Restoration of Ownership Rights to Land.

restoration of property forms could not be carried out, because from 1940, up to the restoration of independence, the characteristics of private property confiscated from citizens were changed or their part was completely destroyed and merged into another form of property, the disruption of which would have a negative impact on the well-being of the state and citizens.

If we compare it with the Georgian reality, in our case the balance was not maintained and the transfer of the property owned by the state to the ownership of citizens often took the form of seizure of property, although it should be noted that the gaining of independence allowed the citizens of Georgia to become economically stronger in terms of taking ownership of plots of land of a certain area and intended purpose, to be used as desired or to make it the subject of a civil turnover contract.

Decisions[82] №11-1993/9-1994 of June 15, 1994 and №10/1994 of October 19, 1994 stated that the restitution of property was partial and not complete, which meant the sorting and evaluation of citizens' applications in the part of admissibility of restoration of private property. The Constitutional Court clarified the scope of the responsibility of the independent state of Lithuania for the issue of property restitution, namely that by 1991 the state could not be responsible for the full restitution of private property seized as a result of the occupation in 1940 and ensuring its transfer to the original owners. Clarification of the issue of responsibility and the need to maintain the balance suspended the threats of civil confrontation. By 1991, the area and distribution of agricultural land in certain municipalities changed fundamentally compared to 1940, while in other municipalities no change was observed. Consequently, land reform and the concept of property restitution were implemented with varying frequency in these municipalities, although the format was common throughout the country.

In the Georgian reality, the results of the confrontation between citizens are still perceived as an acute conflict, because such an event as the overlapping of land plots occurred. This problem does not only refer to the lack of completeness of the measuring question. Of course, citizens, for a certain purpose, still try to use this opportunity to absorb the borders and adjacent territories in whole or in part. Therefore, comparing the distribution of land plots according to municipalities, according to different years, is still problematic.[83] If the comparable years in Lithuania were defined as the beginning of 1940 and the end of 1991, in the Georgian reality this perspective is counted off from 1921, and the assessment of properties confiscated by the Soviet authorities is

[82] Constitutional Court of the Republic of Lithuania N11-1993/9-1994, 15 June 1994 Judgment on the Restoration of Citizens' Ownership Rights to Residential Houses. Constitutional Court of the Republic of Lithuania N10/1994, 19 October 1994 Judgment on the Restoration of the Ownership Rights to Residential Houses.

[83] Giorgi Gogiashvili, 'Constitution and Civil Law: to What Extent is Private Law Subject to Constitutional Control?' (2019) 2(62) Justice and Law 21-22 (in Georgian).

uneven, biased or not carried out at all. In relation to the surveying issue, there is a lack of qualified personnel and their bias towards the person who uses this service. The excessive formalism of the notary makes notarial mediation an inefficient process. In another decision[84], the court determined the relevance of the issue of citizenship for participation in the process of restitution of private property. This reservation is important because from 1940 to 1991 and afterwards, many citizens or former citizens had contact with Lithuania.

From the decision[85] №2-A/2021 of September 28, 2021, it is clear that together with the concept of property restitution, a management strategy for the plots of land with agricultural significance was developed, both from the point of view of registration and preservation of agrarian purpose. In the Georgian reality, the Registry formally indicates the purpose, but no one investigates the agricultural importance of the land[86], risks[87] and dangers related to the yield of the land plot or the change of purpose.[88] In the past, the functioning of the household was based on the yield/cultivating the land plot included in it.[89]

VI. MEDIATION FOR THE PROTECTION OF THE RIGHTS OF HOUSEHOLD OWNERS

In order to consider mediation as an effective means of protecting the rights of household owners, the legislator should develop a strategy for selecting the appropriate environment for mediation and legal resolution of complex social relations [conflict],[90] in order to subsequently start the formation of large-scale targeted working groups according to municipalities,[91] where titles of a household are still unregistered and there

[84] Constitutional Court of the Republic of Lithuania N40/03; 45/03-36/04, 13 March 2013 Judgment on the Interpretation of the Provisions of the Constitutional Court's Judgments of 30 December 2003 and 13 November 2006 Related to Citizenship Issues.

