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FOREWORD

In light of the evolving dynamics within the multilateral development of the Constitutional Court of Georgia, alongside the ongoing legal and socio-political processes globally and nationally, the necessity for active academic discourse becomes increasingly evident. The reasoned analysis of the issues central to constitutionalism stands as a crucial prerequisite for ensuring the sustainability and effectiveness of the liberal-democratic constitutional order.

"Journal of Constitutional Law" has been established as a reputable academic publication, providing Georgian scientists, legal practitioners, and young researchers to disseminate their work to a wide audience and establish themselves within the field of research endeavors. The Journal contributes significantly to the ongoing legal discourse regarding constitutional matters, thus it helps legal professionals in enhancing their understanding across various fields of law.

This edition of the "Journal of Constitutional Law" includes five academic works by Georgian authors. Notably, the Journal includes works of Georgian researchers on the following interesting legal issues: The constitutional scope of the delegation of law-making competence (authored by Lela Macharashvili), juridification tendencies and justice sector reforms in Georgia (authored by Sopho Verdzeuli), understanding the practice of recognition of the norm as unconstitutional by the Constitutional Court of Georgia (authored by Davit Abesadze), the permissibility of holding a referendum under the conditions of occupation of the territories of Georgia (professor authored by George Goradze), and the constitutional status of the President of Georgia in the field of foreign relations (by Tea Kavelidze). Furthermore, this edition presents the academic work of Andrew Kopelman – a professor from Northwestern University (United States of America) on the moral-philosophical issues of freedom of religion, which are pertinent to the ongoing process of understanding the constitutional and legal framework of the liberal-democratic order.

I believe that the present edition of the "Journal of Constitutional Law" will prove to be a valuable source in fostering academic discourse and advancing legal knowledge. It is particularly gratifying to note that this year, the Constitutional Court of Georgia signed a Memorandum of Understanding with Ivane Javakhishvili Tbilisi State University.

This Memorandum signifies the establishment of a close collaborative platform between the Constitutional Court of Georgia and Tbilisi State University in academic, educational, and research fields. Among its provisions, the Memorandum includes collaborative efforts in publishing activities, as well as organizing conferences, public lectures, seminars, and implementing various educational projects at the Constitutional Court. By synergizing the resources of the Constitutional Court of Georgia and Tbilisi State University, it will be possible to implement meaningful academic and educational events, thereby creating new opportunities for individuals engaged in the teaching and learning process of the legal profession.

Professor **Merab Turava**

President of the Constitutional Court of Georgia

CONTENTS

TEA KAVELIDZE

CONSTITUTIONAL STATUS OF THE PRESIDENT OF GEORGIA IN THE FIELD OF FOREIGN RELATIONS

Andrew Koppelman[*]

HOW COULD RELIGIOUS LIBERTY BE A HUMAN RIGHT?**

ABSTRACT

A growing number of scholars think "religious liberty" is a bad idea. The unfairness objection is that singling out religion for special protection is unjust to comparable nonreligious conceptions of the good. The distraction objection asserts that religious liberty is a misleading lens: oppression sometimes occurs along religious lines, but the underlying conflicts often are not really about religious difference. Both objections are sound, but under certain conditions religious liberty should nonetheless be regarded as a right. Law is inevitably crude. The state cannot possibly recognize each individual's unique identity-constituting attachments. It can, at best, protect broad classes of ends that many people share. "Religion" is such a class. Where it is an important marker of identity for many people, it is an appropriate category of protection.

A growing number of scholars think "religious liberty" is a bad idea. They oppose religious persecution but think that a specifically "religious" liberty arbitrarily privileges practices that happen to resemble Christianity and distorts perception of real injuries.

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One criticism, the *unfairness objection*, is that singling out religion for special protection is unjust to comparable nonreligious conceptions of the good.[1] Another, the *distraction objection*, is primarily aimed at international human rights regimes. It asserts that religious liberty is a misleading lens: oppression sometimes occurs along religious lines, but the underlying conflicts often are not really about religious difference, so focusing on religious liberty leads to misunderstanding and policies that make matters worse.[2] Both doubt that there is anything special about religion that justifies singling it out as a right.

Yet religious liberty has obvious attractions. Some intuitively powerful claims are hard to articulate in any other terms. The discourse of religious liberty has helped people with radically different values to live together peacefully. That is one reason why Americans and Europeans are so keen to export it.

I shall argue that both objections are sound, but that religious liberty is nonetheless appropriately regarded as a right. Religion is not uniquely valuable.[3] Other interests are similarly weighty. A focus on religion can divert attention from injuries to those interests. "Religion" is a crude category. But law is inevitably crude. The unfairness objection implies that the state ought to recognize each individual's unique identity constituting attachments. The state can't possibly do that. It can, at best, protect broad classes of ends that many people share. Religion is such a class. Philosophical first principles lose nuance when refracted through law.

American law has been a principal target of the objections. Understanding why they fail here will show why they might fail, and religious liberty might appropriately be regarded as a right, elsewhere.

First Amendment doctrine has used "neutrality" as one of its master concepts, but it treats religion as a good thing. Religious conscientious objectors are often accommodated. Disestablishment protects religion from manipulation by the state. The law's neutrality is its insistence that religion's goodness be understood at a high enough level of abstraction that (with the exception of a few grandfathered practices, such as "In God We Trust" on the currency) the state takes no position on any live religious dispute. America, the most religiously diverse nation on earth, has been unusually successful in dealing with its diversity.[4]

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[1] On the increasing number of scholars who are persuaded of this objection, see Kathleen Brady, The Distinctiveness of Religion in American Law: Rethinking Religion Clause Jurisprudence (Cambridge University Press 2015) 17–55; Andrew Koppelman, Defending American Religious Neutrality (Harvard University Press 2013) 120–165.

[2] Saba Mahmood, Religious Difference in a Secular Age: A Minority Report (Princeton University Press 2016); Elizabeth Shakman Hurd, Beyond Religious Freedom: The New Global Politics of Religion (Princeton University Press 2015); Winnifred Fallers Sullivan, The Impossibility of Religious Freedom (Princeton University Press 2007); see also: the essays collected in Politics of Religious Freedom, Winnifred Fallers Sullivan and others (eds), Politics of Religious Freedom (University of Chicago Press 2015).

[3] Some of course will disagree. See, e.g., Brady, supra note 1. Such people of course have no objection to special treatment of religion.

[4] Koppelman, supra note 1, passim.

The American approach elicits two versions of the unfairness objection.[5] One of these is that other goods are as important as religion. Another relies on the influential view, commonly called *liberal neutrality*, that state action should never be justified on the basis of any contested conception of the good. Both motivate the search for substitutes that do not privilege "religion."

Plenty of substitutes have been proposed, notably equality, conscience, and integrity. All founder on Hobbes's objection that human impulses are so various that there can be no reasonable basis for prioritizing any of them as a basis for exemption from the law. Hobbes is wrong, of course. But without relying on contestable and imprecise categories such as "religion" (which each of the substitutes tries to do without) it is impossible to show that he is wrong. We are less opaque to one another than he thinks because there are *intersubjectively intelligible* goods, which all of these substitutes ignore, whose value transcends individual preferences. Charles Taylor calls these *hypergoods*. People are entitled to be free to pursue those ends. Religion is an example.[6] That is bad news for liberal neutrality. Many human rights claims (religious liberty among them) are unintelligible without reliance on hypergoods.

Blocking someone's access to hypergoods is a serious injury. Different hypergoods are, however, salient for different populations. Hence the dangers of unfairness and distraction.

Religion is an important marker of identity for many, perhaps most, Americans. Where religion thus denotes hypergoods that are the focus of local attachments, religious liberty is appropriately regarded as a right. The term does not honor the full range of valuable human commitments. No regime can do that. American law responds to the specific circumstances of American religious diversity.

Religious liberty could be an appropriate category of protection elsewhere if like conditions exist elsewhere.

I. WHAT IS A HUMAN RIGHT?

There is no consensus on the criteria for specifying human rights. One influential account argues that a person must have certain rights if they are to have any kind of life

[5] I note in passing that these are inconsistent, though sometimes made together: liberal neutrality precludes the state from deeming some ends especially deep and valuable.

[6] It is not a single hypergood, but, as I explain below, a cluster of them.

at all.[7] Whatever your ends, you cannot achieve them if you are enslaved, arbitrarily imprisoned, beaten, starved, tortured, or killed.[8]

Such minimal rights must omit a lot of important ones. Article 16 of the 1948 Universal Declaration of Human Rights cites "the right to marry and to found a family."[9] Female genital mutilation is broadly agreed to be a human rights violation,[10] even though, if practiced under sanitary medical conditions (as it sometimes is), its only effect is to deprive the victim of the capacity for sexual pleasure. Violation of these rights does not block every avenue to a decent life.[11] Some people don't care about either family or sexual pleasure.

On the other hand, these capacities are valued under precisely this description, by many people in every culture of which we are aware, and governments have sometimes unjustly restricted them. Their source, then, is not an abstract idea of agency but the valuations that people happen to hold.

Joseph Raz has argued that a right should be understood as an aspect of human well-being that "is a sufficient reason for holding some other person(s) to be under a duty."[12] If this is correct, and if religious liberty is a universal right, it would have to protect some universal, urgent aspect of human well-being.

Religious liberty is in fact enshrined in many international treaties.[13] Article 18 of the 1948 Universal Declaration holds that each person has the right "to manifest his religion or belief in teaching, practice, worship and observance."[14] That has been repeatedly reaffirmed. The US State Department monitors it in every country.[15]

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[7] Even some of these, such as a right to basic health care, are surprisingly controversial. During oral argument in the Obamacare case, when the Solicitor General argued that Americans could legitimately be required to purchase health insurance because the country is obligated to provide care when they get sick, Justice Antonin Scalia responded: "Well, don't obligate yourself to that." Andrew Koppelman, The Tough Luck Constitution and the Assault on Health Care Reform (Oxford University Press 2013) 1.

[8] See James Griffin, On Human Rights (Oxford University Press 2008); Michael Ignatieff, Human Rights as Politics and Idolatry (Princeton University Press 2001) 90, 173. Here I consider only the philosophical question whether religious liberty is an appropriate basis for judging a regime. I take no position on whether institutions or treaties that specifically guarantee such rights are effective, or whether some desiderata are more important than respect for rights. For skeptical views, see Eric Posner, TheTwilight of Human Rights Law (Oxford University Press 2014); Wendy Brown, "The Most We Can Hope For . . . ": Human Rights and the Politics of Fatalism (Duke University Press 2004) 103 S. Atlantic Q. 451.

[9] Art. 16, Universal Declaration of Human Rights <http://www.un.org/en/universal-declarationhuman-rights/> [10.02.2023].

[10] U.N. Office of the High Commissioner on Human Rights et al., Eliminating Female Genital Mutilation: An Interagency Statement (2008) 8-10 <http://www.un.org/womenwatch/daw/csw/csw52/ statements_missions/Interagency_Statement_on_Eliminating_FGM.pdf> [10.02.2023].

[11] Andrew Koppelman, 'The Limits of Constructivism: Can Rawls Condemn Female Genital Mutilation?' (2009) 71 The Review of Politics 459.

[12] Joseph Raz, The Morality of Freedom (Oxford University Press 1986) 166.

[13] For an enumeration, see Lorenz Zucca, 'Freedom of Religion in a Secular World' in Rowan Cruft and others (eds), Philosophical Foundations of Human Rights (Oxford University Press 2015) 402.

[14] Art. 18, Universal Declaration of Human Rights <http://www.un.org/en/universal-declaration-human-rights/> [10.02.2023].

[15] U.S. Department of State, 'International Religious Freedom Report' (2014) <http://www. state.gov/j/drl/

Various specifications of the right have been offered[16]: freedom from punishment for one's religious beliefs, relief from facially neutral laws that are intended to harm religious minorities, a right to exemption from laws to which one has a religious objection.[17] The last of these, because it involves ad hoc balancing, is probably a poor candidate for a human right. The others, which involve deliberate injury on the basis of religion, are more promising. That kind of purposive harm does happen, and in a lot of places. But the categories are not neatly bounded: sometimes indifference to manifest need amounts to malevolence. Any specification implies that religion is something special: forced conversion would not be oppressive unless religion mattered to people.

What turns on whether any of these is a right? On some accounts, rights limit state sovereignty, authorizing various sorts of sanctions if the right is violated. On other, more modest views, which are all we will rely on here, they are moral imperatives that states are obligated to respect.[18] Is religious liberty such an imperative?

II. THE SPECIFICITY OF RELIGIOUS LIBERTY

Robert Audi defends this right in Razian terms: "the deeper a set of commitments is in a person, and the closer it comes to determining that person's sense of identity, the stronger the case for protecting the expression of those commitments." This can ground a right to religious liberty, because "as a matter of historical fact and perhaps of human psychology as well, religious commitments tend to be important for people in both ways: in depth and in determing the sense of identity." This, Audi claims, is true of "few if any non-religious kinds of commitment."[19]

If only. The world is a dense jungle of commitments and identities. Many have nothing to do with religion. "Religion" is a culturally specific category that emerged from

rls/irf/religiousfreedom/index.htm#wrapper> [10.02.2023].

[16] The ambiguity of its scope is one reason to doubt its value as an international human right. See Zucca, supra note 13, at 395–397. On the other hand, it is widely valued: In the 2007 Pew Global Attitudes Survey, publics in 34 countries covering five different regions were asked about the importance of practicing their religion freely. The response was extremely high, ranking from 84 percent in Eastern Europe to 98 percent in Africa. On average across the 34 countries, 93 percent indicated that it is important to be able to live in a country where they can practice their religion freely, with less than 2 percent indicating that it wasn't important. Brian J. Grim, Religious Freedom: Good for What Ails Us? (2008) 6 The Review of Faith & International Affairs 3. Thanks to Pasquale Annicchino for the reference.

[17] Another proposed specification is a right to be free from "defamation of religion." This raises issues I can't address here.

[18] James Nickel, Human Rights in Stanford Encyclopedia of Philosophy §2.1. (2017) <http:// plato. stanford.edu/entries/rights-human/> [10.02.2023].

[19] Robert Audi, Religious Liberty Conceived as a Human Right in Rowan Cruft and others (eds), Philosophical Foundations of Human Rights (Oxford University Press 2015) 418. Others have made similar arguments. See, e.g., Brady, supra note 1; Michael W. McConnell, 'The Problem of Singling Out Religion' (2000) 50 DePaul Law Review 1.

encounters with foreign belief systems associated with geopolitical entities with which the West was forced to deal.[20] Audi is vulnerable to both the unfairness and distraction objections. Religion is very important to some people and a matter of indifference to others, with most somewhere between. Even forced conversion is regarded by some who undergo it as a minor inconvenience.

The notion of a human right to religious liberty has often been deployed to reflect Christian priorities. European powers invoked it in the nineteenth century to undermine Ottoman sovereignty in the name of protecting Christians.[21] During the occupation of the Philippines, it was centrally focused on Americans' right to evangelize. It was used to protect European ethnic minorities, notably Jews, after World War I, and later still to demote Shinto from its official status in post-World War II Japan.[22] Although the Universal Declaration aspired to be acceptable to a broad range of foundational views,[23] article 18 was largely drafted by American evangelicals and European missionaries who sought support for their struggles against Communism and Islam.[24]

The lived religion of many people is not about professing propositions. It is their entire way of life. There is no separable category of doings that one could protect as distinctively religious. If one tries, one will distort the concerns of the people one thinks one is protecting, picking out and arbitrarily prioritizing those that can be shoehorned into the category "religion."[25]

Consider the 2014 annual State Department International Religious Freedom Report. It collects atrocities: murders, kidnappings, torture, slavery, the usual train of human rights abuses.[26] Horrible. But what have they got to do specifically with religious freedom? They are sometimes religiously motivated. The report begins with an awful story of ISIL militants seizing a toddler from a Christian woman. It's ugly, but the religious motivation is not what's ugliest about it.

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[20] Jonathan Z. Smith, Religion, Religions, Religious in Mark C. Taylor (ed), Critical Terms for Religious Studies (University of Chicago Press 1998) 269; Talal Asad, Genealogies of Religion: Discipline and Reasons of Power in Christianity and Islam (Johns Hopkins University Press 1993).

[21] Mahmood, supra note 2, at 31–65.

[22] Anna Su, Exporting Freedom: Religious Liberty and American Power (Harvard University Press 2016).

[23] Mary Ann Glendon, A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights (Random House Trade Paperbacks 2001) 73-78.

[24] Mahmood, supra note 2, at 48–49; Linde Lindkvist, 'The Politics of Article 18: Religious Liberty in the Universal Declaration of Human Rights' (2013) 4 Humanity - An International Journal of Human Rights, Humanitarianism, and Development 429. The Christian paradigm also dominated the drafting of the religious liberty provision of the European Convention on Human Rights. Samuel Moyn, 'Religious Freedom and the Fate of Secularism', in Jean Cohen and Cécile Laborde (eds), Religion, Secularism, & Constitutional Democracy (Columbia University Press 2016) 27.

[25] Hurd, supra note 2, offers numerous illustrations, of which I give only a sample.

[26] International Religious Freedom Report, supra note 15.

The report details the plight of the Rohingya people in Myanmar, a Muslim minority who have been subjected to violence, harassment, and forced displacement, and denied Burmese citizenship even though they have lived there for generations. The 2016 Report acknowledges: "Because religion and ethnicity are often closely linked, it was difficult to categorize many incidents as being solely based on religious identity."[27] Yet all are counted as violations of religious liberty.

The discrimination and abuse the Rohingya confront, Elizabeth Shakman Hurd observes, "is ethnic, racial, economic, political, postcolonial, and national."[28] The discourse of religious liberty, by focusing on the fact that the oppressors are Buddhist and the victims are Muslim, obscures a complex history in politically malign ways:

> Promoting religious rights, in this case, effectively strengthens the hand of a violently exclusionary set of nationalist movements that depend for their existence on perpetuating the perception of hard-and-fast lines of Muslim-Buddhist difference and immutable ties among majoritarian (Buddhist) religion, race, and Burmese national identity. In other words, the logic of religious rights fortifies those who are most committed to excluding the Rohingya from Burmese society.[29]

Similarly in Syria. The US Commission on International Religious Freedom issued a report in 2013, calling for projects there to promote religious tolerance and to "help religious minorities to organize themselves. " Hurd observes: "To reduce the multiplex grievances of the Syrian people to a problem of religious difference, and their solution to religious freedom, is to play into the hands of the Assad regime, which has benefitted for decades from the politicization of sectarian difference to justify autocratic rule."[30]

"Religious liberty" tends to privilege beliefs rather than practices—and among beliefs, those that are parts of large, ancient orthodoxies, which may not be the beliefs most important to their adherents or most prone to persecution. The reification of religious divisions obscures political possibilities that are not predicated on such divisions. Pressure to honor religious liberty thus can impose a Procustean grid upon, and sometimes even exacerbate, local conflicts. The push to organize minority religious groups also tends to arbitrarily empower those religious leaders who know how to work the system, and so to violate its own commitment to equal treatment of religions. Distraction produces unfairness.