[85] Constitutional Court of the Republic of Lithuania N2-A/2021, 28 September 2021 Judgment on the Legal Remedy for the Protection of the Pre-emption Right to Acquire Private Agricultural Land.

[86] Arkadyush Vudarski and Lado Sirdadze, 'The Jungle of Registries in the 21st Century' (2020) 6 Georgian-German Journal of Comparative Law 25-27 (in Georgian).

[87] Additionally, see Ketevan Kvinikadze, 'Conflict of Interests of the Former and New Owner during Bona Fide Acquisition of Ownership of Real Estate' (2015) 5(48) Justice and Law 75-76 (in Georgian).

[88] Comp. Tamar Khavtasi, 'The Property Right During a State of Emergency' (2020) 1 Journal of Constitutional Law Special Issue 137-138.

[89] Additionally, see Tengiz Urushadze and others, Soil Science (Publishing House: "Shota Rustaveli State University" 2011) 86 (in Georgian).

[90] Comp. Irakli Kandashvili, 'Mediation - Innovation in the Georgian Legal Space and an Effective Mechanism for the Realization of Human Rights' (2022) 2 Justice 101-102 (in Georgian).

[91] Khubua, Kalichava, supra note 34, 233-239; Ekaterine Ninua, 'Some Legal and Economic Aspects of Land Reform' (2015) Conference Papers: Economic, Legal and Social Problems of Contemporary Development 2-5.

is a dispute between the parties or the threat of forming a disputable relationship.[92]

The importance of mediation is relevant in the process of determining the fact of receiving inheritance and the place of opening of the estate through non–contentious proceedings,[93] among them, it is important to protect the property rights of household member and non-member heirs through mediation. In order to reach an agreement with mutual and multilateral interest, it is possible to critically evaluate the historical, social and legal function of the household archive statement in the process of implementing a new stage of the state reform of systematic land registration. In case of a dispute between the parties, it is preferable that the mediation be conducted by a mediator registered in the Registry of the Georgian Mediator Association, and not by a notary, who may have difficulty adapting the principles and norms of mediation to a complex legal case.[94] Mandatory use of notarial mediation confirms[95] that notaries, as a rule, fail to regulate cases when owners of households confront each other with different demands and subsequently the mediation case is brought into court.[96] The actions of the mediator notary are conditioned by the undue presumption of liability,[97] which is why notarial mediation is strictly formalized and ineffective.[98]

It is important to establish the addressees of property rights, whether it is a member of the household or a non-member, who need to use mediation or require alternative dispute resolution. These are:

– The last surviving member of the household;

– The intestate heir who is the member of the household;

– The testamentary heir who is the member of the household;

– A person without hereditary status who is the member of the household;

– The intestate heir who is not the member of the household;

[92] National Public Registry Agency website, "Register Land Easily and Become an Owner" <https://napr.gov.ge/p/1579> [last accessed on 14 July 2022].

[93] Comp. Giorgi Khubua and Lado Sirdadze, 'Law Technologies (Legaltech) in Georgia, Their Use in Private Companies and Public Agencies' (2022) 7 Georgian-German Journal of Comparative Law 9-10.

[94] Comp. Collective of Authors, Socio-demographic and Family Policy of Demographic Development of Georgia (Publishing House "Poligraph", 2010) 48.

[95] Article 18, Law of Georgia "On Systematic and Sporadic Registration of Rights to Land Plots and Completion of Cadastral Data". June 3, 2016. LHG, 17/06/2016.

[96] Nino Kharitonashvili, 'Mediation in the Georgian Notarial System' (2019) Alternative Dispute Resolution 2018-2019 Special Edition 21; Richard Bock, 'The German Notarial System' (2020) 8 Georgian-German Journal of Comparative Law 6-8.

[97] Article 4, Order №71 of the Minister of Justice of Georgia on the Approval of the Instruction "On the Procedure for Performing Notarial Acts". March 31, 2010. LHG, 33, 31/03/2010.

[98] Comp. Irakli Leonidze and Mariam Nutsubidze, 'Peculiarities of the Institution of Notarial Mediation in Georgian Law and Its Development Perspective' (2019) Alternative Dispute Resolution, 2018-2019 Special Issue 82.

– The testamentary heir who is not the member of the household;

– A person without hereditary status who is not the member of the household.

The 2nd and 3rd paragraphs of the first article of the Law of Georgia "On Mediation" can be applied for the classification of forms and means of alternative dispute resolution.[99] The advantage of mediation, compared to other dispute resolution mechanisms, implies a new model of resolution of disputed legal issues related to household regulation, the novelty of which is expressed in the establishment of mediation legislation and practice in Georgian law. In different states of the world, mediation is already considered to be relatively preferable among other dispute resolution mechanisms.[100]

Mediation is the only alternative to bring household owners or their heirs lost in time and space back to reality. Accordingly, along with the study of the nature of the relationship within the scope of the social event of the deterioration of the attitudes of the disputing parties, the issue of clarifying the legal consequences does not always imply the rejection of the norms established in the society and, by making unjustified demands, aggravating the situation.[101] Self-determination of the parties through mediation often aims to clarify the issue for the parties.[102]

Mediation is a way to complement other dispute resolution mechanisms. Therefore, interesting is the case of household regulation, for which the persons in charge of other dispute resolution mechanisms cannot or do not establish the standard of effective proceedings,[103] and with the functioning of the mediation institute and the combination or sharing of mediation powers, it became possible to establish citizen-oriented governance and organizational proceedings.

[99] See the website of the Association of Mediators of Georgia, the newsletter about the activities of the "Association of Mediators of Georgia" in September - December 2021 <https://mediators.ge/ka/article/sainformacio-biuleteni/329> [last accessed on 14 July 2022].

[100] Natia Chitashvili, 'Peculiarities of Individual Ethical Obligations of a Lawyer-mediator and the Need for Regulation' (2016) 2 Law Journal 29 (in Georgian).

[101] Comp. Ketevan Kochashvili, Ownership as the Basis of Presumption of Ownership (TSU Publishing House 2012) 86 (in Goergina).

[102] Mikheil Bichiya, 'The Importance of Using Mediation in Business Disputes During a Pandemic' (2021) 3 Law Gazette 14-15 (in Georgian); Aleksandre Tsuladze, The Georgian Model of Court Mediation in the Euro-American Prism (TSU Publishing House, 2016) 15-16.

[103] Author's note: legislator's mobilization regarding a problematic issue, in individual case, is determined by a specific precedent. The legislator mobilized in this way is characterized by actions with hasty and unforeseen legal consequences, which is expressed in the new legislative agenda. Additionally, see Ekaterine Ninua, 'Some Peculiarities of Receiving Estate' (2018) 2(58) Justice and Law 117-118 (in Georgian).

VII. CONCLUSION

For decades, the state failed to provide effective regulation of title of a household. The practice established by the Common Courts of Georgia was not enough to protect the rights of the owners of the household, and the discussion of this issue in the Constitutional Court of Georgia was unsuccessful. That is why this issue is a challenge for the Constitutional Court, which back in 2005 had the opportunity to express a clear opinion regarding the deficiency of Article 1323 of the Civil Code of Georgia. The aim of the present study was a systematic review of title of a household lost in time and space. As a result of the research, the need for correct assessment and fair resolution of complex legal cases related to title of a household was determined in order to improve the family and inheritance relations of Georgian citizens.

Finally, based on the research, the following conclusions were made:

1. The management of the agricultural plots of land of the household, the area of the registered property, the location and the issue of registration in the name of an individual are problematic. The challenges and shortcomings that accompany this process, both from the point of view of the interest and actions of the state and citizens, create a socio-legal situation of encroaching on the legal status of householders.