When the American Baptists and Deists converged on the idea of disestablishment, they had specific evils in mind: the levying of religious taxes upon those who did not

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[27] U.S. Department of State, Burma 2016 International Religious Freedom Report <http://www. state. gov/j/drl/rls/irf/religiousfreedom/index.htm#wrapper> [10.02.2023].

[28] Hurd, supra note 2, at 48.

[29] ibid, 46-47.

[30] ibid, 115.

subscribe to the established religion and the jailing of unlicensed preachers.[31] The idea of "free exercise of religion" was a nicely tailored response to those grievances. It is less helpful—it is a distraction—in Myanmar.

III. DOING WITHOUT "RELIGION"

How to respond to the unfairness and distraction objections? One answer is that freedom of religion ought to be protected indirectly, under the description of more familiar general rights (so that heresy, for example, is protected as free speech),[32] or disaggregated into its component goods.[33] The injuries of the Rohynga or of the victims of ISIL are best described without much reference to religion.

This approach, however, will not protect religion in some of the most salient American cases. It is no help for Quaker draft resistors, or Native Americans who want to use peyote in their rituals, or Muslim prisoners who want to wear beards, or even Catholics who wanted to use sacramental wine during Prohibition.[34] Cases like that arise outside North America and Europe. Brazilian courts in 2009 considered whether Jews were entitled to an alternate date for a national college admission exam that is given on Saturdays.[35]

Some attractive claims are hard to characterize in nonreligious terms. Hurd sometimes uses the rhetoric of religious liberty in spite of herself. In Guatemala, the K'iche' are a Maya ethnic group whose land rights have been routinely violated by multinational mining operations in collusion with the police and the state. The State Department reports "no reports of abuses of religious freedom" in the country, Hurd complains, because, even though the land is sacred to them, "they are perceived as having no

[31] Andrew Koppelman, 'Corruption of Religion and the Establishment Clause' (2009) 50 William and Mary Law Review 1831, 1862-1864.

[32] Ira Lupu and Robert Tuttle, Secular Government, Religious People (Wm. B. Eerdmans Publishing Co. 2014) 177-210; James Nickel, 'Who Needs Freedom of Religion?' (2005) 76 University of Colorado Law Review 941.

[33] Cécile Laborde, 'Religion in the Law: The Disaggregation Approach' (2015) 34 Law and Philosophy 581.

[34] Nickel argues that individual exemptions can be created without using the category of "religion," for example when it is decided "to give scientific researchers exemptions from drug laws in order to allow them to study controlled substances." Nickel, supra note 32, at 958. It is not obvious, however, and Nickel does not explain, how one could justify classic religious accommodations, such as sacramental wine, under a nonreligious description. Laborde suggests (responding to me) that sacramental wine could be protected by freedom of association. Supra note 33, at 598 n. 45. This mischaracterizes that freedom. A group that gathers for the purpose of violating the law is not constitutionally protected. Rather, it is guilty of the additional crime of conspiracy.

[35] Jewish Center for Religious Education v. The Union (2009), in Steven Gow Calabresi and others (eds), The U.S. Constitution and Comparative Constitutional Law: Texts, Cases, and Materials 1200 (Foundation Press 2016). A lower court granted relief, but it was reversed on appeal.

(recognizable) religion."[36] This argument implies not that we should stop talking in religious terms but that the K'iche' ought to be recognized as a religion, with legal protections following from that. But then we would once more have to address the fairness objection.[37]

Another response is to supplement the familiar rights of speech, association, and so forth, with an additional right that captures the salient aspect of religion but is not confined to religion (thus avoiding the unfairness objection). This entails substituting some right X for religion as a basis for special treatment, making "religion" disappear as a category of analysis.[38] Many candidates for X are on offer: individual autonomy, mediating institutions between the individual and the state, psychologically urgent needs, norms that are epistemically inaccessible to others, and many more.

Here I focus on the three most prominent, which I'll call Equality, Conscience, and Integrity.

Begin with Equality. Christopher Eisgruber and Lawrence Sager build their whole approach around the unfairness objection. The privileging of religion is wrong because "religion does not exhaust the commitments and passions that move human beings in deep and valuable ways."[39] They claim that the state should "treat the deep, religiously inspired concerns of minority religious believers with the same regard as that enjoyed by the deep concerns of citizens generally."[40] When religion is burdened, they write, courts should ask whether comparably deep nonreligious interests are being treated better: where a police department allowed an officer to wear a beard for medical reasons, it also was appropriately required to allow a beard worn for religious reasons.[41]

Eisgruber and Sager never explain what "deep" means—how to tell which concerns are "serious" and which are "frivolous."[42] Even if one takes the term commonsensically, to signify interests that are intensely felt, their principle cannot be implemented. Thomas Berg observes that the same police department did not allow beards "to mark an ethnic

[36] Hurd, supra note 2, 51.

[37] Hurd rejects "a more encompassing, new and improved 'International Religious Freedom 2.0'" because it would "(re)enact a modified version of the same exclusionary logic." Ibid, 63. Any possible rights claim will however generate remainders. See Section 6.

[38] Some also propose to keep the category of religion while supplementing it with some additional basis for accommodation, such as conscience. See infra note 104.

[39] Christopher L. Eisgruber and Lawrence G. Sager, 'The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct' (1994) 61 The University of Chicago Law Review 1245.

[40] ibid, 1285.

[41] Christopher L. Eisgruber and Lawrence G. Sager, Religious Freedom and the Constitution (Harvard University Press 2007) 90-91.

[42] ibid, 101. See: Cécile Laborde, 'Equal Liberty, Nonestablishment, and Religious Freedom' (2014) 20 Legal Theory 52; Andrew Koppelman, 'Is It Fair to Give Religion Special Treatment?' (2006) University of Illinois Law Review 571.

identity or follow the model of an honored father."[43] So the requirement of equal regard is incoherent: "When some deeply-felt interests are accommodated and others are not, it is logically impossible to treat religion equally with all of them."[44] Eisgruber and Sager are reluctant to specify a baseline, but they can't do without one.

Our two other candidates for X avoid this error by answering the "equality of what?" question.

The most commonly invoked substitute for "religion" is Conscience.[45] This doesn't really address the unfairness problem, because it uncritically thematizes one principal theme of Christianity. Many who propose it treat its value as so obvious as not to require justification. Unstated and perhaps unstatable (because theologically loaded) premises are at work. They also implausibly assume that the will to be moral trumps all our other projects and commitments when these conflict, and that no other exigency has comparable weight.[46]

Conscience is also underinclusive, focusing excessively on duty. Many and perhaps most people engage in religious practice out of habit, family loyalty, adherence to custom, a need to cope with misfortune and guilt, curiosity about metaphysical truth, a desire to feel connected to God, or happy enthusiasm, rather than a sense of duty prescribed by sacred texts or fear of divine punishment. Conscience is salient for some people, but others have needs equally urgent that can't be described in those terms, and so the fairness problem is simply transcribed into a different register. Conscience, like religion, is one exigency among many.

The Integrity approach avoids these difficulties by broadening the focus still further, beyond conscience. Raz thinks that "[t]he areas of a person's life and plans which have to be respected by others are those which are central to his own image of the kind of person he is and which form the foundation of his self-respect."[47] Paul Bou-Habib relies

[43] Thomas C. Berg, 'Can Religious Liberty Be Protected as Equality?' (2007) 85 Texas Law Review 1185, 1194.

[44] ibid, 1195.

[45] Amy Gutmann, Identity in Democracy (Princeton University Press 2003) 151-191; William Galston, The Practice of Liberal Pluralism (Cambridge University Press 2005) 45-71; Kwame Anthony Appiah, The Ethics of Identity (Princeton University Press 2005) 98; Michael J. Sandel, Democracy's Discontent: America in Search of a Public Philosophy (The Belknap Press 1996) 65-71; Michael J. Perry, Human Rights Theory, 4: Democracy Limited: The Human Right to Religious and Moral Freedom (Emory Legal Studies Research Paper No. 15–355 2015) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2610942> [10.02.2023]; Rogers M. Smith, ''Equal' Treatment? A Liberal Separationist View' in Steven V. Monsma and J. Christoper Soper (eds), Equal Treatment of Religion in a Pluralistic Society (Eerdmans Pub Co; NEW STIFF WRAPS 1998) 190.

[46] Bernard Williams spent much of his career refuting that. Bernard Williams, Ethics and the Limits of Philosophy (Routledge 1985).

[47] Joseph Raz, 'A Right to Dissent? II. Conscientious Objection' in Joseph Raz, The Authority of Law: Essays on Law and Morality (Oxford University Press 1979) 280.

on the value of acting in light of one's deepest commitments.[48] Ronald Dworkin claims that laws are illegitimate if "they deny people the power to make their own decisions about matters of ethical foundation—about the basis and character of the objective importance of human life. . . ."[49]

Jocelyn Maclure and Charles Taylor offer the most detailed account of Integrity. "Core beliefs" are those that "allow people to structure their moral identity and to exercise their faculty of judgment."[50] "Moral integrity, in the sense we are using it here, depends on the degree of correspondence between, on the one hand, what the person perceives to be his duties and preponderant axiological commitments and, on the other, his actions."[51] There is no good reason to single out religious views, because what matters is "the intensity of the person's commitment to a given conviction or practice."[52]

This avoids both the unfairness and the distraction objections. By asking what any person's commitments really are, it avoids the assumptions about the salience of religion that entangle both Audi and the State Department in the distraction objection.

There is, however, reason to doubt whether wholehearted commitment, without more, should warrant deference. Its object might be worthless.[53] There is also an epistemic problem. How can the state discern what role any belief plays in anyone's moral life? What could the state know about my moral life? About which decisions of mine involve matters of ethical foundation?[54]

Proponents of Integrity tend to think that religion is always a matter of intense commitment. Religion, however, does not hold the same place in the lives of all religious people. An individual may not think much about his religion until a crisis in middle age. If commitment were what matters, then there would be no basis for protecting spiritual exploration by the merely curious. As noted earlier, the notion that religion is central to everyone's identity also has pernicious ideological uses.

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[48] Paul Bou-Habib, 'A Theory of Religious Accommodation' (2006) 23 Journal of Applied Philosophy 109. He focuses on moral duties, but his argument's logic entails Integrity rather than Conscience.

[49] Ronald Dworkin, Justice for Hedgehogs (Belknap Press: An Imprint of Harvard University Press 2013) 368. Dworkin confidently declares that these include "choices in religion." Chandran Kukathas, The Liberal Archipelago: A Theory of Diversity and Freedom (Oxford University Press 2003), claims that he wants to protect "conscience," but he understands this term so capaciously that he is more appropriately classified as an Integrity theorist.

[50] Jocelyn Maclure and Charles Taylor, Secularism and Freedom of Conscience (Harvard University Press 2011) 76.

[51] ibid.

[52] ibid 97. All these accounts leave unresolved many questions about the value of integrity, which I cannot explore here. See Cheshire Calhoun, 'Standing for Something' (1995) 92 The Journal of Philosophy 235.

[53] Andrew Koppelman, 'Conscience, Volitional Necessity, and Religious Exemptions' (2009) 15 Legal Theory 215.

[54] Some Supreme Court opinions and commentators have similarly suggested deference to each person's "ultimate concerns," with similar difficulties. Jesse H. Choper, Securing Religious Liberty: Principles for Judicial Interpretation of the Religion Clauses (University of Chicago Press 1995) 69-74.

Any defense of religious accommodations must confront Thomas Hobbes's classic argument for denying all claims of conscientious objection. For Hobbes, human beings are impenetrable, even to themselves, their happiness consisting in "a continuall progresse of the desire, from one object to another; the attaining of the former, being still but the way to the later"[55]; their agency consisting of (as Thomas Pfau puts it) "an agglomeration of disjointed volitional states (themselves the outward projection of so many random desires)."[56] Concededly some people have unusually intense desires of various sorts. But "to have stronger, and more vehement Passions for any thing, than is ordinarily seen in others, is that which men call MADNESSE."[57] No appeal to "such diversity, as there is of private Consciences"[58] is possible in public life for Hobbes.[59]

Part of Hobbes's objection to any reliance on Conscience or Integrity is epistemic: he doubts that the law can discern "the diversity of passions, in divers men."[60] But this epistemic skepticism is parasitic on his skepticism about objective goods: "since different men desire and shun different things, there must need be many things that are *good* to some and *evil* to others . . . therefore one cannot speak of something as being *simply good*; since whatsoever is good, is good for someone or other."[61] When there are disagreements, "commonly they that call for right reason to decide any controversy, do mean their own. But this is certain, seeing right reason is not existent, the reason of some man, or men, must supply the place thereof; and that man, or men, is he, or they, that have the sovereign power."[62] What is most exigent in other minds is not knowable, because there is nothing coherent there to know.[63]

At least at the architectonic level, and perhaps at the operational level as well, Hobbes's political philosophy is consistent with the constraint of liberal neutrality: in Dworkin's

[55] Thomas Hobbes, Leviathan (C.B. Macpherson ed. 1968) 160.

[56] Thomas Pfau, Minding the Modern: Human Agency, Intellectual Traditions, and Responsible Knowledge (University of Notre Dame Press 2013) 189.

[57] Hobbes, supra note 55, 139.

[58] ibid, 366.

[59] Pfau, supra note 56, 194-195.

[60] Hobbes, supra note 55, 161.

[61] Thomas Hobbes, Man and Citizen (Hackett Publishing Company 1972) 47; cf. Hobbes, supra note 55, 120.

[62] Thomas Hobbes, The Elements of Law Natural and Politic (2nd Edition, Ferdinand Tonnies Edition, 1969) 188; cf. Hobbes, supra note 55, 111.

[63] Hobbes, supra note 55, 83: for the similitude of the thoughts and passions of one man, to the thoughts and passions of another, whosoever looketh into himself and considereth what he doth when he does think, opine, reason, hope, feare, &c., and upon what grounds; he shall thereby read and know what are the thoughts and Passions of all other men upon the like occasions. I say the similitude of Passions, which are the same in all men, desire, feare, hope, &c.; not the similitude of the objects of the Passions, which are the things desired, feared, hoped, &c.: for these the constitution individuall, and particular education, do so vary, and they are so easie to be kept from our knowledge, that the characters of mans heart, blotted and confounded as they are, with dissembling, lying, counterfeiting, and erroneous doctrines, are legible onely to him that searcheth hearts.

classic formulation, "the government must be neutral on what might be called the question of the good life," so that "political decisions must be, so far as is possible, independent of any particular conception of the good life, or of what gives value to life."[64] Hobbes thinks the state can ignore the question of the good life, whose answer is merely the gratification of appetite. His psychology entails his rejection of special treatment of religion—or Conscience, or Integrity. If you want to embrace a different conclusion, you can't embrace his psychology.

Hobbes is at least right about this: we are too opaque to one another, our depths are too personal and idiosyncratic, for the state to know for certain which commitments and passions really merit respect. There are, of course, familiar legal devices for detecting Conscience or Integrity. Look how crude they are. Sometimes the law has interrogated individual conscientious objectors. American draft boards used to do that.[65] They were mighty fallible, and eventually a cottage industry of draft counselors defeated them by teaching inductees what to say. In 1972, the year the draft ended, more young men were exempted from the draft than were inducted.[66]

There is also wholesale accommodation of large groups. That's clumsy, too. During Prohibition, the Volstead Act exempted sacramental wine. No attempt was made to examine individual Catholic priests and parishioners to determine the depth of their conviction.

The various integrity principles that have been proposed can't be administered— at least not with any precision. Maclure and Taylor write that "The special status of religious beliefs is derived from the role they play in people's moral lives, rather than from an assessment of their intrinsic validity."[67] If the state is supposed to defer to identity-defining commitments, how can it tell what these are?[68] Simon Cabulea May hypothesizes a draft resistor for whom military service would prevent the perfection

[64] Ronald Dworkin, Liberalism, in A Matter of Principle (Harvard University Press 1985) 191. For Hobbes, there are no individual rights against the state, but the sovereign's interests entail a broad field of liberty for the subjects. Ian Shapiro, The Evolution of Rights in Liberal Theory (Cambridge University Press 1986) 29-40.

[65] Andrew Koppelman, 'The Story of Welsh v. United States: Elliott Welsh's Two Religious Tests' in Richard Garnett and Andrew Koppelman (eds), First Amendment Stories (Foundation Press 2012) 293; Maclure and Taylor, supra note 50, 97-99.

[66] Koppelman, supra note 65, 314-315. Sometimes the exigency will be clear. "A finding that a claimant is sincere should be easy if one cannot discern any secular advantage from a person's engaging in the behavior she asserts is part of her religious exercise." Kent Greenawalt, Religion and the Constitution: Free Exercise and Fairness (Princeton University Press 2006) 122-123. But that is true of only some accommodation cases.

[67] Maclure and Taylor, supra note 50, 81.

[68] Raz understands the difficulty of discerning anyone's conscience, and so advocates less intrusive devices, such as "the avoidance of laws to which people are likely to have conscientious objection." Raz, supra note 47, 288. This is not possible: there are too many kinds of objection.

of his skills at chess, which he regards as "a most vivid manifestation of the awesome beauty of the mathematical universe."[69] Perhaps chess really does play a quasi-religious role in his moral life.

Of course, courts judge internal mental states all the time, more or less imperfectly, and law's imprecision is not usually troubling. The Integrity view, however, is motivated at its core by a protest against the law's failure to honor individual differences.

John Rawls thought that, for purposes of theorizing about justice, we must regard one another with a model of agency as opaque as that of Hobbes, in which for all we can tell the man who compulsively counts blades of grass is pursuing what is best for him.[70] If people are thus incommensurable, then it is not apparent how some of their desires can legitimately be privileged over others, leaving Rawls's "liberty of conscience" indeterminate. Conscience, at least as it is understood in the original position, is the same black box that it was in Hobbes.[71]

Sherbert v. Verner [72] held that a state unemployment bureau could not deny compensation to a Seventh-Day Adventist who refused to work on Saturdays: "to condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties."[73] Suppose someone quits his job because he claims that integrity requires him to spend his days counting blades of grass. What is the state supposed to do?