2. The existing agriculture in rural areas was destroyed only because the state perceived the household as a circumstance devoid of content and function, and not as an opportunity for economic development through the social coexistence of citizens.

3. The fact that since 2022 the systematic registration of land throughout the country has started, makes us think once again what challenges the citizens of Georgia and the state faced, when the word "the whole country", for the purposes of this reform, means "carrying out surveying and registration activities in 59 municipalities of Georgia (except for the occupied territory and the self-governing cities: Tbilisi, Batumi, Kutaisi, Rustavi, Poti).".[104] In general, positive expectations should be accompanied by real results and the anticipation of expressing support, so that this reform, like its predecessors, does not turn into a never-ending process.

4. The legislator wants to subject the regulation of title of a household lost in time and space to the process of systematic land registration and in this way satisfy the interest of the heirs of the household who are members and non-members, subsequently the interest of the owners. It would be desirable to clearly mention the problems of Georgian citizens, which this reform would aim to solve in the predetermined territorial area. Accelerated registration should not be an end in

[104] Website of the National Agency of Public Registry, "Systematic Land Registration" <https://napr.gov.ge/p/2063> [last accessed on 14 July 2022].

itself, the essence of the issue is to protect the property right of citizens, and not to ignore it by the fact of registration.

5. The function of the Public Registry, notarial system and court will reach its perfection when the citizens will no longer need litigation to solve the problem.[105]

[105] Additionally, see Sukhitashvili, supra note 20, 31.

OVERVIEW OF JUDGMENTS OF THE CONSTITUTIONAL COURT OF GEORGIA

ABSTRACT

"Journal of the Constitutional Law" continues to offer readers an overview of the latest practice of the Constitutional Court of Georgia. Three important judgments of the Constitutional Court were selected for publication in the current edition. The editors of the journal hope that the overview of the practice of the Constitutional Court will raise the level of legal discussion in relation to the activities of the court.

JUDGMENT №3/2/1478 OF DECEMBER 28, 2021

On December 28, 2021, the Plenum of the Constitutional Court of Georgia adopted a judgment №3/2/1478 on the case "Constitutional submission to the Tetritskaro District Court on the constitutionality of the second sentence of Article 3(20), the third sentence of Article 25(2), Article 48(1) and (2), the first sentence of Article 48(5) and the first sentence of Article 48(7) of the Criminal Procedure Code of Georgia (Constitutional Submission №1478).

Two different issues were disputed in the case. Part of the disputed norms defined by the Criminal Procedure Code of Georgia established the obligation of the accused to speak only the truth if he/she decides to testify in court. The procedural norm was also disputed in the case, which excluded the possibility of asking a question by the judge hearing the criminal case, without the consent of the parties.

Regarding the first matter in dispute, the author of the constitutional submission pointed out that the criminal procedural legislation, by imposing a mandatory oath and the obligation to tell the truth before testifying, made the accused face a choice between using the right to remain silent and giving false testimony. In particular, according to the position of the author of the submission, the strict sanctions for false testimony defined by the Criminal Code have a chilling effect and encourage the accused to use the right to remain silent when he/she has to choose between confessing to the crime and giving false testimony. Regarding the subject of the second dispute, the author of the constitutional submission also explained that the person who makes the assessment and the final decision regarding the criminal case is the judge, who determines and evaluates the important circumstances for the final decision on the case. Thus, according to the author of the constitutional submission, the judge should have the opportunity, independently of the consent of the parties, to ask clarifying questions, which would

be necessary to dispel ambiguities, to resolve a specific issue and to ensure a fair trial.

In its judgment, the Constitutional Court of Georgia, first of all, explained that the term "witness" referred to in Article 31(4) of the Constitution of Georgia includes, inter alia, the accused who decides to testify in his/her own defense. Thus, the right of the defense party to call and interrogate witnesses, implies, inter alia, giving the testimony by the defendant. In this way, the accused is given the opportunity to present his/her version of events before the decision-making court in connection with the criminal case, to influence the course of the case and the final results.