IV. DELIVERING THE HYPERGOODS

We are in our depths mysterious to one another. But we are similar enough to know where the deep places are likely to be.

Those deep places consist, in large part, of goods toward which we are drawn. The sources of value in terms of which people tend to define themselves are not as idiosyncratic as Hobbes imagined.

Maclure and Taylor eschew any reliance on contestable goods, instead embracing liberal neutrality: the democratic state must "be neutral in relation to the different worldviews

[69] Simon Cabulea May, 'Exemptions for Conscience' in Cécile Laborde and Aurelia Bardon (eds), Religion in Liberal Political Philosophy (Oxford University Press 2017) 191.

[70] John Rawls, A Theory of Justice (2nd Edition, Belknap Press: An Imprint of Harvard University Press 1971) 379-380. Michael Sandel observes that among the "circumstances of justice" that motivate Rawls's liberalism is an "epistemic deficit" in "our cognitive access to others." Liberalism and the Limits of Justice 172 (1982).

[71] In Rawls, this problem is remediable at the constitutional stage of the four-stage sequence, but only because at that stage liberal neutrality must be abandoned. Andrew Koppelman, 'Why Rawls Can't Support Liberal Neutrality: The Case of Special Treatment for Religion' (2017) 79 Review of Politics 287.

[72] Sherbert v. Verner, 374 U.S. 398 (1963) <https://supreme.justia.com/cases/federal/us/374/398/> [10.02.2023].

[73] ibid, 406.

and conceptions of the good—secular, spiritual, and religious—with which citizens identify."[74] In his earlier work, Taylor took a very different line: "a society can be organized around a definition of the good life, without this being seen as a depreciation of those who do not personally share this definition," and such a society can be liberal if it respects fundamental liberties.[75]

If the state hopes to respect people's moral identities, as Maclure and Taylor advocate, it cannot accomplish this without relying on the earlier Taylor's observation that identity is necessarily grounded not on a person's brute preferences but rather upon her orientation toward sources of value that transcend those preferences.[76] It can only protect Integrity that is oriented toward some intersubjectively intelligible end— which is to say, some good, of the kind that liberal neutrality demands that the state ignore. Equality, Conscience, and Integrity are all designed to respect liberal neutrality. That is what leaves them vulnerable to Hobbes's objection.

The difficulties of implementing Integrity have thus brought us to the distinction, articulated by Taylor, between strong and weak evaluation.[77] Strong evaluation involves "discriminations of right or wrong, better or worse, higher or lower, which are not rendered valid by our own desires, inclinations, or choices, but rather stand independent of these and offer standards by which they can be judged."[78] Thus, for example, I may "refrain from acting on a given motive—say, spite, or envy— because I consider it base or unworthy."[79]

Hobbes's skepticism can be avoided— generally is avoided because we pursue ends outside ourselves that we can know and share.[80] Hobbes thought there were no such ends.

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[74] Maclure and Taylor, supra note 50, 9-10.

[75] Charles Taylor, Multiculturalism and "The Politics of Recognition" (Amy Gutmann Edition, Princeton University Press 1992) 59. This is a more realistic aspiration than liberal neutrality. Most regimes in the world support some religions more than others. Jonathan Fox, A World Survey of Religion and the State (Cambridge University Press 2008).

[76] Charles Taylor, The Ethics of Authenticity (Harvard University Press 1991) 31-41. For further critique of Maclure and Taylor's embrace of liberal neutrality see Andrew Koppelman, Keep It Vague: The Many Meanings of Religious Freedom: 140 Commonwealth (Northwestern University School of Law 2013).

[77] It is smuggled into Eisgruber and Sager's notion of "deep" concerns, though there it is intermingled with brute medical needs. See Laborde, supra note 42.

[78] Charles Taylor, Sources of the Self: The Making of the Modern Identity (Harvard University Press 1989) 4.

[79] Charles Taylor, 'What Is Human Agency?' (1985) 1 Human Agency and Language: Philosophical Papers 16.

[80] My argument is anticipated in a way by C. B. MacPherson, who argued that Hobbes failed to anticipate that there could be a group "with a sufficient sense of its common interest that it could make the recurrent new choice of members of the legally supreme body without the commonwealth being dissolved and everyone being thrown into open struggle with everyone else." Introduction, in Hobbes, supra note 55, 55. But MacPherson thought that the common interest could be found in the economic position of the bourgeoisie. There are other possibilities.

Taylor refers to those sources of value as "hypergoods," "goods which not only are incomparably more important than others but provide the standpoint from which these must be weighed, judged, decided about."[81] They can provide a reasonable basis for singling out certain choices as especially important. If those are the urgent ends that the state ought to respect, then the objectionable unfairness and distraction consist in neglecting those ends.

One way of understanding religious conflict—and the quarrels between the religious and the antireligious—is as a collision of inconsistent hypergoods. Different regimes recognize and orient themselves around different hypergoods. They will often recognize rights to such hypergoods. In many traditions, for example, orphans are entitled to a religious education. Following Raz, we should expect that recognition of any hypergood will entail strong interests in that hypergood, and that these interests could be construed to entail rights.

Call the basis of such rights *locally recognized hypergoods*. This term sounds paradoxical: hypergoods make claims on everyone, and if you don't see their value, there is something wrong with you. On the other hand, few hypergoods are universally appreciated. Well-being consists of realizing objective goods while recognizing their value.[82] If different populations value different hypergoods, then they have different paths to well-being.

Claims based on hypergoods are reasonably contestable. Ultimate ends are not the kind of thing people can be argued into seeing.[83] That is why defenses of human rights can easily decay into table-pounding, or smuggling teleological premises into arguments that nominally disavow them.[84]

The pursuit of a hypergood is an urgent interest. The urgency of the interest can generate obligations in others, which is to say, a right. If a lot of people in a given polity happen to value the same hypergood, and have reason to regard it as in need of protection, then they have a reason to elevate that hypergood to the status of a legal right. The content of the right is contingent on local values. Some oppressed groups, Saba Mahmood observes, have sought "not so much freedom of conscience as . . . a group's ability to establish and maintain social institutions that could, in turn, secure the passage of

[81] Taylor, supra note 78, 63.

[82] See the elegant argument to this effect in Derek Parfit, Reasons and Persons (Oxford University Press 1984) 502.

[83] See Robert P. George, 'Recent Criticism of Natural Law Theory' (1999) Defense of Natural Law 48.

[84] Steven D. Smith, The Disenchantment of Secular Discourse (Harvard University Press 2010). Theistic premises, of course, are no more secure, and so the common claim that human rights must have a religious foundation merely displaces the problem. See Andrew Koppelman, Naked Strong Evaluation (University of Pennsylvania Press 2009). For an argument that secular liberals should own up to the reasonably contestable elements of their worldview, see Andrew Koppelman, 'If Liberals Knew Themselves Better, Conservatives Might Like Them Better' (2017) 20 Lewis & Clark Law Review 1201.

requisite traditions to future generations and the preservation of communal identity."[85] Integrity can protect this because it can protect anything. In the United States, we have a large population that feels this way about their interest in publicly brandishing semiautomatic rifles.[86] Hypergoods sometimes conflict in zerosum ways.[87]

Of course, we often find one another's hypergoods repugnant. Then if we respect them we do it under some description having to do with the internal state of the actor: I respect this because I see it's important to you. This inaccessibility[88] also produces proposals to banish recognition of hypergoods from politics, notably the claim that a liberal state ought to be neutral toward all contested conceptions of the good. But it is not possible to accommodate people's attachment to hypergoods without recognizing the hypergoods themselves, under some description that transcends the fact of the attachment.

V. THE POLITICS OF STRONG EVALUATION

If hypergoods are locally salient, then political conditions ought to facilitate access to them. That is one argument for democracy. The shape of the social environment is something that its denizens should have a say about.

America is an illustration. The American idea of religious liberty is rooted in dissenting Protestantism's bitter conflicts, first with the Church of England and then with state religious establishments. Its central ideas, of state incompetence over religious matters and the importance of individual conscience, are responses to that experience.

Since colonial times, the United States has been religiously diverse, but the overwhelming majority of Americans have felt that religion is valuable.[89] Early struggles turned on an instrumental dispute over whether its value was best realized by state support for religion or by disestablishment. The proponents of disestablishment won. Their view, that religion is valuable and that the state therefore should be disabled from taking sides in religious disputes, has shaped American law ever since.[90]

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[85] Mahmood, supra note 2, 18.

[86] The American resistance to a right to health care, noted above, reflects an inclination to treat one's property (which would have to be taxed to support such a right) as a hypergood. See Koppelman, supra 7, passim.

[87] Thus, Justice Breyer observed that, even if there is a fundamental right to bear arms, the compelling interest in public safety can justify its infringement. District of Columbia v. Heller, 554 U.S. 570, 689 (2008) (Breyer dissenting) <https://supreme.justia.com/cases/federal/us/554/570/> [10.02.2023].

[88] This inaccessibility has led some theorists to justify liberal neutrality on epistemic grounds: it is wrong to justify state action on grounds that some citizens are incapable of cognizing. This argument, too, is defeated by Hobbesian opacity. I don't and can't know what you are incapable of cognizing. Andrew Koppelman, 'Does Respect Require Antiperfectionism? Gaus on Liberal Neutrality' (2015) 22 Harvard Review of Philosophy 53.

[89] Here I bracket the exclusions from this ecumenism, notably Native American and African religions.

[90] Koppelman, supra note 1, 1-77.

In the United States today, "religious liberty" remains an attractive candidate for protection. That's why the ACLU and the Christian Coalition unite in wanting to protect it. "Religion" denotes a known set of deeply held values. Religious beliefs often motivate socially valuable conduct. Hardly any religious groups seek to violate others' rights or install an oppressive government. All religions are minorities and so have reason to distrust government authority over religious dogma. There are pockets of local prejudice, especially against Muslims. "Religious liberty" is a handy rubric for averting abuses.

The protection of religion is based not on the integrity of its adherents or the intensity of their feelings, but religion's status as an object of strong evaluation. Integrity and intensity signify only the internal states of the actor: hard to detect and possibly worthless. The blockage of intense preferences is the complaint of the utility monster and the grass counter.

So there's that to be said for democratically recognized rights. International relations however are not democratic. All international norms have the same elitist provenance: they are agreed to, often by oligarchical governments and often with no intention of complying, because doing so is in their interest.[91] In this respect religious liberty is no worse than any other human right, but also no better.

Sometimes, we on this side of a national border notice that people on the other side are being denied something that we think urgently important. That may be a good enough reason to bring pressure on foreign governments to stop blocking their subjects' access to that good. If we can get enough other governments to agree with ours, we can negotiate an international instrument that declares access to the pertinent hypergood to be a right.

Of course, I have just described the early, naïve Christian evangelizing impulse that produced the first modern claims for religious liberty. One implication of my argument is that modern human rights advocacy is not different in kind from this. It merely involves a broader and vaguer set of hypergoods.

Raz observes that contemporary human rights practice assumes that even if some rights (such as the right to education) cannot be universalized across human history, "human rights are synchronically universal, meaning that all people alive have them."[92] If, however, rights are parasitic on interests, then could one object that religious liberty is not thus universal, because the valuation of this liberty, under this description, is not universal?

[91] Posner, supra note 8, 59-122.

[92] Joseph Raz, 'Human Rights in the Emerging World Order' in Rowan Cruft and others (eds), Philosophical Foundations of Human Rights (Oxford University Press 2015) 225.

Religious persecution does happen, and in a lot of places. Rights both have Procrustean effects and can remedy real abuses. Where a right isn't being violated it is pointless and distracting to invoke it. But that is true of all rights. Religious liberty is the right tool for a specialized job. The critics who emphasize distraction have made an important contribution, because the pathologies they describe are less likely to happen if those administering rights are aware of their possibility. On the other hand, if you use the wrong tool, that isn't the tool's fault.

VI. REMAINDERS

What about the unfairness objection—that there are other deep and valuable concerns, and that they are neglected by "religious liberty"?

Sometimes the unfairness complaint is made as if one could reasonably demand that law recognize all pressing moral claims, with no imprecision at all.[93] Geertz observes that "the defining feature of legal process" is "the skeletonization of fact so as to narrow moral issues to the point where determinate rules can be employed to decide them."[94] Rules, Frederick Schauer writes, are "crude probabilistic generalizations that may thus when followed produce in particular instances decisions that are suboptimal or even plainly erroneous."[95] Human rights claims are like law in this respect: whether or not they can be backed by legal sanctions, they similarly skeletonize facts in order to make people see and care about distant atrocities.

The fairness objection is right: "religion" omits other equally exigent concerns. The distraction objection is right: it draws our attention away from such concerns. The case for religious liberty need not deny these objections. It can concede them and say: look where you end up when you try to do without it.

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[93] Brian Leiter, for example, thinks that religious accommodation should be based on "features that all and only religious beliefs have," and complains that, under prevailing understandings of religious liberty, a Sikh will have a colorable claim to be allowed to carry a ceremonial dagger, while someone whose family traditions value the practice will be summarily rejected. Brian Leiter, Why Tolerate Religion? (Princeton University Press 2013) 1-3, 27. Under what description could the law accommodate the latter? Much later in his book, Leiter acknowledges the indispensability of legal proxies; ibid, 94–99; but does not examine the impact of that concession on his thesis that singling out religion is unfair. For further critique, see Andrew Koppelman, 'How Shall I Praise Thee? Brian Leiter on Respect for Religion' (2010) 961 San Diego Law Review 47.

[94] Clifford Geertz, Local Knowledge: Further Essays in Interpretive Anthropology (2nd Edition, Basic Books 2000) 170.

[95] Playing By the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life xv (Clarendon Press 1991). Since rights claims are always rule-invoking, they are inevitably underinclusive and distracting. Mary Ann Glendon, Rights Talk: The Impoverishment of Political Discourse (Free Press 1991). Human rights discourse itself, without more, bespeaks impoverished political ambition. Samuel Moyn, The Last Utopia: Human Rights in History (Harvard University Press 2010).

For law's purposes, the term's bluntness has its advantages. Although "religion" is a term that resists definition, American courts have had little difficulty determining which claims are religious, and the question is rarely even litigated.[96] It has a (mostly) settled semantic meaning. The best accounts of this meaning have held that this denotes a set of activities united only by a family resemblance, with no necessary or sufficient conditions demarcating the boundaries of the set.[97] Timothy Macklem objects that the question of what "religion" conventionally means is a semantic one, but the question of what beliefs are entitled to special treatment is a moral one, and it requires a moral rather than a semantic answer.[98] But in certain contexts, religion may be the most workable proxy for Integrity, which is not directly detectable by the state. All laws are bounded by the semantic meaning of their terms, which only imperfectly capture real moral salience.

Why use this term and not another one? No single factor justification for singling out religion can succeed. As noted earlier, any invocation of any factor X as a justification will logically entail substituting X for religion as a basis for special treatment, making "religion" disappear as a category of analysis. Aside from the epistemic difficulties considered above, this substitution will be unsatisfactory because underinclusive. There will be settled intuitions about establishment and accommodation that it will be unable to account for. Any X will be an imperfect substitute for religion, but a theory of religious freedom that focuses on that X will not be able to say why religion, rather than X, should be the object of solicitude.

There are two ways around this difficulty. One is to say that these are not ends that the state can directly aim at, and that religion is a good proxy. This justifies some imprecision in the law. We want to give licenses to "safe drivers," but these are not directly detectible, so we use the somewhat overinclusive and underinclusive category of "those who have passed a driving test." But this doesn't work for at least some of the substitutes on offer. The state can aim directly at accommodating conscience, say, or autonomy.

The other way is to say that, at least in some parts of the world, religion is an adequate (though somewhat overinclusive and underinclusive) proxy for multiple goods, some of which are not ones that can be officially endorsed.[99] Each of those goods is, at least,

[96] Koppelman, supra note 1, 7-8.

[97] See, e.g., Kent Greenawalt, 'Religion as a Concept in Constitutional Law' (1984) 72 California Law Review 753.

[98] Timothy Macklem, Independence of Mind (Oxford University Press 2006) 120-126. David Richards similarly argues that commonsense conceptions of religion "hopelessly track often unprincipled and ad hoc majoritarian intuitions of 'proper' or 'real' religion." David A. J. Richards, Toleration and the Constitution (Oxford University Press 1986) 142.

[99] See, e.g., Brady, supra note 1, 102: "Religion is directed to the Power that grounds all that is, and religious belief and practice involve a relationship to this reality that overcomes humanity's deepest existential threats through union or communion with this absolute and eternal source. There can be nothing more

more likely to be salient in religious than in nonreligious contexts. The fact that there is so much contestation among religions as to which of these goods is most salient is itself a reason for the state to remain vague about which of the goods associated with religion is most important. Because "religion" captures multiple goods, aiming at any one of them will be underinclusive. That is enough to justify singling out religion.[100] It might be enough to justify a universal human right to "religious liberty," if that captures hypergoods that cannot be otherwise described.

"Religion" denotes a group of candidates for X, chained together by what may be no more than a semantic contingency. It is an appropriate candidate for protection because it contains interests, not otherwise signifiable, urgent enough to be a basis of rights. Perhaps this cluster concept doesn't correspond to any real category of morally salient thought or conduct. It is flexible enough to capture intuitions about accommodation while keeping the state neutral about theological questions.[101] (My claim that there are multiple hypergoods is anathema to some religious views, which may nonetheless support religious freedom because that freedom does protect the One True Path.[102]) Other, more specific categories are either too sectarian to be politically usable, too underinclusive to substitute for religion, or too vague to be administrable.[103]

The case for any right based on locally recognized hypergoods rests on a distinctive interlocking pattern of mutual transparency and opacity. Were there no transparency, we would not have devised these categories, which transcend our own specific orientations toward the good as we apprehend it. Were there no opacity, we would not be impelled to institutionalize our appreciation of the good under such crude legal categories as "religion." All are somewhat overinclusive and underinclusive. It would be a mistake to rely solely on any of them. Religion isn't *that* special.[104]

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important than the Ultimate Reality by which all things are, and no higher human interest than the salvation or liberation or fulfillment that inheres in this connection."

[100] Thus, in a way, Audi is right: the right to religious liberty is, for many people, "contingently basic." Audi, supra note 19, 418.

[101] Thus, Laborde's objection to the proxy strategy, that "it is not clear what religion is a proxy for," actually points to one of its virtues. Laborde, supra note 33, 592.