After this, the Constitutional Court pointed out that the privilege of protection against self-incrimination, guaranteed by Article 31(11) of the Constitution of Georgia, is related to the respect of the defendant's freedom of will to remain silent. Accordingly, the named constitutional guarantee serves to ensure a person's freedom of choice between the rights of silence and testimony. The limitation of the mentioned right cannot be caused by the regulation, within the framework of which the influence on the will elements of a person is not carried out in order to obtain evidence/testimony from him/her. The Constitutional Court reviewed the relevant norms of criminal procedural legislation and noted that the accused, taking into account his/her status and legal status, unlike other categories of witnesses, is exempted, inter alia, from the obligation to testify in court. Thus, testifying in court is the right of the accused and it is an act performed on the basis of free will. In this regard, the accused has a free choice - to use the right to remain silent and to benefit from the privilege of protection against self-incrimination or to testify in his/her own defense. In addition, with the reservation that the decision taken in favor of maintaining silence cannot be evaluated as proof of the guilt of the accused.

The Constitutional Court also emphasized that the accused may naturally have an interest in misrepresenting the facts to the court. The mandatory procedure of taking an oath during his/her testimony and the warning about the imposition of criminal liability for false testimony serve, inter alia, to provide by the accused witness only truthful information to the court and, in this way, the legal assurance of the reliability of the testimony. The ability to testify without risk of liability will reduce the credibility of the testimony of the accused, which will not help the administration of justice and, at the same time, will significantly harm the opportunity of the innocent accused to defend himself/herself. Thus, the court concluded that the accused does not have a constitutional right to perjury. And the legal system, which allows the accused to testify only on the condition of telling the truth, does not limit the constitutional privilege of protection against self-incrimination.

The Constitutional Court by the judgment in question also assessed the constitutionality of the restriction on asking questions to the judge and considered it incompatible with the right to a fair trial. The judgment explains that limiting the ability of judges to ask

questions on the grounds that an important circumstance for the case is not revealed at the hearing, not only does it not represent a requirement of the right to a fair trial, but also essentially contradicts the goals of the criminal justice process. In particular, the interest in determining the objective truth in the case cannot depend only on the desire of the parties or their competence. An individual judge (or jury) creates a guarantee of fair and proper justice in a specific case. The passivity and artificial fettering of the trial court may lead to injustice - the conviction of an innocent person or the release of a guilty person from responsibility. In this regard, the Constitutional Court noted that it is necessary for the judge to have the opportunity to thoroughly and comprehensively examine all the circumstances important to the case at the hearing, which are necessary for the formation of internal beliefs and the implementation of justice in the case. And thus, he/she must have the opportunity to ask questions when the composition of the act which is considered to be a crime is unclear, the testimony given by a witness, expert or other participant in the criminal process is unclear, confusing and/or contradictory, or when the need to ask questions is stipulated by the need for the judge to determine the sequence of events and identification of the factual circumstances of the case, etc.

The Constitutional Court explained the right to an impartial court guaranteed by Article 31(1) of the Constitution of Georgia and pointed out that the requirement of impartiality of the court applies not only to the court's decision, but also to the process through which and as a result of which the said decision is made. In this process, the court is not only obliged to be impartial, but great importance is attached to its external manifestation. The Constitutional Court noted that the judge should exercise the authority to ask questions under conditions of reasonable judicial self-restraint. The main limitation and the basic principle that should limit the use of said authority for the judge is that his/her function is to examine the evidence presented at the trial, to encourage clarity and not to create new evidence. In this regard, the Constitutional Court additionally indicated that questioning by the trial judge should not be conducted with such language and terminology, tone, gestures, behavior or form and intensity as to give rise to reasonable suspicion of the judge's bias. In compliance with these conditions, asking a question by a judge is an integral part of the constitutional requirement of a fair hearing and is an action aimed at a complete investigation of the case, establishing the truth, which does not interfere with the constitutional requirements of the equality and competition of the parties and/or the impartiality of the court.