[102] The Catholic church embraced religious liberty for this reason in the early twentieth century. Samuel Moyn, 'Religious Freedom Between Truth and Tactic', in Winnifred Fallers Sullivan and others (eds), Politics of Religious Freedom (The University of Chicago Press 2015) 135. Those who would rather privilege Conscience or Integrity might likewise consider whether "religious liberty" is close enough to their target to be worth settling for.

[103] Andrew Koppelman, 'Nonexistent and Irreplaceable: Keep the Religion in Religious Freedom' (2015) 142 Commonweal <https://www.commonwealmagazine.org/nonexistent-irreplaceable> [10.02.2023]; 'Religion's Specialized Specialness' (2013) 79 University of Chicago Law Review Dialogue 71 http://lawreview.uchicago.edu/sites/lawreview.uchicago.edu/files/uploads/Dialogue/Koppelman%20Online.pdf [10.02.2023]. '"Religion" as a Bundle of Legal Proxies: Reply to Micah Schwartzman' (2014) 51 San Diego Law Review 1079. For a similar argument, see Christopher Lund, 'Religion is Special Enough' (2017) 103 Virginia Law Review 481.

[104] I am therefore not suggesting that recognition of religious liberty should exclude other categories,

VII. PROTEST

The argument I have just laid out will not satisfy those who are left out—who think that religion is pernicious and false. It is no fun being a remainder.

The special treatment of religion alienates some citizens. Political alienation has been a salient concern in American discussions of religious liberty. Justice O'Connor thought that endorsement of any specific religious view "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[105]

Alienation is, however, an inescapable part of political life. Any action that reduces some citizens' alienation will alienate others, and it is probably impossible to know in advance what the balance will be.[106] Similarly, an appeal to goods that are not universally recognized will produce alienation—that's the claim of much of the public reason literature—but it too is unavoidable, since so few goods are universally recognized.

Political alienation is a chronic condition of all regimes. It must be managed. (A regime without it, in which all citizens uncritically identified with the state, would be a totalitarian nightmare.) The question of which locally valued allegiances ought to be the object of majoritarian recognition is not different in kind from the question of which locally valued hypergoods ought to be the object of rights protection. Both are contingent on what matters urgently to a significant proportion of the locals. The state can recognize categories of hypergoods. Any such categories will inevitably be overinclusive and underinclusive. The only remedy is supplementation by additional

such as conscience. Micah Schwartzman, 'Religion as a Legal Proxy' (2014) 51 San Diego Law Review 1085. Conscience, however, cannot be a complete substitute for religion, and even if law accommodates both, it will not and cannot cover the full field of Integrity. There are also circumstances in which legal accommodation is appropriately restricted to religion, because nonreligious claims are too idiosyncratic for law to cognize without defeating the law's purpose. Kent Greenawalt, Exemptions: Necessary, Justified, or Misguided? (Harvard University Press 2016).

[105] Lynch v. Donnelly, 465 U.S. 668, 687, 688 (1984) (O'Connor, J., concurring) <https://supreme.justia.com/cases/federal/us/465/668/> [10.02.2023]. This argument has sometimes been endorsed by a majority of the Court, see, e.g., County of Allegheny v. ACLU, 492 U.S. 573, 592–593 (1989) <https://supreme.justia.com/cases/federal/us/492/573/> [10.02.2023] and has a large scholarly following. See, e.g., Eisgruber and Sager, supra note 41, 61-62, 122; Noah Feldman, Divided By God: America's Church-State Problem - And What We Should Do About It (Farrar, Straus and Giroux 2005) 14-16; Steven G. Gey, 'Life After the Establishment Clause' (2007) 110 West Virginia Law Review 1; Steven B. Epstein, 'Rethinking the Constitutionality of Ceremonial Deism' (1996) 96 Columbia Law Review 2083.

[106] Steven D. Smith, Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom (Oxford University Press 1995) 109-115; Richard W. Garnett, 'Religion, Division, and the First Amendment' (2006) 94 Georgetown Law Journal 1667.

categories which will themselves be similarly imperfect.[107] All we can do is go on to the next step of long division in order to try to make the remainder smaller.[108]

Law inevitably generates subtler pathologies. To the extent that preferential treatment is given under any description, people will inevitably try to recharacterize themselves in order to fit that description. All law has this distorting, Procrustean tendency. People are nudged into the state's categories, their lives insidiously shaped by those categories. Under present American law, prisoners are sometimes entitled to have prison requirements relaxed if they can show that those requirements burden the free exercise of religion.[109] This induces them to think about those claims in religious terms, and disfavors those whose claims cannot be thus categorized. That also sometimes happens with international human rights claims.[110]

It is unsurprising that this elicits protest. The condemnation of cruelty is one of the primal commitments of liberalism.[111] Yet liberalism has its own characteristic cruelties. One of these is the bureaucratic bulletheadedness that is inseparable from the rule of law. This paradox demands that liberalism constantly, guiltily interrogate its own geography of pain. The pain and its interrogation are both aspects of the normal functioning of a liberal society.[112]

The desire to dispense with "religion" and instead accommodate all deep and valuable human concerns, to create a world in which these are the basis for a pervasive practice of exemptions from generally applicable laws, is reminiscent of Herbert Marcuse's suggestion in Eros and Civilization that we should seek to abolish "surplusrepression," repression that exceeds the needs of civilization.[113] Marcuse was thinking of sexual repression, and the ideal of sexual liberation that he articulated in 1955 has rocked our world. Parity for all deep and valuable concerns is an even more radical ambition. Freud was right: you can't please everybody.[114] The best we can do is rely on proxies that tend to capture the general areas that are likely to be unfathomable.

Look at where we have come: to a place of exquisite sensitivity to the alienation of very small minorities whose basic rights to personal security are otherwise respected. This is admirable but fussy in a world where much worse things are happening. A right

[107] Another supplement is minority rights to group autonomy. The value of such rights to members is typically underwritten by the availability of exit. This too is imperfect, because of unavoidable uncertainty about when and for whom the costs of exit are prohibitive. Kukathas, supra note 49, 110–111.

[108] This is what American law has done, by making its understanding of religion broader and vaguer as the nation's religious diversity has increased. Koppelman, supra note 1, 15–45.

[109] Greenawalt, supra note 104, 132-145.

[110] Hurd, supra note 2, offers numerous illustrations.

[111] Judith N. Shklar, Ordinary Vices (Belknap Press 1984) 7-44.

[112] This is the real paradox of liberalism, not an inability to confront its enemies, as some have contended. Andrew Koppelman, 'Unparadoxical Liberalism' (2017) 54 San Diego Law Review 257.

[113] Herbert Marcuse, Eros and Civilization: A Philosophical Inquiry into Freud (Beacon Press 1966).

[114] Sigmund Freud, Civilization and Its Discontents (James Strachey Translation, W. W. Norton & Company; The Standard Edition 1961).

to religious liberty is properly aimed at those worse things, which are common enough that an aversive reaction is appropriate.[115] Since one never knows where the danger will manifest, freedom from it is a plausible candidate for a universal right. Like all other rights, this one is not salient where it is not violated.

The resistance to any alienation or repression whatsoever is reminiscent less of Marcuse than of his daft contemporary Wilhelm Reich. One thing that the secular liberals need to learn from the Christians is that we had better get used to living in a fallen, broken world. Unfairness and distraction you will always have with you.

[115] On the importance of negative paradigm cases for the construction of rights, see Andrew Koppelman, 'Originalism, Abortion, and the Thirteenth Amendment' (2012) 112 Columbia Law Review 1917.

*Lela Macharashvili**

CONSTITUTIONAL LIMITS OF DELEGATION OF THE LAW-MAKING COMPETENCE

ABSTRACT

The exercise of legislative authority and, consequently, the determination of the country's policy while regulating public relations, constitutes the constitutional prerogative of the direct representative of the people - the Parliament. Nevertheless, considering the extensive nature of legislative activities and the intricacies of contemporary governance, there are instances where entrusting legislative functions to the executive branch becomes unavoidable. In scholarly literature and judicial practice, the delegation of the law-making function seldom sparks dissent. Although the extent and scope of delegation itself are permissible for constitutional purposes, it remains a subject of fervent debate.

The Constitutional Court of Georgia has also established specific standards concerning the delegation of law-making competence. However, judicial decisions on this matter are not abundant. This paper is dedicated to exploring the delegation instrument and analyzing relevant international standards.

I. INTRODUCTION

In contemporary states, instances of the delegation of law-making competence to the executive power have proliferated. It is deemed an unavoidable mechanism for the efficient implementation of governance.[1] The impermissibility of authority delegation may overwhelm the Parliament, and a prohibition motivated by the protection of fundamental rights might undermine the same objective. The persistent practice of delegation also jeopardizes various constitutional principles. While judicial oversight of delegated legislation exists, the courts, when faced with executive discretion, wield a limited influence at best.[2] Consequently, it is crucial to scrutinize the extent to which placing legislative activities in the hands of the executive branch is acceptable.

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[1] András Sajó and Renáta Uitz, The Constitution of Freedom: An Introduction to Legal Constitutionalism (Oxford University Press 2017) 260.

[2] Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) <https://supreme.justia.com/cases/federal/us/467/837/> [last accessed on 15 July 2023].

In the Constitutional Court of Georgia's practice, the constitutional boundaries of the delegation of the legislative function are not distinctly defined. The court elucidated the essence of delegation for the first time in decision №3/3/763 of July 20, 2016.[3] Thus, prior to this decision, there were no constitutional standards in practice by which legislative activity could be delegated to another body. At the same time, following the mentioned decision, amidst the evolution of court practices, the established standards were gradually expanded and reshaped, although definitive answers to some fundamental questions are still pending.

The paper examines the goals of delegating law-making activities from the Parliament to the executive power, the risks associated with broad delegation, and the factors that define the constitutional boundaries of delegation. The article underscores the challenges observed in the Constitutional Court's practice and proposes suitable solutions. In addition to examining the practices of the Constitutional Court of Georgia, the paper discusses the standards established by other countries, specifically addressing the limits of legislative delegation to the executive authority for the regulation of issues governed by law.

II. THE LAW-MAKING FUNCTION OF THE LEGISLATIVE AUTHORITY AND THE ROLE OF THE EXECUTIVE AUTHORITY IN THE PROCEDURE FOR ADOPTING A LAW

The scope of competence of the legislative body varies across countries based on the state governance model. In some systems, the parliament not only creates the government but also oversees its activities, establishes the country's policy, and elects/appoints certain officials. Conversely, in other systems, the parliament may lack some of these competences, though all parliaments share the common feature of performing a legislative function.[4]

According to the Constitution of Georgia, "People are the source of state authority. People exercise power through their representatives, as well as through referendums and other forms of direct democracy."[5] As outlined in the Constitution of Georgia, "The Parliament of Georgia is the supreme representative body of the country that exercises legislative power, defines the main directions of the country's domestic and

[3] The decision of the Constitutional Court of Georgia on case №3/3/763 "Group of members of the Parliament of Georgia (Davit Bakradze, Sergo Ratiani, Roland Akhalia, Giorgi Baramidze et al., a total of 42 members of the Parliament) v. the Parliament of Georgia", 20 July 20 2016.

[4] András Sajó and Renáta Uitz, supra note 1, 256.

[5] Article 3, paragraph 2, Constitution of Georgia <https://www.matsne.gov.ge/ka/document/view/30346?publication=36> [last accessed on 10 February 2023].

foreign policies, controls the activities of the Government within the scope established by the Constitution, and exercises other powers."[6] Hence, as per the Constitution of Georgia, the constitutional mandate to determine the primary directions of the country's development rests with the representatives elected by the people. Consequently, the execution of legislative power, i.e., law-making activity, falls within the constitutional competence of the Parliament of Georgia.

The Constitution of Georgia also delineates the mandate of the government, stating that, "The Government of Georgia is the supreme body of executive power that implements the domestic and foreign policies of the country."[7] Neither the provision mentioned nor any other in the Constitution grants the Government of Georgia the authority to engage in law-making activities at the constitutional level. However, whereas most constitutions designate lawmaking as the formal responsibility of legislators with the executive tasked to execute, parliamentary systems witness the legislature actualizing the legislative intentions of the executive. Notably, the government holds a distinctive right of legislative initiative.[8]

According to the Constitution of Georgia, the Government of Georgia possesses the right of legislative initiative[9] and has the privilege of requesting an extraordinary review of draft laws submitted to the Parliament.[10] At the same time, in addition to its legislative initiative, the Constitution of Georgia delineates the Government's distinct competence concerning the State Budget Law. Specifically, the Parliament of Georgia shall annually adopt the Law on the State Budget by a majority of the total number of its members.[11] Furthermore, only the Government of Georgia shall have the right to present a draft State Budget to Parliament after the Basic Data and Directions have been examined with the committees of Parliament.[12] Amending a draft law on the State Budget shall be inadmissible without the consent of the Government.[13] Parliament may adopt a law on increasing the expenditures or on reducing the revenues of a State Budget, or on introducing new financial obligations for the State for the current budget year, only with the consent of the Government. Laws related to the following budget year may be adopted with the consent of the Government or within the scope of the document on Basic Data and Directions of the country submitted by the Government to Parliament.[14]

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[6] ibid, Article 36, paragraph 1.
[7] ibid, Article 54, paragraph 1.
[8] Andras Sajo, Limiting Government: An Introduction to Constitutionalism (scientific edition and foreword by Tevdore Ninidze, 2003) 196 (in Georgian).
[9] Article 45, paragraph 1, Constitution of Georgia <https://www.matsne.gov.ge/ka/document/view/30346?publication=36> [last accessed on 10 February 2023].
[10] ibid.
[11] ibid, Article 66.
[12] ibid, Article 66, paragraph 2.
[13] ibid, Article 66, paragraph 3.
[14] ibid, Article 66, paragraph 4.

The remarks of the President on the Law on the State Budget may be accepted by Parliament only with the consent of the Government.[15] In addition, according to the Constitution of Georgia, the Constitutional Court of Georgia shall in accordance with the procedures established by the organic law, make decisions on the constitutionality of a normative act on the basis of a claim submitted by the Government.[16] Thus, the government possesses the authority to initiate constitutional control and, from this perspective, has the capacity to influence law-making activity.

Therefore, the government of Georgia, at the constitutional level, lacks mandate to adopt laws; Rather, it holds the competence to initiate legislation. Simultaneously, it possesses special powers concerning the state budget law and is equipped with the authority to request the recognition of acts passed by the Parliament as unconstitutional.

III. DELEGATION OF LAW-MAKING COMPETENCE AND ITS PRACTICAL NEED

Despite the crucial role of the legislative branch of law-making activities, the executive authority in modern states often receives explicit authority or obligation from the legislature to regulate certain issues. Consequently, a significant portion of legal norms are adopted by the executive branch of the government.[17] It should be noted that the constitutions of certain countries specify the eligibility of delegation and describe its scope in detail (for example, Germany,[18] France[19]). The constitutions of several countries do not include a reservation regarding the admissibility of the delegation of legislative competence, and relevant constitutional standards are derived from court practice (for example, Australia,[20] USA[21]). Georgia also falls into the latter category, where the admissibility of delegating the competence to draft norms by the Parliament and its scope are determined by the Constitutional Court.

The legislator's delegation of issues to be regulated by law to the executive authority is justified by several arguments, among which is the promotion of the effective implementation of fundamental legislative activities.[22] Legislative authority encompasses

[15] ibid, Article 66, paragraph 7.

[16] ibid, Article 60, paragraph 4, subparagraph "b".

[17] András Sajó and Renáta Uitz, supra note 1, 60.

[18] Article 80, Basic Law for the Federal Republic of Germany (GG) <https://www.gesetze-im-internet. de/englisch_gg/englisch_gg.pdf> [last accessed on 15 August 2023].

[19] Article 38, Constitution of the French Republic <https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/anglais/constiution_anglais_oct2009.pdf> [last accessed on 8 August 2023].

[20] Baxter v. Ah Way 8 CLR 626, 637-638 (1910) <https://jade.io/article/61932?at.p=index> [last accessed on 15 July 2023]; Roche v. Kronheimer 29 CLR 329 (1921) <https://jade.io/article/62937> [last accessed on 15 July 2023].

[21] J.W. Hampton, Jr & Co v. U.S. 276 US. 394, 406 (1928) <https://supreme.justia.com/cases/federal/us/276/394/> [last accessed on 15 July 2023].

[22] European Commission for Democracy through Law (Venice Commission), 'The Quality of Law'

making decisions on various aspects of public life across all areas of the country's development and normative regulation of relevant legal relations. Consequently, legislative activity, involving the transfer of various aspects of public relations to the normative space and their regulation, is an ongoing process that demands considerable time, effort, and human/material resources.[23] It is nearly impossible for the legislature to enact all the detailed rules through general laws, and the ordinary legislative process, with its debates and votes, may not be suitable for this purpose.[24] Accordingly, the legislative body's attempt to regulate all issues related to the limitation of rights may result in its paralysis or disruption.[25]

Even if the parliament could regulate all the details its own, it would lack the ability to continuously adapt the laws during their enforcement.[26] In a developing society, there is an ongoing necessity to adapt, modify, and customize regulations in various spheres of public life to accommodate new realities and values.[27] Thus, in addition to protecting the legislature from overloading, the delegation of authority enables straightforward statutory changes in areas that require frequent modification. This, in turn, allows for adapting regulation to changing circumstances through simplified procedures.[28]

At the same time, legislation becomes an ineffective tool if it can only regulate issues existing at the time of law adoption. The purpose of legislation is to govern future relations, addressing any issues that may arise in the application of the law. However, given the diversity of legal relations, it is impossible to foresee and regulate all issues in advance. Hence, legislation often leaves room for authorized persons to determine the circumstances under which the law is applicable.[29]

At the same time, the delegation of regulatory authority is also justified by the need of expeditious decision-making on various issues.[30] Frequently, urgent action is required, and the government cannot afford to wait for the legislature to convene.[31]

(CDL-UDT(2010)020, 2010), paragraph 8 <https://www.venice.coe.int/WebForms/documents/default.aspx?pdffile=CDL-UDT(2010)020-e> [last accessed on 15 January 2023].

[23] Decision of the Constitutional Court of Georgia on case №1/1/1505,1515,1516,1529 "Paata Diasamidze, Giorgi Chitidze, Eduard Marikashvili and Lika Sajaia v. the Parliament of Georgia and the Government of Georgia", 11 February 2021. II-37.

[24] European Commission for Democracy through Law (Venice Commission), 'The Quality of Law' (CDL-UDT(2010)020, 2010), paragraph 8 <https://www.venice.coe.int/WebForms/documents/default.aspx?pdffile=CDL-UDT(2010)020-e> [last accessed on 15 January 2023].