The Constitutional Court noted that, based on the disputed norm, the judge was restricted from asking questions during the proceedings, including in a form that did not violate the principle of equality and competition between the parties and the judge's impartiality. The specified one hindered the establishment of the truth in the criminal case and limited both the right of the accused to a fair trial, as well as the interest of the injured party and the entire society to execute justice within the framework of a

fair court. While discussing the possible legitimate purpose of the limitation of the mentioned rights, the Constitutional Court noted that it would be meaningless to claim that the proceedings, which fail to ensure a proper investigation of the case, derive from any legitimate interest of any of the parties to the criminal proceedings or serve them and are in any way compatible with the constitutional requirements of the right to a fair trial. Accordingly, the Constitutional Court considered the restriction established by the disputed norm to be self-serving and incompatible with the interests of justice.

JUDGMENT №3/5/1341, 1660 OF JUNE 24, 2022

On June 24, 2022, the Plenum of the Constitutional Court of Georgia made a judgment on the case "Constitutional submissions of Tetritskaro District Court regarding the constitutionality of the first sentence of Article 200(6) of the Criminal Procedure Code of Georgia" (constitutional submissions №1341 and №1660).

According to the submissions, the norm of the Criminal Procedure Code, which determined the procedure for applying bail to the detained accused, was disputed. In particular, based on the contested norm, the provision of bail as a preventive measure against the detained person before securing the bail, in all cases, led to the accused being in custody.

According to the submissions, the judge was not authorized, based on the factual circumstances of the case, to make an individual judgment on the application of custody when he/she deemed it appropriate. At the same time, the disputed norm did not provide for the possibility of assessing the reasonableness of the imprisonment. The mentioned was contrary to the right to freedom confirmed by Article 13(1) of the Constitution of Georgia. Thus, the author of the constitutional submissions considered that the court should be able to decide in each individual case whether it is necessary to use the measure of custody for the purpose of securing bail for a person.

The Constitutional Court of Georgia assessed the extent to which the contested regulation represented a proportionate means of achieving the legitimate goal of avoiding interference with the investigation and the prompt implementation of justice. According to the definition of the Constitutional Court, in a legal and democratic state, the principle works in favor of freedom of an individual. This implies that the restriction of a person's freedom through imprisonment is not a rule, but an exception. Limiting a person's freedom is an extreme measure that should be used only in exceptional cases and circumstances, when the said measure is absolutely necessary and there is no other alternative to achieve a legitimate goal.

According to the court, the Constitution of Georgia separates detention and imprisonment. By itself, the fact that a person is detained, a priori, cannot become

the basis or prerequisite for justifying imprisonment. At the same time, the issue of detention, its need and necessity should be considered by the judge independently of the fact of detention.

The Constitutional Court did not rule out that in practice there can be in exceptional cases an objective need to leave the person in custody for a certain period of time to ensure the payment of the bail determined by the court, in the form of a preventive measure, even after the decision on the use of bail is made. However, the Constitutional Court explained that, in some cases, the right to physical freedom and inviolability of an individual was arbitrarily limited by the contested regulation, as long as the person continued to be in a detention/prison facility based on it, when there was no longer a necessary, exceptional reason for the restriction of freedom. Thus, the Constitutional Court shared the position of the Tetritskaro District Court and considered that the judge should make a decision based on the individual circumstances of the case, taking into account the existing threats, regarding the need to keep a person in custody in order to ensure the immediate payment of bail.

Taking into account all of the above, the Constitutional Court concluded that the disputed norm was a disproportionate restriction of human freedom (Article 13(1) of the Constitution of Georgia), which is why it recognized as unconstitutional the normative content of the first sentence of Article 200(6) of the Criminal Procedure Code of Georgia, which precluded the judge from releasing the accused before posting bail.