[25] Decision of the Constitutional Court of Georgia on case №1/7/1275 "Aleksandre Mdzinarashvili v. the National Communications Commission of Georgia", 2 August 2019. II-30.

[26] András Sajó and Renáta Uitz, supra note 1, 261.

[27] Decision of the Constitutional Court of Georgia on case №1/5/1499 "Mikheil Samnidze v. the Government of Georgia", 16 December 2021. II-13.

[28] Decision of the Constitutional Court of Georgia on case №1/7/1275 "Aleksandre Mdzinarashvili v. the National Communications Commission of Georgia", 2 August 2019. II-31.

[29] Baxter v Ah Way 8 CLR 626, 637-638 (1909) <https://jade.io/article/61922?at.hl=Baxter+v+Ah+Way+(1909)> [last accessed on 15 January 2023].

[30] Decision of the Constitutional Court of Georgia on case №1/7/1275 "Aleksandre Mdzinarashvili v. the National Communications Commission of Georgia", 2 August 2019. II-31.

[31] European Commission for Democracy through Law (Venice Commission), 'The Quality of Law' (CDL-UDT(2010)020, 2010), paragraph 8 <https://www.venice.coe.int/WebForms/documents/default.

Moreover, it is considered preferable, from the perspective of legislative technique, to separate the most important general rules from detailed issues. Certain matters may be too technical to settle at a legislative level (e.g. building regulations). Furthermore, some issues, such as expediency limits, are better regulated at the regional or local level than at the national level, as local authorities may have a better understanding of the needs of local legislation.[32]

Thus, the delegation of legislative competence is an essential tool in the legislative process. It arises from practical needs and serves the purposes of effective governance.

IV. ARGUMENTS AGAINST THE DELEGATION OF LAW-MAKING COMPETENCE

Despite the practical importance of delegating of law-making competence, various arguments have been raised against the use of this mechanism. Simultaneously, considering the potential dangers associated with delegating this function, courts in different countries have adopted a diverse approach regarding the permissibility of this instrument and its constitutional scope. The present chapter is dedicated to the analysis of these risks.

1. THE PRINCIPLE OF SEPARATION OF POWERS

In order to safeguard against the usurpation and abuse of power, and thereby prevent the infringement of fundamental human rights and freedoms, countries adopt an institutional architecture where the authority is distributed among different branches. As *James Madison* highlighted in the letters of the Federalist, there are two most reliable means which would have kept us from the gradual concentration of all power in one department. On the one hand, it is necessary to grant proper constitutional authority to those who manage this or that department; on the other hand, it is necessary that they have personal reasons to resist the attempts of members of other departments to encroach on their powers."[33] According to *Charles Louis de Montesquieu*: it has always been the case that a man in power tend to abuse it, and this tendency persists until they encounter a barrier. To prevent the abuse of power, structures should be organized in

aspx?pdffile=CDL-UDT(2010)020-e> [last accessed on 15 January 2023].

[32] ibid.

[33] The Federalist Papers, No. 51: Madison (New York: Mentor Books, 1961) 322 <https://files.libertyfund.org/files/788/0084_LFeBk.pdf> [last accessed on 14 August 2023].

a manner where power is used to control power.[34] The craving for power can only be curbed when the individual harbouring this desire is not the one in control of the means necessary to achieve it.[35]

Thus, "the principle of the separation of powers aims to mitigate the risks of concentration and misuse of state power. Under such institutionalization of state power, it becomes possible to deter usurpers of official power and safeguard the supreme and immutable constitutional value - human rights and freedoms".[36] The branches of government should mutually support each other, even though they have to evolve independently. Failing to do so might provide an opportunity for unilateral creation and enforcement of regulations, leading to the potential for tyranny.[37] In light of these risks, some countries opt not to delegate legislative competence.[38]

It is considered that the division of power between the branches of government prevents the consolidation of powers not only through encroachment by one branch on the competence of another but also in the case of voluntary surrender of power.[39] Building on the aforementioned points, the argument against delegating law-making competence is connected to upholding the principle of separation of powers.

2. POPULAR SOVEREIGNTY AND REPRESENTATIVE DEMOCRACY

John Locke argued against the delegation of legislative power, stating that the legislature shall not delegate the power of making law to others. According to him, when individuals agree to be governed by laws, it implies that these laws should be issued by those chosen

[34] Anne M. Cohler and others (eds), Charles Secondat and Baron de Montesquieu, The Spirit of the Laws (Cambridge University Press 1992) 4.

[35] Sajo, supra note 8, 90.

[36] Decision of the Constitutional Court of Georgia on the case №3/4/641 "Constitutional Submission of Kutaisi Court of Appeal on the Constitutionality of Article 19(3) of the Law of the Autonomous Republic of Adjara on the Management and Disposal of Property of the Autonomous Republic of Adjara", 29 September 2016. II-2.

[37] European Commission for Democracy through Law (Venice Commission), 'The Quality of Law' (CDL-UDT(2010)020, 2010), paragraph 1 <https://www.venice.coe.int/WebForms/documents/default.aspx?pdffile=CDL-UDT(2010)020-e> [last accessed on 15 January 2023].

[38] For example, the Constitutional Court of the Republic of Lithuania indicates in a number of decisions that in Lithuania, based on the principle of separation of powers, there is no mandate to delegate the authority to adopt a law. See Constitutional Court's Rulings of 26 October 1995, 19 December 1996, 3 June 1999, and 5 March 2004 <https://lrkt.lt/data/public/uploads/2021/06/selected-official-constitutional-doctrine-19932020.pdf> [last accessed on 15 January 2023]; Constitutional Court's Rulings of 26 October 1995, 19 December 1996, and 3 June 1999 <https://lrkt.lt/data/public/uploads/2021/06/selected-official-constitutional-doctrine-19932020.pdf> [last accessed on 15 January 2023].

[39] Ronald A. Cass, Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State (George Mason University Legal Studies Research Paper Series 2017) 149.

in a specific constitutional form, and the authority to make laws should not be handed over to others.[40] *Locke* posited, based on the principle of popular sovereignty, that the authority to draft laws is inherently a delegated power from the people. This delegated authority cannot be further transferred without the explicit consent of the people.[41]

Legislation, functioning as a mechanism to balance competing interests and values, is inherently obligatory. It constitutes a significant intervention in human freedom, as it compels the recipient of the norm to adhere to a rule of conduct that may not align with their agreement or interests. In a democratic society, such restrictions on human rights are legitimized by the elective nature of the decision-making body. Thus, the execution of law-making activities is the responsibility of a body empowered to represent the people, possessing public-democratic legitimacy from this perspective. "The delegation of legislative power to an elected [people's representative] body is a fundamental aspect of democracy, as it enables citizens, albeit indirectly, to participate in the creation their own laws."[42] These arguments constitute the foundation for the principle of the inadmissibility of delegation of delegated authority *(Delegata potestas non potest delegari)*.

The Constitutional Court of Georgia also affirms the significance of the mentioned principle. According to the Constitutional Court's definition, "Democracy, in the immediate sense, implies the rule of the people, therefore, it encompasses the right of citizens to participate in both the formation and implementation of the government. … Democracy is primarily manifested through the realization of popular sovereignty, as people's participation in the implementation of government is the fundamental essence, basis, and goal of democracy".[43] "The concept of popular sovereignty suggests that every citizen contributes to the establishment of the government and, consequently, engages in the exercise of power. Popular sovereignty is predominantly realized through the principle of representative democracy. Each citizen of Georgia selects a representative to whom they delegate their authority, thereby endowing them with the legitimacy to make crucial decisions and govern the state."[44] The essence of democracy extends beyond the mere act of electing representatives through the exercise of the right to vote. Its ongoing outcome is the execution of the governing function by the elected representatives, inherently encompassing the performance of the legislative function.[45]

[40] David Schoenbrod, Power Without Responsibility: How Congress Abuses the People through Delegation (Yale University Press 1993) 155, 156.

[41] John Locke, Second Treatise on Government (1689)' in Peter Laslett (ed), Two Treatises of Government: John Locke (Cambridge University Press 1988) 362-363.

[42] Sajo, supra note 8, 191.

[43] Decision of the Constitutional Court of Georgia on case №3/3/574 "Citizen of Georgia Giorgi Ugulava v. the Parliament of Georgia", 23 May 2014. II-9.

[44] Decision of the Constitutional Court of Georgia on case №1/3/547 "Citizens of Georgia Ucha Nanuashvili and Mikheil Sharashidze v. the Parliament of Georgia", 22 May 2015. II-3.

[45] The dissenting opinion of the judge of the Constitutional Court of Georgia - Giorgi Kverenchkhiladze regarding Decision №1/1/1505,1515,1516,1529 of the Constitutional Court of Georgia, 11 February 2021. Paragraph 5.

Based on the above, the argument against the delegation of law-making activity may also be grounded in the primacy of popular sovereignty and the principle of safeguarding representative democracy.

3. LESS TRANSPARENT DECISION-MAKING PROCESS

Another argument against the delegation of legislative competence to the executive authority arises from the procedural differences in adopting a normative act. The executive's adoption process is characterized by less transparency and accountability compared to the complex parliamentary procedures employed by the legislative body. The latter involves transparent decision-making, the balancing of interests, and the participation of both political majorities and minorities. Adopting an act through such a procedure allows all interested parties to contribute to the formation of political will, mitigating the risk of arbitrary actions by the majority. This approach significantly reduces the potential for the arbitrary use of power and enhances the legitimacy and credibility of the adopted act.[46]

In contrast to the aforementioned, the act is adopted by the executive authority (government, ministry) under conditions of limited transparency and accountability, thereby heightening the risk of unilateral, arbitrary decisions and potentially excessive restrictions on basic rights and freedoms. It is often presumed that the executive power is more susceptible to violate human rights.[47] Different branches of government operate on distinct principles. The executive branch is not structured, and, in fact, cannot be organized based on the principle of decision-making by a majority vote, as extensive discussions may compromise the effectiveness of governance.[48] As a consequence, the government, particularly the ministry, tends to adopt acts with fewer discussions, debates, and the exchange of opinions, as well as less confrontation of ideas. This dynamic results in fewer filters to prevent unjustified interference with rights and fewer procedural safeguards that could otherwise reduce the likelihood of unilateral decisions through a non-transparent procedure.

If legislation fails to emerge from broad public consensus, it is less likely to possess the potential to safeguard minority interests. Therefore, one of the arguments against the delegation of legislative competence stems from a less transparent decision-making procedure.

[46] Decision of the Constitutional Court of Georgia on case №1/7/1275 "Aleksandre Mdzinarashvili v. the National Communications Commission of Georgia", 2 August 2019. II-28.
[47] Sajo, supra note 8, 192.
[48] ibid, 214.

V. PERMISSIBLE SCOPE OF DELEGATION OF LEGISLATIVE ACTIVITY

The practical necessity of delegating legislative competence often prevails over arguments against it, leading the executive to become a participant in the rule-making process. However, there is a challenge in determining the permissible scope of the delegated authority. Entrusted uncontrolled law-making to the executive power contradicts the principles of democracy.[49] While there is an opportunity to assess acts adopted within the framework of delegated authority, it is fundamentally flawed for a body lacking proper legislative competence to make a decision on specific issues.[50] Hence, it is crucial to establish the bounds within which the legislative body is authorized to delegate the regulation of a particular issue to another body.

1. ISSUES, REGULATION OF WHICH CANNOT BE DELEGATED

The Constitutional Court of Georgia, like the courts of other countries, essentially establishes similar criteria when delineating the scope of issues that cannot be delegated. Specifically, the Constitutional Court deems the delegation of a fundamentally important part of its powers by the Parliament of Georgia as unconstitutional.[51] According to the interpretation of the Constitutional Court, the direct mandate given by the people to the members of the Parliament of Georgia implies that they should make decisions concerning the fundamental principles and the essential aspects of the social, economic, cultural, legal and political development of the country, following the procedures defined by the Constitution. They are expected to deliberate on issues that are of high political and public interest and whose regulation holds significant importance.[52] They are tasked with determining the approaches to resolving issues that impact the country's long-term development prospects and/or entail significant restrictions on the fundamental rights of individuals.[53]

Similar to Georgia, the German Constitutional Court stipulates that the legislator must personally make all "substantial" decisions.[54] When assessing the substance of the issue,

[49] ibid, 206.

[50] Decision of the Constitutional Court of Georgia on case №1/7/1275 "Aleksandre Mdzinarashvili v. the National Communications Commission of Georgia", 2 August 2019. II-39.

[51] The decision of the Constitutional Court of Georgia on case №3/3/763 "Group of members of the Parliament of Georgia (Davit Bakradze, Sergo Ratiani, Roland Akhalia, Giorgi Baramidze et al., a total of 42 members of the Parliament) v. the Parliament of Georgia", 20 July 2016. II-78.

[52] Decision of the Constitutional Court of Georgia on case №2/5/700 "Coca-Cola Bottlers Georgia LLC", "Castel Georgia LLC" and JSC "Tskali Margebeli" v. the Parliament of Georgia and the Minister of Finance of Georgia", 26 July 2018. II-17.

[53] Decision of the Constitutional Court of Georgia on case №1/5/1499 "Mikheil Samnidze v. the Government of Georgia", 16 December 2021. II-18.

[54] Kalkar I case, BVerfGE 49, 89 (1978) <https://www.bundesverfassungsgericht.de/EN/Entscheidungen

consideration is given to general constitutional regulations, particularly basic rights[55] and the principle of democracy.[56] According to the US Supreme Court, Congress cannot delegate power that is "strictly and exclusively legislative."[57] The legislature must establish a foundation for legitimate administrative action and cannot evade making fundamental decisions for society.[58]

The Constitutional Court of Georgia declared the contested norm as unconstitutional only in one instance, citing the significance of the delegated issue. Specifically, the matter pertained to the delegation of content regulation of the freedom of expression, as established by the Constitution of Georgia, to the National Communications Commission of Georgia. Stressing the paramount importance of freedom of expression, the Constitutional Court of Georgia underscored the prohibition of assigning the content regulation of this right to another body.[59]

In addition to the prohibition of delegating issues of fundamental importance, the Constitutional Court of Georgia deems it unconstitutional to confer such authority to another government body, the delegation of which is expressly prohibited by the Constitution of Georgia.[60] The court's explanation asserts that the delegation of the

/40ff/FAQ-Liste.html> [last accessed on 15 July 2023], see English translation Donald P. Kommers and Russell A. Miller, The Constitutional Jurisprudence of the Federal Republic of Germany (3rd Edition, Dike University Press 2012) 177, 178; BVerfGE 33, 303, 303 (1972) <https://www.bundesverfassungsgericht.de/DE/Entscheidungen/Liste/30ff/liste_node.html> [last accessed on 15 July 2023]; BVerfGE 47, 46, 78-79 (1977) <https://www.bundesverfassungsgericht.de/DE/Entscheidungen/Liste/40ff/liste_node.html> [last accessed on 15 July 2023]; BVerfGE 49, 89, 126 (1978) <https://www.bundesverfassungsgericht.de/EN/Entscheidungen/40ff/FAQ-Liste.html> [last accessed on 15 July 2023].

[55] BVertUE 50, 257, 274 (1981) <https://www.bundesverfassungsgericht.de/DE/Entscheidungen/Liste/50ff/liste_node.html> [last accessed on 15 July 2023]; BVerfGE 49, 89, 127 (1978) <https://www.bundesverfassungsgericht.de/EN/Entscheidungen/40ff/FAQ-Liste.html> [last accessed on 15 July 2023].

[56] Hartmut Maurer, Allgemeines Verwaltungsrecht (18 Auflage, Beck 2011) section 6, arginal number 14; Donald P. Kommers and Russell A. Miller, The Constitutional Jurisprudence of the Federal Republic of Germany (3rd Edition, Dike University Press 2012) 176; Sven Hölscheidt, 'The principle of lawful management' (2001) Juristische Arbeitsblätter 409 (412).

[57] Wayman v. Southard, 23 U.S. 42-43 (1825) <https://supreme.justia.com/cases/federal/us/23/1/> [last accessed on 15 July 2023].

[58] Stefan Huster and Johannes Rux, 'Kommentierung des Art. 20a GG' in Volker Epping and Christian Hillgruber (eds), Beck'scher Online-Kommentar Grundgesetz (23 Auflage, Verlag C.H.BECK München 2014), Article 20, paragraph 173.

[59] Decision of the Constitutional Court of Georgia on case №1/7/1275 "Aleksandre Mdzinarashvili v. the National Communications Commission of Georgia", 2 August 2019.

[60] For example, the Constitutional Court found it unconstitutional for the executive authority to determine the fee structure. According to the interpretation of the Constitutional Court, the indication of Article 67(1) of the Constitution that "only the law" shall determine the structure and the procedures for introducing taxes and fees, as well as their rates and the scope of those rates, excluded the possibility of delegating this issue. See Decision of the Constitutional Court of Georgia on the case №2/3/1279 "Levan Alafishvili and "Commandite company Alafishvili and Kavlashvili - Georgian Lawyers Group" v. the Government of Georgia", 5 July 2019.

impeachment process and the election of certain officials by the Parliament of Georgia would also contravene the Constitution of Georgia.[61] Moreover, according to the court's practice, issues that the Constitution of Georgia designates to be regulated by Organic law cannot be addressed based on regular legislation passed with a lower quorum.[62]

2. THE NEED TO DETERMINE THE SCOPE OF AUTHORITY GRANTED IN THE DELEGATION OF LEGISLATIVE ACTIVITY

According to the definition provided by the Constitutional Court of Georgia, as well as the courts of other countries, it is imperative, before the delegation of legislative power, that the purpose, content, and scope[63] of the delegated authority be explicitly determined by the act granting the authority.[64]

In the delegation of law-making competence, determining the legal scope of the granted authority is associated with the following considerations: the citizen must be able to predict how the delegated authority will be used and discern the interests and factors that should be taken into account when exercising the delegated authority.[65] At the same time, a "vague blanket rule" that grants the executive branch broad authority to define the limits of individual freedom contradicts the principle that administrative bodies should operate in accordance with the law. Moreover, establishing a clear framework of delegated authority is intricately tied to the principle of the separation of powers. If the law fails to adequately define the power of the executive, it risks the executive not implementing the law but substituting the decisions of the legislature. Furthermore, the mandate of the courts to ensure the protection of citizens' rights from government

[61] Decision of the Constitutional Court of Georgia on case №2/5/700 "Coca-Cola Bottlers Georgia LLC", "Castel Georgia LLC" and JSC "Tskali Margebeli" v. the Parliament of Georgia and the Minister of Finance of Georgia", 26 July 2018. II-13.