JUDGMENT №3/6/813 OF DECEMBER 22, 2022

On December 22, 2022, the Plenum of the Constitutional Court of Georgia made a judgment on the case "*Aleksandre Melkadze v. the Parliament of Georgia*" (Constitutional Lawsuit №813). The disputed norm in the mentioned case defined the rule of formation of the single list of voters and stated that the data of the voter will be included in the single list of voters according to the place of his/her registration.[1]

According to the plaintiff's argumentation, based on the disputed norm, a voter who was removed from the registration by place of residence, whose registration was declared invalid or who was registered without specifying the address, could not be included in the unified list of voters. The inclusion of this category of persons in the unified list of voters depended on the development of a temporary, exceptional rule before the elections, with the transitional provisions of the Election Code of Georgia and the resolutions of the CEC, which gave the voters of the category named for specific

[1] The subject of the dispute in full: the constitutionality of the first sentence of Article 31(3) of the Organic Law of Georgia "Election Code of Georgia" (the version valid until July 27, 2018) in relation to Article 28 of the Constitution of Georgia (the version valid until December 16, 2018).

elections the opportunity to register and vote. Based on the above, according to the plaintiff's explanation, the disputed norm excluded the possibility of fully enjoying the active right to vote and contradicted the right to vote enshrined in the Constitution of Georgia.

According to the position of the defendant, the Parliament of Georgia, on the basis of the disputed norm, the determination of the place of voter registration as a principle of the formation of a unified list of voters served the administration of the proper election system. Such an approach excluded the manipulation of voter flows and, in this way, insured the risks of election fraud and violation of the principle of equality of votes.

Based on the analysis of the legislation, testimony of witnesses and materials presented in the case, the Constitutional Court of Georgia came to the conclusion that the disputed norm excluded the category of persons in a similar situation as the plaintiff from the unified list of voters. As a result, the availability of the right to vote for the mentioned persons, every time, depended on the development of additional and temporary legislative regulations before the elections.

The Constitutional Court explained that since the active right to vote is one of the fundamental rights in terms of guaranteeing the existence of representative democratic governance in the state, its perfect realization is particularly important in a democratic society. The legislator should take all possible measures so that all those persons who are recognized by the Constitution of Georgia as subjects with active electoral rights can come to the elections and express their opinion by voting. Based on the above, the Constitutional Court determined that any restriction that excludes the possibility of individual voters, especially a specific category of voters, to participate in the elections, should be selected with extra caution and should be subject to strict constitutional and legal scrutiny.

The Constitutional Court noted that the contested regulation served to achieve the valuable public legitimate goals named by the defendant, and the restrictive measure was a useful and necessary means of achieving the mentioned legitimate goals.

At the same time, the Constitutional Court explained that the intense restriction imposed by the disputed norm, which excluded persons without registration or those registered without specifying their address, from entering the unified list of voters, established an unfair balance between the interests of ensuring the smooth administration of the election process and the proper guarantee of the active right to vote, especially in the circumstances, when, in parallel with appealing to the complication of election administration, the legislator, in order to ensure the right to vote of unregistered or registered voters without address, had established a uniform practice of regulating the issue under discussion with temporary, although constantly updated, transitional provisions, which clearly indicated the fact that the development of a solid and non-

recurring mechanism for the administration of the election process, even different from the general rule of registration in the unified voter list for the category of persons mentioned by the main provisions of the Election Code from the point of view of provision, would not create an unnecessary burden for the CEC.

Furthermore, the Constitutional Court of Georgia did not share the defendant's position regarding the regulation of the exceptional rule of inclusion in the unified list of voters in order to encourage registration with the transitional provisions of the Election Code and pointed out that, on the one hand, there was no evidence of a rational connection between the promotion of a person's registration and the regulation of the exceptional rule of inclusion in the unified list of voters with the transitional provisions and, on the other hand, based on the extremely great importance of the active right to vote, it was unjustified to limit the right to vote with a similar intensity, on the grounds of encouraging registration by specifying the address of the place of residence of citizens.

Based on all of the above, the Constitutional Court recognized as unconstitutional the first sentence of Article 31(3) of the Organic Law of Georgia "Election Code of Georgia" (edition valid until July 27, 2018) in relation to Article 24 of the Constitution of Georgia.