[62] Decision of the Constitutional Court of Georgia on case №2/5/658 "Georgian citizen Omar Jorbenadze v. the Parliament of Georgia", 16 November 2017. II-26, 28.

[63] In the practice of the US Supreme Court, instead of determining the content, scope and purpose of the authority, the concept of the "intelligible principle" is used, within the framework of which the court checks whether the parliamentary act establishes adequate guidelines for the executive power to be guided based on it. See András Sajó and Renáta Uitz, supra note 1, 261.

[64] Decision of the Constitutional Court of Georgia on case №1/1/1505,1515,1516,1529 "Paata Diasamidze, Giorgi Chitidze, Eduard Marikashvili and Lika Sajaia v the Parliament of Georgia and the Government of Georgia", 11 February 2021. II-42; See also: the decision of the Supreme Court of Israel on the case Rubinstein v Minister of Defense, HCJ 3267/97, 9 December 1998; Article 80, paragraph 1, Basic Law for the Federal Republic of Germany (GG) <https://www.gesetze-im-internet. de/englisch_gg/englisch_gg.pdf> [last accessed on 15 August 2023]; Article 76, Constitution of the Italian Republic <https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf> [last accessed on 8 August 2023].

[65] BVerfGE 1, 14, 60 (1951) <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/1951/09/qs19510909_2bvq000151.html> [last accessed on 8 August 2023]; BVerfGE 15, 153, 160 (1962) < https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/1983/12/rs19831215_1bvr020983en.html> [last accessed on 8 August 2023].

violations is fulfilled only if the courts can scrutinize the implementation of the norm by the executive branch. Hence, the scope of the powers granted must be appropriately delineated in the law.[66]

According to the practice of the Constitutional Court of Georgia, "determining the purpose, content and scope of the delegated authority is crucial, as it is with these criteria that the legality of the acts adopted by the executive authority and its actions should be examined. Ultimately, this assessment gauges the extent to which the Parliament of Georgia adhered to the given mandate. The judiciary should possess the ability to evaluate the actions of the Georgian government based on the criteria established by the legislator. Hence, the purpose, content, and scope of the delegation of authority should be clearly, unambiguously, and comprehensibly defined".[67]

It should be noted that although the Constitutional Court of Georgia has been assessing the constitutionality of the delegation of legislative competence for a considerable period, the standard requiring the determination of objectives, content, and permissible scope before delegation was established only by the decision made on February 11, 2021.[68] The constitutionality verification of the authority delegated under this standard occurred in a total of 2 decisions.[69] Before that, the Constitutional Court did not apply this standard when assessing the constitutionality of the delegation of rule-making functions.[70]

VI. PROBLEMATIC ISSUES RELATED TO DELEGATION OF LEGISLATIVE ACTIVITY

After examining the overarching standards for the delegation of legislative activity, it is crucial to delineate the challenges associated with delegating law-making competence and explore potential solutions. This chapter delves into the practical intricacies of applying general delegation standards to individual cases, highlighting key factors that demand consideration in the delegation process.

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[66] Donald P. Kommers and Russell A. Miller, The Constitutional Jurisprudence of the Federal Republic of Germany (3rd Edition, Dike University Press 2012) 176.

[67] Decision of the Constitutional Court of Georgia on case №1/1/1505,1515,1516,1529 "Paata Diasamidze, Giorgi Chitidze, Eduard Marikashvili and Lika Sajaia v. the Parliament of Georgia and the Government of Georgia", 11 February 2021. II-51.

[68] ibid.

[69] ibid; See also: Decision of the Constitutional Court of Georgia on case №1/5/1499 "Mikheil Samnidze v. the Government of Georgia", 16 December 2021.

[70] For example, the decision of the Constitutional Court of Georgia on case №3/3/763 "Group of members of the Parliament of Georgia (Davit Bakradze, Sergo Ratiani, Roland Akhalia, Giorgi Baramidze et al. a total of 42 members of the Parliament) v the Parliament of Georgia", 20 July 2016; Decision of the Constitutional Court of Georgia on case №2/5/700 "Coca-Cola Bottlers Georgia LLC", "Castel Georgia LLC" and JSC "Tskali Margebeli" v the Parliament of Georgia and the Minister of Finance of Georgia", 26 July 2018.

1. DIFFICULTY DETERMINING THE SCOPE OF PERMISSIBLE DELEGATION

As previously mentioned, for the delegation of legislative activities to align with constitutional principles, the parliament must refrain from delegating the authority to regulate fundamental, essential issues to another body. In cases where the authority to regulate non-essential issues is delegated, the guiding criteria must be sufficiently determined, providing a clear framework to which the executive branch of the government will be bound in the process of rule-making. Although this standard is essentially formulated in the practice of different countries, its general nature poses challenges when adapting it to specific cases.[71] Thus, establishing the exact boundaries of the delegation of discretionary power to another branch is a complex subject of inquiry[72] and not easily enforceable by the courts.[73]

For example, in one of the cases, the German Constitutional Court drew a distinction between the matters of a student repeating a class and expulsion of a student.[74] The court noted that the expulsion of a student was linked to significant rights, impacting their future life and employment prospects. Therefore, it was deemed an essential issue for constitutional purposes and should be regulated by the Parliament.[75] Conversely, retaking the class did not significantly impact the student's rights; it merely extended their education by one year, making the matter suitable for delegation.[76] Consequently, the demarcation between essential and non-essential issues is delicate.

The constitutional standard regarding the obligation to specify the purpose, scope and content of the delegated authority when delegating the resolution of non-essential issues is of a general nature. According to the practice of the Constitutional Court of Georgia, "determining the purpose, scope, and content of delegation does not imply the degree of concretization that is characteristic of directly right-limiting regulation. If the legislator is required to provide detailed forms and types of any restrictions on the right in the delegating act and to define their clear content, the delegation of authority itself would, in fact, lose its meaning both in terms of relieving the legislator from the regulation of technical-procedural issues and in terms of making decisions based

[71] Decision of the Constitutional Court of Georgia on case №1/5/1499 "Mikheil Samnidze v. the Government of Georgia", 16 December 2021. II-18.

[72] Wayman v. Southard, 23 U.S. 46 (1825) <https://supreme.justia.com/cases/federal/us/23/1/> [last accessed on 15 July 2023].

[73] Mistretta v. United States, 488 U.S. 361, 415 (Justice Scalia dissenting) (1989) <https://supreme.justia.com/cases/federal/us/488/361/> [last accessed on 15 July 2023].

[74] BVerfGE 58, 257, 257, 268-276 (1981) < https://www.bundesverfassungsgericht.de/DE/Entscheidungen/Liste/50ff/liste_node.html> [last accessed on 15 July 2023].

[75] ibid, 273, 275.

[76] ibid, 273-76.

on specialized knowledge/experience and within a shorter time frame."[77] Similar to the practice of the Constitutional Court of Georgia, in the judicial practice of other countries, the adequacy of the legal framework for restricting rights is assessed on a case-by-case basis. The precision of the guidelines is intricately linked to the nature of the issue to be regulated and the intensity of the regulation.[78] In particular, the need for precision is less pronounced when delegating smaller, less significant powers compared to the delegation of powers that could potentially encroach upon a broad spectrum of fundamental rights or impose substantial burdens on businesses.[79]

In terms of tailoring the aforementioned standard to a specific case, Decision No. 1/1/1505,1515,1516,1529 adopted by the court on February 11, 2021, stands out as a significant milestone in the practice of the Constitutional Court of Georgia.[80] In the contested norms of the mentioned case, the government of Georgia or the Minister designated by the government was granted the authority to introduce regulations restricting the freedom of movement, property and the right of assembly to protect public health during the pandemic. Simultaneously, the legislation stipulated that the restriction of the right by the executive authority should aim to achieve the benefits protected by the relevant article of the Constitution of Georgia, be necessary for a democratic society, non-discriminatory and proportionally restrictive. The Constitutional Court deemed that the delegation of authority to limit the right in such a manner met the standard for determining the content, scope, and purpose of the delegated authority.

Regarding the nature of the issue at hand, the court highlighted that the delegation outlined in the contested norms was of a temporary nature. Furthermore, under the delegated authority, the Government of Georgia was specifically empowered to introduce rules aimed at safeguarding public health during a pandemic or an epidemic particularly dangerous for society. According to the court's stance, these measures were not anticipated to exert a significant impact on the long-term prospects of the country's social, economic, cultural, legal, or political development. At the same time, the exercise of the delegated authority as per the contested norms did not entail such a

[77] Decision of the Constitutional Court of Georgia on case №1/1/1505,1515,1516,1529 "Paata Diasamidze, Giorgi Chitidze, Eduard Marikashvili and Lika Sajaia v the Parliament of Georgia and the Government of Georgia", 11 February 2021. II-46.

[78] Am. Trucking, 531 U.S. 475 (2001) (majority opinion) <https://supreme.justia.com/cases/federal/us/531/457/> [last accessed on 15 July 2023]; Donald P. Kommers and Russell A. Miller, The Constitutional Jurisprudence of the Federal Republic of Germany (3rd Edition, Dike University Press 2012) 180; Ronald A. Cass, Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State (George Mason University Legal Studies Research Paper Series 2017) 172.

[79] Ronald A. Cass, Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State (George Mason University Legal Studies Research Paper Series 2017) 172.

[80] Decision of the Constitutional Court of Georgia on case №1/1/1505,1515,1516,1529 "Paata Diasamidze, Giorgi Chitidze, Eduard Marikashvili and Lika Sajaia v the Parliament of Georgia and the Government of Georgia", 11 February 2021.

substantial infringement on human freedom, either in its nature or intensity, that would unequivocally necessitate the decision on its permissibility to be exclusively determined by the legislative body.[81]

It is noteworthy, that the disputed regulation essentially outlined the purpose of the delegated authority, specifying that regulations restricting the right to freedom of movement, property, and assembly by the executive power could only be adopted for the purpose of protecting public health. Apart from this declaration, the Government of Georgia or the relevant Ministry was not bound by any reservations. Additionally, they were granted the authority to introduce regulations differing from existing normative acts. The scope of action of the executive authority was not constrained by the legislator's reference to the obligation to observe the principles of proportionality and non-discrimination. These principles, in and of themselves, constitute the constitutional standard for any regulation limiting rights, and their inclusion in the law did not provide an extra guarantee of right-protection, let alone specify the extent of the delegated authority.

Therefore, in the absence of a clear framework during the delegation of the authority to introduce restrictive regulations, the executive branch was authorized to implement any measures limiting the rights to freedom of movement, property, and assembly for the purpose of safeguarding public health. Simultaneously, the fact that this authority was linked to the pandemic and of a temporary nature did not negate the essence of the matter at hand. The power to regulate a specific issue, whether for a short or indefinite period, cannot alter the substance of the matter or diminish its fundamental nature.[82] The resolution of fundamental issues remains a perpetual and unalterable responsibility of the legislative body, even if temporarily delegated to another entity, contrary to the general standard set by the Constitutional Court regarding the delegation of legislative competence. The contested norms conferred authority not only to the government but also to a specific ministry, allowing the limitation of constitutional rights and the establishment of regulations distinct from normative acts. This case undeniably manifested the genuine risks associated with broad delegation of legislative activity.

At the same time, it is important to highlight that the contested regulation was enacted amid the outbreak of the pandemic, specifically the new coronavirus (COVID-19), in the country. Although no official state of emergency was declared, the state authorities were unable to exercise their constitutional powers in a normal manner, signifying the presence of a "de facto" state of emergency. During a state of emergency, the Constitution itself allows for the transfer of right-limiting regulations to other branches of government,

[81] ibid.

[82] The dissenting opinion of the judge of the Constitutional Court of Georgia - Giorgi Kverenchkhiladze regarding the decision of the first chamber of the Constitutional Court of Georgia №1/1/1505,1515,1516,1529, 11 February 2021. Paragraph 21.

following the appropriate constitutional procedure.[83] Hence, the state of emergency provides a rationale for restricting certain constitutional rights by circumventing the regular rules of delegation. However, in this decision, the Constitutional Court appraised the delegation of legislative activity in its prevailing form, deeming it constitutional - not as an exceptional circumstance, but advocating this approach as a general standard for evaluating the delegation of law-making activities. Applying this standard to assess the delegation of authority poses a substantial threat to the principles of separation of powers and democracy.

2. SEPARATION OF LEGISLATIVE AND EXECUTIVE ACTIVITIES

The Constitutional Court of Georgia's stance on the delegation of legislative activity leaves several fundamental questions unanswered, aligning with diverse positions found in the decisions of other countries' courts and legal doctrine. Among these issues, a crucial aspect is the clarification of the term "legislative activity." Notably, in the Constitutional Court's practice, there is an absence of analysis on whether any restrictive decision articulated in a normative rule constitutes legislative activity. It remains unclear whether the executive function, by its nature, necessitates, in certain instances, the promulgation of normative rules, thereby not constituting the exercise of legislative function but rather the implementation and enforcement of the law.

Additionally, it is noteworthy that the norms enshrining the fundamental rights affirmed by the Constitution of Georgia, in certain instances, *expressis verbis* state the obligation[84] to limit these rights based on the law, while several provisions lack such a reservation.[85] The constitutional standards for the delegation of legislative activity, as per the Constitutional Court's practice, are applicable only in instances where a fundamental right, confirmed by the Constitution, imposes the obligation to limit it based on the law. The Constitutional Court refers to this provision, emphasizing that in such cases, the Constitution mandates the limitation of the right through legal means. Following this rationale, the court assesses the extent to which the executive branch's restriction of the right aligns with the Constitution. Consequently, the Court has not yet established the standards of delegation for other rights that the Constitution does not explicitly require to be limited by law. It is noteworthy that the court will need to address this question in the ongoing case.[86]

[83] Article 71, Constitution of Georgia <https://www.matsne.gov.ge/ka/document/view/30346?publication=36> [last accessed on 10 February 2023].

[84] For example, freedom of movement reinforced by Article 14 of the Constitution of Georgia, rights to personal and family privacy, personal space and privacy of communication protected by Article 15, right to property protected by Article 19, etc.

[85] For example, right to free personal development protected by Article 12 of the Constitution, right to fair administrative proceedings reinforced by Article 18, procedural rights guaranteed by Article 31, etc.

[86] Constitutional Complaint №1502 "Zaur Shermazanashvili v. the President of Georgia and the

The separation of legislative activity and administrative rule-making powers by the executive branch is a widely discussed issue in the practice of the US Supreme Court. In the case of *Field v. Clark*, the US Supreme Court made a distinction between fact-finding authority and legislative exercise. Specifically, according to the court's clarification, when Congress prescribes an action to be taken in the presence of a specific fact, and the President is authorized to ascertain this fact and subsequently carry out the action prescribed by Congress, it constitutes an executive action, not a legislative one.[87] The decision was unrelated to the policy discretion inherent in legislation.[88] Instead, the court scrutinized whether it constituted an exercise of general policy discretion (legislative prerogative) or involved fact-finding and implementation (executive function).[89] In the case *J. W. Hampton, Jr. & Co. v. United States,* the Court emphasized that Congress had unequivocally defined its tariff plan and policy. The President, in this context, possessed discretion solely in the implementation of the plan and did not formulate the plan independently.[90] Hence, it was concluded that there was no delegation of legislative power.[91]

Thus, there is an opinion suggesting that the executive body, tasked with enforcing legislation, must frequently establish rules to fulfill its duty. This responsibility is inherent to this branch of government and is not intricately linked to the delegation of legislative activity.[92] As per the US Supreme Court, executive branch agencies engage in rule-making, a practice that has existed since the founding of the Republic. However, in accordance with the constitutional structure, this is deemed an exercise of executive

Government of Georgia", 11 May 2020 <https://constcourt.ge/ka/judicial-acts?legal=9169> [last accessed on 16 May 2023]; Constitutional Complaint №1503 "Tornike Artkmeladze v. the President of Georgia, the Parliament of Georgia and the Government of Georgia", 19 May 2020 <https://constcourt.ge/ka/judicial-acts?legal=9191> [last accessed on 16 May 2023].

87 Field v. Clark, 143 U.S. 693 (1892) <https://supreme.justia.com/cases/federal/us/143/649/> [last accessed on 15 July 2023].

88 ibid, 682-94.

89 Ronald A. Cass, Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State (George Mason University Legal Studies Research Paper Series 2017) 164.

90 The issue concerned Congress's delegation of authority to impose customs duties on imports to the President, within which the President was authorized to impose a different (increased or reduced, up to 50%) customs duty than the fixed duty, in order to equalize the value of imported goods with national production.

91 J.W. Hampton, Jr & Co v. U.S. 276 US. 394, 406-10 (1928) <https://supreme.justia.com/cases/federal/us/276/394/> [last accessed on 15 July 2023].

92 For example, Kathryn A. Watts, 'Rulemaking as Legislating' (2015) 103 Georgetown Law Journal 1003, 1005 ("the Court holds ... that rule-making by administrative agencies must be an exercise of the "executive power" contained in Article II of the Constitution"); John F. Manning, 'Separation of Powers as Ordinary Interpretation' (2011) 124 Harvard Law Review 1939, 2020 ("It is no less accurate to say that when an agency implements an act by making rules pursuant to an intelligible principle, that agency is, in fact, enforcing the law."); Edward Rubin, 'The Myth of Accountability and the Anti-Administrative Impulse' (2005) 103 Michigan Law Review 2073, 2094 (Implementation of the legislation "necessarily requires a certain amount of policy development").

power.[93] In a different case, the Court explained that "a certain degree of discretion, and therefore lawmaking, is inherent in most executive or judicial actions."[94]

It is generally acknowledged that the authority to make political decisions is not inherently a legislative power; rather, it can fall within the purview of the executive or the judiciary if it aligns with the constitutional roles assigned to these branches.[95] Hence, while applying and implementing the law, the executive authority, at times, encounters the necessity to promulgate norms. However, such rule-making is considered part of the executive function and not within the purview of legislative authority.[96]

3. DELEGATION OF DELEGATED AUTHORITY

Among other crucial issues concerning the permissibility of the delegation of legislative activity, the matter of allowing further delegation of the delegated authority is noteworthy. In the Georgian legal framework, neither the constitution nor any other legislative act includes a provision regarding the permissibility or prohibition of delegating this authority to another body by an entity with delegated authority when transferring law-making competence by the legislative authority. Simultaneously, the Constitutional Court of Georgia has not yet provided clarification on this matter.

From this point of view, the basic law of Germany is noteworthy, stipulating that, "... If the law provides that such authority may be further delegated, such subdelegation shall be effected by statutory instrument."[97] Hence, the delegation of powers, initially delegated to the executive authority by the latter to another body is permissible only if the delegating act explicitly allows for such provision. Consequently, if the legislative body does not specify the possibility of further delegation of this competence during the initial delegation of authority, the matter should be regulated by the body empowered for such decisions by the Parliament.

Similarly to Germany, according to the practice of the US Supreme Court, the delegation of authority bestowed by the legislative body is prohibited unless the legislative body has clearly expressed its intent to permit such delegation.[98]

As mentioned, the Constitutional Court of Georgia has not yet set constitutional

[93] City of Arlington v. Federal Communications Commission 569 U.S. 290, 304 n.4 (2013) <https://supreme.justia.com/cases/federal/us/569/290/> [last accessed on 15 July 2023].

[94] Am. Trucking, 531 U.S. 475 (2001) (majority opinion) <https://supreme.justia.com/cases/federal/us/531/457/> [last accessed on 15 July 2023].

[95] Ronald A. Cass, Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State (George Mason University Legal Studies Research Paper Series 2017) 185.

[96] András Sajó and Renáta Uitz, supra note 1, 260.

[97] Article 80, Basic Law for the Federal Republic of Germany (GG) <https://www.gesetze-im-internet. de/englisch_gg/englisch_gg.pdf> [last accessed on 15 August 2023].

[98] United States v. Giordano, 416 U.S. 505 (1974) <https://supreme.justia.com/cases/federal/us/416/505/> [last accessed on 15 July 2023].

standards concerning the aforementioned issue. Simultaneously, there is no explicit provision in the legislation outlining eligibility standards for the further delegation of delegated authority. Nevertheless, considering the discussed international standards, if the executive authority delegates authority without explicitly stating such a possibility sanctioned by the Parliament of Georgia, it is likely to contravene the national constitution.

VII. CONCLUSION

Amid the global pandemic of the new coronavirus (COVID-19), it became evident that in the absence of a clear definition of the constitutional limits of the delegation of law-making competence, even in a parliamentary republic, there are no constraints on the unchecked authority of the executive power. Simultaneously, there is no dispute that a broad delegation of law-making activities to the executive power jeopardizes the fundamental principles of the Constitution and heightens the risks of excessive interference in human rights. Ongoing constitutional lawsuits before the Constitutional Court already raise inquiries necessitating a more precise delineation of the standards for the delegation of legislative activity. Furthermore, given the attention already directed towards the delegation issue, it is likely that Constitutional Complaints questioning the constitutionality of statutes, specifically alleging violations of delegation standards, will see an increase.

Given that the Constitution of Georgia lacks a precise framework for the delegation of legislative activity, it falls upon the Constitutional Court of Georgia to elucidate whether the delegated authority can be further delegated, clarify the meaning of prohibiting the delegation of a fundamentally important issue, and delineate the purpose, content, and scope of the delegated authority. Simultaneously, it is crucial for the Court to establish the limits of the executive body's competence to independently create norms. The Court's prompt response to these issues and the formulation of a constitutional-legal framework for delegation are more than a mere scholarly pursuit; they are a practical necessity for ensuring the effectiveness of the principle of separation of powers and safeguarding fundamental rights and freedoms.

Sopho Verdzeuli*

JURIDIFICATION OF POLITICS – CONTRADICTORY RESULTS OF THE JUSTICE SECTOR REFORMS IN GEORGIA

"Juridification is an ugly word -

as ugly as the reality which it describes"[1]

ABSTRACT

The interrelation between the law and politics permeates contemporary discussions of constitutional and statehood issues. Law and legal formalism have penetrated many areas, which were traditionally considered political, which has created a trend of juridification of politics globally. Juridification at the expense of reducing the role of political institutions, is provided by strengthening formal-legal systems. The struggle and change of balance between the "political" and the "legal" are characterized by a number of complex and contradictory outcomes.

The aim of the presented work is to investigate the trend of juridification in Georgia in the light of the reform of the justice sector. For this purpose, the paper examines changes implemented in the judicial and prosecution systems within the framework of the 2017-2018 constitutional reform. The paper tries to answer two main questions: whether the constitutional reform strengthened juridification trend in Georgia, and what problematic/contradictory results may be associated with such a reform strategy.

I. INTRODUCTION

The search for balance between the individual and the collective, the legal and the political, the sovereign and the global, remains an unresolved issue in discussions of political law. The law significantly invaded social and political life, and „the political agenda was completely subjected to judicial control".[2] Such a trend can be observed both at the local and international levels, which is accompanied by the increasing legal regulation of domestic, regional and international issues andassignment of new functions to judicial or quasi-judicial bodies.[3] This is not surprising, nor is it unique

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1 Gunther Teubner (ed), Juridification of Social Spheres: A Comparative Analysis in the Areas of Labor, Corporate, Antitrust, and Social Welfare Law (De Gruyter 1987) 3.

2 Ran Hirschl, The Judicialization of Politics (The Oxford Handbook of Political Science 2011) 262.

3 Daniel Kelemen, 'Eurolegalism and Democracy' (2012) 50 Journal of Common Market Studies 55, 57.

to any one country, as this trend is generally associated with the dominant discourse of „economic liberalization".[4] "Courts, lawyers and "justice" are taking over and not going anywhere"[5], and this affects the wider political, socio-economic and constitutional context.

The expansion of legal structures and the increase of the legalistic discourse can have different forms and effects at national and international levels. If at the national level this may translate into an increase in the role of legal, judicial and quasi-judicial bodies in the decision-making process, at the international level it may lead to the restriction of sovereign power and recognition of the dominant role of international regulation and international tribunals.[6] The reasons for the expansion of legal regulation vary. When applying this approach within the country, there may be an expectation that the growing legal structures will be able to respond and neutralize various political and social problems caused by "distrust towards state power".[7] At the international level, regulation may aim at establishing uniform and consistent practices, which are well-established in specific countries and creation of common legal, economic or security zones.[8] In any case, the expansion of legal methods and structures, i.e., juridification, is related to the restriction of political power. Instead of political deliberation and inclusive public reflection, legal discourse dominates the debate. Political discretion is replaced by legal formalism, judges, lawyers and bureaucrats replace political representatives, and elected bodies transfer their power to unelected institutions. As a result, such juridification causes a significant change in the balance of law and politics, weakens the political process and strengthens the primacy of the law.

This is a complex issue because the increase of juridification does not always lead to uniform results, since "once it is initiated, it develops a rhythm and effects that are not easy to contain" [9]. The main question that needs to be answered is what is the "price of juridification" and what limitations or contradictions are associated with such a trend."[10]

The presented paper analyzes the controversial nature and consequences of juridification in Georgia's justice sector. More specifically, the purpose of this paper is to discuss the impact of juridification trends on justice in the light of the large-scale

[4] ibid.

[5] David Levi-Faur, 'The Political Economy of Legal Globalization: Juridification, Adversarial Legalism, and Responsive Regulation. A Comment' (2005) 59 International Organization 458.

[6] Anne-Mette Magnussen and Anna Banasiak, 'Juridification: Disrupting the Relationship between Law and Politics?' (2013) 19 European Law Journal 325, 334.

[7] Lars Trägårdh and Oñati International Institute for the Sociology of Law (eds), After National Democracy: Rights, Law and Power in America and the New Europe (Hart 2004) 51.

[8] ibid, 42.

[9] Davina Cooper, 'Local Government Legal Consciousness in the Shadow of Juridification' (1995) 22 Journal of Law and Society 506, 508.

[10] Teubner, supra note 1, 25.

constitutional reform of 2017-2018.[11] The paper is built around two main issues: 1. Has the constitutional reform strengthened the trend of juridification in the justice system of Georgia. 2. What important difficulties and controversial issues are connected with this process.

The studies on the Georgian justice system contain a number of noteworthy findings that point to factors hindering the independence of the system.[12] Despite extensive and valuable research in this area, the effects of juridification generally remain unnoticed or are insufficiently discussed in the literature.[13] In addition, the dominant discourse and approach in the conducted studies is the issue of institutional depoliticization of justice at the expense of further expansion of legal regulation. The present paper attempts to change the dominant research framework on the justice sector. To this end, the paper shifts the traditional focus of research from the discourse of regulation to the controversial consequences of excessive legal regulation.

It should be noted here that this paper does not consider the policy of "deregulation" as a feasible alternative to increasing juridification. As Teubner points out, the critique of these historical processes "should not make us forget the libertarian function that juridification has[14]." Teubner emphasizes that the juridification process cannot be reversed or modified through deregulation or other radical processes.[15] The importance of its rethinking lies in "dealing only with the dysfunctional consequences of juridification".[16]

This paper assesses the reforms implemented in the justice sector of Georgia, in particular, in the judicial and prosecution systems. The assessment is based on the 2017-2018 constitutional reform, as it represents one of the most visible cases of changing the balance between the law and politics in the justice sector. Taking into consideration, that the mentioned constitutional reform encompasses many dimensions, this paper is limited to the research of only those aspects that are essential for the analysis of the

[11] Resolution of the Parliament of Georgia "On Creation of the State Constitutional Commission and Approval of the Statute of the State Constitutional Commission" <https://www.matsne.gov.ge/ka/document/view/3472813?publication=0> (in Georgian) [last accessed on 10 February 2023].

[12] Coalition for an Independent and Transparent Judiciary, "Judicial System: Reforms and Perspectives" (2017) <http://www.coalition.ge/index.php?article_id=150&clang=0> (in Georgian) [last accessed on 10 February 2023].

[13] ibid; Human Rights Education and Monitoring Center (EMC), "Prosecution System Reform" (2018) <https://socialjustice.org.ge/ka/products/prokuraturis-sistemis-reforma> (in Georgian) [last accessed on 10 February 2023]; Georgian Young Lawyers Association and Transparency International - Georgia, "Monitoring Report of the High Council of Justice N5" (2017) <https://www.transparency.ge/sites/default/files/iusticiis_umaglesi_sabchos_monitoringis_mexute_angarishi.pdf> (in Georgian) [last accessed on 10 February 2023].

[14] Teubner, supra note 1, 13.

[15] ibid, 27.

[16] ibid.

change in the balance between the law and the politics. It should be emphasized here, that the purpose of this study is not to assess which system of balance between the law and the politics is better for Georgia, the one in force before the constitutional reform, or the one introduced after the constitutional reform. Answering this question is beyond the scope of this study. The main task of the presented paper is only to describe the logic of the reform carried out in the justice system and to connect it with the juridification paradigm.

II. "JURIDIFICATION"- A USEFUL PARADIGM FOR RESEARCH

This chapter aims to present the most appropriate definition of the research paradigm - the concept of "juridification" and its essential elements. Since the concept itself is broad and rather ambivalent, it is important to offer an interpretation of certain complex aspects of the term. In order to better understand the juridification trend, it is also important to analyze other legal, social or political developments that may have contributed to the elaboration of juridification approach, both at the global and local levels. This chapter does not limit itself to a simple definition of terms but aims at explaining why and how the concept of juridification can be used to study important legal and political transformations.

1. ELEMENTS OF JURIDIFICATION

The term "juridification" is used to describe various political, social and legal events and processes, which are characterized by the invasion and dominance of the legal in the political sphere. It also explains the relationship between the two fundamental elements of the constitutional system – the legal and the political.

Juridification can be defined as "legalization of social and political life".[17] It is also used to analyze the extension of a court's jurisdiction or legal rights and duties. It is possible to describe important institutional transformations with this concept. In other words, it can explain the relationship between various state institutions, governance processes and public policy issues, and describe how this process affects the balance between political and legal spheres. In this regard, all types of legal regulations cannot be considered as juridification, as they may not cause substantial changes in the "nature of the relationship"[18]. This paper uses the term "juridification" to analyze significant changes in institutional and governance processes.

There are other similar concepts, that to some extent, describe similar trends. For example, such a term is "judicial jurisdiction over politics". This term describes a system

[17] Levi-Faur, supra note 5, 452.

[18] Martin Loughlin, Legality and Locality: The Role of Law in Central-Local Government Relations (Oxford University Press 1996) 365.

in which 'some of the most pressing and polemical political disputes characteristic of a democratic state are referred to the courts."[19] Hirschl describes three main features of such judicialization, which may be relevant in the case of juridification as well.[20] Firstly, it is an extension of legalistic or legal discourse to essentially political issues; secondly, the application of judicial review procedures to public policy issues, and finally, "judicial jurisdiction over megapolitics"[21], i.e., subjecting to judicial jurisdiction those areas, that shape organized society or the state as a political entity. Although the concept of "juridification" and "judicialization of politics" have a lot in common, the latter is focused on the involvement of judicial or quasi-judicial bodies in solving political issues. Therefore, this paper chooses to use "juridification" as a broader term, which does not necessarily imply the involvement of courts and judicial bodies in political matters but indicates to a more general trend of legal regulation of political processes.

Juridification, to some extent, has the same meaning as "depoliticization". However, on the other hand, the term "depoliticization" also requires additional clarification, as it can be used in different ways.[22] On the one hand, institutional "depoliticization" may have a broad positive connotation in the sense of the creation of "a kind of buffer zone between politicians and certain policy areas", that excludes political instrumentalization of the public service or judiciary[23]. This may mean the process of eliminating the political vertical and mechanisms of inappropriate political control over the activities of judicial bodies and other independent institutions.

However, juridification may have more in common with another meaning of "depoliticization", which has a negative connotation. Depoliticization may well describe the process of erosion of politics through various legal, institutional and structural decisions, "by which politicians try to move to a relationship of indirect rule and/or to convince the demos that they are no longer considered responsible for certain problems".[24] Thus, essential issues of public life may disappear from the spheres of democratic public discussions and direct political responsibility of elected politicians. They can be transferred to professionalized, bureaucratic and exclusive formats.

This paper considers "juridification" as a term similar to this kind of "depoliticization". More precisely, "juridification" describes, in a way, fundamental changes between the political and the legal, while "depoliticization" refers to the consequences of this process.[25]

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[19] Hirschl, supra note 2, 254.
[20] ibid.
[21] ibid, 256.
[22] Matthew Flinders and Jim Buller, 'Depoliticisation: Principles, Tactics and Tools' (2006) 1 British Politics 293, 294.
[23] ibid, 297.
[24] ibid, 295.
[25] Teubner, supra note 1, 10.

2. AMBIVALENCE OF THE CONCEPT OF JURIDIFICATION

Gunter Teubner, when using the concept of juridification in the context of labor law, identified three areas, including legal, sociological and political, through which juridification can be studied.[26] In his study, Teubner emphasizes one of the most important aspects of juridification - the ambivalence of this concept, which is best expressed in its ability to "ensure freedom in parallel to taking it away".[27]

This aspect of juridification is particularly important in the context of "protection of vulnerable groups", as they can benefit from institutionalization and regulation of the state's social obligations.[28] Here it is important to distinguish between, on the one hand, the juridification of individual and collective rights, and on the other hand, the juridification of institutions and political processes. When analyzing juridification in a welfare state, Magnussen and Nielsen provide a necessary insight into the interrelation between social, civil and political citizenship.[29]

The purpose of this paper is not to analyze the issue of juridification in relation to the discourse of the rights. The paper agrees with the idea developed by Magnussen and Nielsen that "juridification of social policy provides individuals with a resource base for action."[30] Taking into consideration this position, it is important to note that the problems of one type of juridification do not necessarily and to the same degree apply to all types of juridification.

In other words, not all forms of juridification can be considered negative for democratic governance and decision-making processes.[31] Magnussen and Banasiak have developed a useful classification of legal and political relations. Based on these four clusters, they propose the following four versions of interrelations, that strengthen or weaken the balance between the law and politics:

The authors suggest that in some areas, such as the health sector, expansion of regulation and individual rights can improve access to information and resources, which in the end of the day, are of critical importance for the democratic process.[32] This type of interrelation is referred to as "political juridification".[33] In this scenario, both politics and law seem equally empowered[34]. Conversely, the authors also propose another

[26] Teubner, supra note 1.
[27] ibid, 9.
[28] Anne-Mette Magnussen and Even Nilssen, 'Juridification and the Construction of Social Citizenship' (2013) 40 Journal of Law and Society 228, 238.
[29] Magnussen and Nilssen, supra note 28.
[30] ibid, 240.
[31] Magnussen and Banasiak, supra note 6.
[32] ibid, 332.
[33] ibid, 330.
[34] ibid.

cluster – "juridification of the political", in which the balance is tipped in favor of the law.[35] This is best expressed in cases, where matters of political importance are reduced to legal regulation, or in other words, "social reality [...] is reduced to legal reality."[36] The authors conclude that "expansion of individual rights may gradually reduce the space, in which collective bodies and institutions can implement policy, and thus lead to depoliticization of public debate".[37] A third version of the interrelation between law and politics can lead to the "politicization of law", which envisages strengthening politics by weakening the law.[38] Although it is quite similar to political instrumentalization, this type of interrelation differs from such form of politicization of the justice sector, in which judicial decisions are made according to political instructions. In case of "politicization of the law", the law itself becomes broader and more general. Consequently, the use of legal instruments varies according to the social and political context and public attitudes.[39] The last interesting direction of the interrelation is called "privatization"[40]. This concept describes a situation, where neither law nor politics play a leading role anymore. There are "other systems of knowledge" that dominate[41], for example, the logic of the market economy equally opposes the classical understanding of the political and the legal and introduces a new system of social organization. Taking into consideration these four types of possible developments, the second cluster of interrelations, which is referred to as "juridification of the political", is the most relevant for the purposes of this paper.

Blichner and Molander also offer interesting classifications. They distinguished five aspects of juridification and focused on the stages of the juridification process.[42] The first aspect is the constitutive element of law that forms the basis of the legal order and formal legalistic framework (constitutive juridification).[43] The second form describes the process of spreading legal regulation to new areas, as well as the increase of regulation of differentiated social relations.[44] The authors highlight an interesting aspect of the process and its dual nature, as sometimes juridification and de-juridification happen at the local or international level at the same time.[45] The next form of juridification is expressed in the application of the law in order to resolve a conflict[46]. This type of

[35] ibid, 332.
[36] Youri Hildebrand, 'Freer markets, more court rulings?' (Utrecht University Repository 2010) 31 <https://dspace.library.uu.nl/handle/1874/44578> [last accessed on 10 February 2023].
[37] Magnussen and Banasiak, supra note 6, 333.
[38] ibid, 335.
[39] ibid.
[40] ibid, 337.
[41] ibid.
[42] Anders Molander and Lars Chr Blichner, 'Mapping Juridification' (2008) 14 European Law Journal 36.
[43] ibid, 39.
[44] ibid, 42.
[45] ibid, 43.
[46] ibid, 44.

juridification can be implemented within, or outside the court system. Another form describes an extension of judicial power, especially when legal norms are vague and require clear interpretation by the court.[47] And finally, the authors describe a general extension of legal thinking, that can replace any other opinion prevailing in the society. The authors describe this phenomenon as follows: "Society develops a legal culture that extends beyond or even replaces other background cultures".[48]

An overview of these clusters also reveals that some forms of juridification are crucial for the establishment of political citizenship and the formation of a proper state apparatus. However, over-expansion of the legal system can be dangerous. It can reduce the complex social reality to a single legal case. Thus, juridification is a complex phenomenon and an ambivalent term, that requires careful consideration.

3. THE SPREAD OF THE JURIDIFICATION TREND

In discussing the spread of juridification, several contributing factors are considered, including "the spread of the rights discourse".[49] Juridification can be used to alleviate political crisis and social tension, as well as to maintain the influence of various power groups. This phenomenon is sometimes explained by deep distrust or alienation between political and social groups, a long history of rivalry between different classes of society, or internal conflicts within the country.[50] For example, juridification can be seen as a way of solving a problem, when there is no longer any entity with sufficient legitimacy to make decisions on fundamental political issues. In such case, increasing legal formalism may be a strategic decision for the purpose of creating a peaceful basis for the coexistence of different social groups.

The trend of juridification is also related to the discourse of economic liberalization[51] and the process of "transition from state governance to market governance".[52] The idea of modern "economic society" produces the dominance of legal paradigms over democracy[53]. While "republicanism" promotes the idea of a collective existence of political society, "liberalism" is formed in the context of individualistic, negative rights.[54]

The spread of the juridification trend can be connected to different reasons at the same

[47] ibid, 45.
[48] ibid, 47.
[49] Hirschl, supra note 2, 254.
[50] ibid, 262.
[51] Hildebrand, supra note 36, 10.
[52] ibid, 13.
[53] Jürgen Habermas, Ciaran Cronin and Pablo De Greiff, The Inclusion of the Other: Studies in Political Theory (Cambridge: MIT 1998) 261.
[54] ibid, 258.

time because they are not necessarily contradictory to each other. Hirschl identifies three power actors who benefit from the expansion of "Judicialization", which is also relevant for juridification process. These actors are: "endangered political elites", "economic elites" and "judicial elites".[55] All these groups have their own interest in expanding the legal discourse. For economic elites, this benefit is manifested in the strengthening of the free market and competition, which is provided by the expansion of the established limits of state intervention.[56] For court elites, this benefit is related to increasing their influence over political and social life.[57] As for the political elites, their benefit lies in maintaining dominance and hegemony, which they achieve by transferring decision-making authority on controversial issues to unelected bodies[58]. This confirms, that the trend of spreading juridification can serve several interests at the same time.

It may sound contradictory, but economic deregulation may lead to increased regulation of political and social life. Hildebrand explains this interrelation between economic deregulation and expanded legal regulation by examining four economic dimensions. The author links this phenomenon to the need for creation of risk reduction institutions in economic systems, where state intervention has been limited[59]. In other words, legal systems are taking on a new role of risk reduction and conflict resolution, which was previously performed by the state.

According to Hildebrand, juridification can be considered as desired or unintended result of two aspects of liberalization, i.e., expansion of competition and commercialization of public sectors in detriment to public interests.[60] Competition, as a direct result of economic liberalization and deregulation, generates new disputes, thus requiring new legal forms of dispute resolution. As for the second aspect – commercialization, here the power of intervention is transferred from the state to private, profit-oriented organizations, which, in case of conflict, increases the risk of putting the interests of consumers above the public interests.

As discussed above, the dominant discourse of economic deregulation and the concept of a small state play an important role in the expansion of juridification. The issues of economic liberalization and juridification supported by such policies may prove to be particularly sensitive in countries such as Georgia, as they seek to comply with the logic of international financial aid schemes[61]. In this process, they are required to implement the policy of deregulation.[62]

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[55] Ran Hirschl, Towards Juristocracy: The Origins and Consequences of the New Constitutionalism (Pbk ed, Cambridge, Mass; Harvard University Press 2007) 12.

[56] ibid.

[57] ibid.

[58] ibid.

[59] Hildebrand, supra note 36, 29.

[60] ibid, 267-268.

[61] ibid, 20.

[62] James Tully, 'The Imperialism of Modern Constitutional Democracy' in Martin Loughlin and Neil

4. JURIDIFICATION AND LIBERAL LEGALISM

As mentioned above, the juridification trend is dictated by the growing competition and the idea of a limited state. The important question here is: What might economic deregulation mean for the legal system and how does it affect the role of law in modern society? The legal system is not isolated from other areas of statehood. Thus, the logic of legal development, to a large extent, reflects the system of other structures, including the economy. The law affects other structures and is itself influenced by them. Cooper describes juridification as "the increasingly central role of the law in structuring social, political, cultural, and economic life."[63]

In this context, the rule of law is presented as a necessary precondition for creating a predictable and favorable legal environment for investments and economic growth.[64] According to Kelemen liberal, constitutional democracies operate under the concept of the rule of law because they respect human rights and limit political power to the discourse of individual rights.[65] However, an important aspect of liberal democracy that may not be sufficiently represented in this definition, is the idea of a limited state. Liberal democracy promotes individual autonomy and less intervention of a state in people's lives.[66] This is significantly related to the concept of liberal legalism. As Levinson noted, "liberal legalism views the rule of law as a means of resolving the inevitable conflicts between atomized individuals living in a liberal society."[67]

This is a necessary insight because it highlights how deeply rooted social conflicts are in the concept of a limited state, which no longer plays a key role and transfers its functions to the private sphere. According to this logic, a limited state, in favor of a market economy, becomes an essentially conflicting form of organization of society. It is based on the logic of competition. Thus, it still produces conflicts, disputes, and more conflicts because it reduces the chances of social and political consensus.

It is interesting to analyze how such a conflicting system achieves stability and what role juridification and liberal legalism have in this process. Describing the concept of "juridification," Teubner says that "juridification is [...] the expropriation of a conflict."[68] This definition brings a key point to the discussion. By casting away politics, juridification limits the possibilities of a fundamental transformation of social life.

Walker (eds), The Paradox of Constitutionalism: Constituent Power and Constitutional Form (Oxford University Press 2008) 316.

[63] Cooper, supra note 9, 507.

[64] Martin Loughlin, 'The Apotheosis of the Rule of Law' (2018) 89 The Political Quarterly 659, 665.

[65] Kelemen, supra note 3, 64.

[66] Wilfried Hinsch, 'Global Distributive Justice' [2001] Global Distributive Justice 22, 60.

[67] Sanford Levinson, 'Escaping Liberalism: Easier Said than Done' (1983) 96 Harvard Law Review 1466, 1467.

[68] Teubner, supra note 1, 8.

Deep-rooted social conflicts, caused by structural reasons, are limited and defined as individual cases, which must also be individually resolved through formal, legal approaches. At this point, there is no room left for broad public deliberation. It is in the interest of this dominant system to reduce problems to individual cases. As Teubner states, "[juridification] defaces social conflicts, reduces them to legal cases, and thus excludes the possibility of an adequate, future-oriented, socially useful solution."[69]

This can be explained by the assumption that the law is, by its very nature, individualistic. Individualism is an important concept for this discussion because it can be "best explained by the triumph of a market society, that favors the individual both politically and economically."[70] Relevant legal structures use this concept in their own way and create legal formalities that leave no space for collective, democratic determination. Or as Teubner points out, the repressive nature of juridification tends to depoliticize social conflicts."[71]

The form of reducing conflicts to legal disputes is largely related to the idea of procedural justice. As Hirschl puts it, "the expansion of legalistic discourse and procedures must reflect the widespread practice of translating fundamental justice into procedural justice."[72] In this sense, the role of the law is fragmented and not comprehensive. Procedural fairness is undoubtedly important, but it can only be fair if the litigants are otherwise equal. Otherwise, it may create justice only in legal disputes, courtrooms and dispute resolution contexts, but substantial inequalities and differences will persist. This fragmented view of the law hinders the radical transformation of the system. This demonstrates how juridification helps depoliticize, thus becoming a tool for achieving stability in a conflictual form of social organization.

As noted here, although the role of judicial authorities and their level of involvement increases in the case of juridification, it is still more related to procedural justice than substantive issues.[73] Therefore, such engagement cannot directly translate into the strengthening of democracy and fundamental human rights. Moreover, juridification can be used to shift attention from systemic problems to individual legal disputes.

III. THE IMPACT OF JURIDIFICATION ON GEORGIAN JUSTICE

The recent experience of Georgia reveals the special role of legislative regulation and the strong narrative of "depoliticization" in justice sector reforms. Based on the concepts discussed in the previous chapter, this chapter aims to discuss to what extent

[69] ibid.
[70] Trägårdh and Oñati International Institute for the Sociology of Law, supra note 7, 43.
[71] Teubner, supra note 1, 9.
[72] Hirschl, supra note 2, 255.
[73] ibid.

the constitutional reform of 2017-2018 has strengthened juridification in the justice sector of Georgia and what impact these reforms may have on changing the balance between the political and the legal. To achieve this goal, the following parts of the paper analyze the sixth chapter of the Constitution of Georgia, which regulates issues related to the justice sector, including the judicial and prosecutorial systems.[74]

1. A COMPLEX CONTEXT AND A STRONG DISCOURSE OF DEPOLITICIZATION

After 1995, when the Constitution of Georgia defined the justice system, the institutional framework regulating this sphere was fundamentally changed several times. At different times, the country faced different challenges: systemic corruption and bribery;[75] weak legal and institutional arrangement of the justice sector;[76] total control of the judiciary by the country's political leadership and executive power;[77] disproportionately stringent and inhumane criminal justice system and sanctions;[78] lack of independence of justice bodies and political instrumentalization.[79] The reformist steps taken in response to these challenges have had direct, indirect and, quite often, controversial consequences for both the judiciary and the general democratic environment in the country.

For example, the fight against "endemic corruption" in the judicial system was successful.[80] However, the highly problematic legal and political mechanisms used for this purpose created new challenges in the system.[81] The dismissal of acting judges and appointment of new judges created ground for their manipulation and strengthening of the political vertical over the court. Later, the new government's fragmented vision regarding justice system reform, inconsistent political will, and intent to instrumentalize

[74] Chapter 6, Constitution of Georgia <https://www.matsne.gov.ge/ka/document/view/30346?publication=36> [last accessed on 10 February 2023].

[75] Human Rights Education and Monitoring Center (EMC), Georgian Young Lawyers' Association and Transparency International - Georgia, "Analysis of the judicial liability system" (2014) 9 <http://coalition.ge/files/analysis_of_the_judicial_liability_system_ge.pdf> (in Georgian) [last accessed on 10 February 2023].

[76] Coalition for an Independent and Transparent Judiciary, "Justice System in Georgia" (2012) 33-34 <http://www.coalition.ge/index.php?article_id=55&clang=0> (in Georgian) [last accessed on 10 February 2023].

[77] Thomas Hammarberg, 'Georgia in Transition' (2013) 9 <https://www.gov.ge/files/38298_38298_595238_georgia_in_transition-hammarberg1.pdf> [last accessed on 10 February 2023].

[78] ibid, 11.

[79] Human Rights Education and Monitoring Center (EMC), "The Politics of Invisible Power" (2015) 4-5 <https://socialjustice.org.ge/ka/products/ukhilavi-dzalauflebis-politika-kvlevis-mokle-mimokhilva> (in Georgian) [last accessed on 10 February 2023].

[80] Hammarberg, supra note 77, 5.

[81] Human Rights Education and Monitoring Center (EMC), Georgian Young Lawyers' Association and Transparency International – Georgia, supra note 75, 10.

the system[82] resulted in the reappointment and legitimization of judges whose integrity was negatively assessed by non-governmental organizations.[83]

Reforms of the justice sector were influenced by various subjective and objective political, social and ideological factors operating at different times. One of the interesting features of these reforms was the change in the interrelation between the political and legal dimensions. Over a certain period of time, the involvement of politics and the political vertical in the justice sector has intensified. This was evident even at the legislative level[84]. Later, the influence of organized politics on the justice sector was formally reduced. However, this did not cause the actual political influence to disappear.[85]

The extremely negative experience of consolidated political power, which undermines the institutional autonomy of independent bodies, created a solid basis for the retreat of the political and the advancement of the legal as a more legitimate system of organizing state institutions in Georgia. Such experience has contributed to a powerful discourse of "depoliticization" and the discussions have largely been dominated by the narrative of juridification.[86]

In 2017-2018 Georgia carried out a constitutional reform, which significantly changed the constitutional arrangement of the justice sector, institutional order and strengthened the narrative of "depoliticization". This paper does not aim to assess the benefits of the constitutional system, chosen for the organization of the justice sector of Georgia. Nor is the purpose of this paper to criticize the idea of legal reforms in general. This is a complex issue, especially due to the dual nature of juridification, which at different times may have different results, positive as well as negative.[87] Instead, this paper attempts to analyze the logic of the 2017-2018 constitutional reform, the impact of juridification on this process, and describe the change in the balance between the political and the legal in the justice sector.

[82] Coalition for an Independent and Transparent Judiciary, supra note 12, 10.

[83] Coalition for an independent and transparent judiciary, "The coalition negatively assesses the processes ongoing in the court" <http://www.coalition.ge/index.php?article_id=151&clang=0> (in Georgian) [last accessed on 10 February 2023].

[84] Human Rights Education and Monitoring Center, supra note 79, 10; Coalition for an Independent and Transparent Judiciary, supra note 76, 13.

[85] Human Rights Education and Monitoring Center, supra note 13, 11-12; Also, Georgian Young Lawyers' Association, "Reform of the Justice System in Georgia, 2013-2021", (2021) <https://gyla.ge/files/news/ფონდი/2021/GetFileAttachment-4.pdf> (in Georgian) [last accessed on 10 February 2023].

[86] ibid.

[87] Magnussen and Banasiak, supra note 6, 330.

2. THE IMPACT OF JURIDIFICATION ON THE CONSTITUTIONAL REFORM

This paper claims, that the constitutional reform of 2017-2018 strengthened the juridification trends in the justice sector of Georgia. Once again, juridification can be defined as: the "distribution of more power, for example to judicial institutions or dissemination of the methods of legal reasoning".[88] This chapter analyzes the constitutional changes in the justice sector and shows the dominance of legalistic systems at the expense of replacing political ones.

Relevant to this discussion is Hirschl's question – "What is the political?"[89] In this regard, his own answer is noteworthy, emphasizing the difference between the political and the legal by referring to "deep moral and political dilemmas"[90], i.e., indicating to such dilemmas, that ultimately fall under the political and not the legal sphere. Such systems and institutions that make up the state and the organized body politic, should be the subject of political deliberation. The interrelation between law and politics, more specifically, the balance between the legal and the political, is important in every way, because it affects the nature of organization and functioning of state institutions, and social and political life.[91]

The justice sector, by its very nature, is the kind of system in which the dominance of the "political" is the least acceptable. This is related to the fundamental reservation that "the judiciary is neither functionally a pluralistic representative chamber, nor structurally a party government."[92] The justice sector, including the judiciary and prosecutor's office, should be distanced from politics to ensure independent and impartial administration of justice. The idea of independence primarily refers to the "concrete cases" under consideration[93]. As for the establishment and formation of the justice sector, this is less the private affair of specific knowledge systems or bureaucratic institutions. The process of formation of state institutions largely determines the degree of their legitimacy and trust in the eyes of the public.

3. GENERAL PROSECUTOR'S OFFICE OF GEORGIA

The title of Chapter 6 of the Constitution of Georgia is "Judiciary and Prosecutor's Office". It is important to note that today the prosecutor's office, together with the judicial system, is included in one chapter of the Constitution, which emphasizes the

[88] ibid, 332.
[89] Hirschl, supra note 2, 257.
[90] ibid.
[91] ibid, 256.
[92] Pierre Rosanvallon, Democratic Legitimacy: Impartiality, Reflexivity, Proximity (Princeton University Press 2011) 160.
[93] Martin Shapiro, 'Judicial Independence: New Challenges in Established Nations' (2013) 20 Indiana Journal of Global Legal Studies 253, 268.

important transformation of the constitutional logic. From 2008 to 2018, the Prosecutor's Office was part of the Ministry of Justice. Naturally, such institutional framework contained a number of risks, including the possibility of political instrumentalization of criminal prosecution.[94] This does not entail only analytical reasoning or hypothetical risk. The Prosecutor's Office was an extremely politicized institution that was involved in a number of high-profile political cases.[95] Criticism of such a system has sparked a discussion about a new and appropriate place for the Prosecutor's Office in the constitutional system. This led to a series of prosecutorial reforms in 2013, 2015 and 2017-2018. Despite these changes, the institutional place and arrangement of the Prosecutor's Office remained a matter of debate.[96]

The 2017-2018 constitutional reform created a new constitutional framework, according to which the Prosecutor's Office is no longer part of the government cabinet. It is headed by the General Prosecutor, who is nominated by the Prosecutorial Council and elected by the full majority of the Parliament.[97]

The Constitution defined the accountability of the Prosecutor's Office to the Parliament in the form of submitting annual reports[98]. Also, the impeachment mechanism was introduced as the only way to remove the General Prosecutor from the office[99]. According to the Constitution of Georgia, impeachment can be used only in case of committing a crime or violation of the Constitution[100]. The Constitution left the regulation of other issues to the organic law.[101]

The new constitutional framework of the prosecution system consists of three important aspects, that are crucial when considering the degree of juridification in constitutional reform:

The first concerns the new constitutional place of the Prosecutor's Office. In the past, the Prosecutor's Office was a part of the Cabinet of the Government, and a corresponding provision was included in the same chapter of the Constitution, that regulated the work of the Cabinet of Ministers.[102] From 2018, at the level of the Constitution, the Prosecutor's Office is considered together with the judicial system[103]. This change demonstrates the

[94] Human Rights Education and Monitoring Center, supra note 13, 9.
[95] Hammarberg, supra note 77, 14.
[96] Human Rights Education and Monitoring Center, supra note 13, 9-10.
[97] Article 65, paragraph 2, Constitution of Georgia <https://www.matsne.gov.ge/ka/document/view/30346?publication=36> [last accessed on 10 February 2023].
[98] ibid, article 65, paragraph 4.
[99] ibid, article 48, paragraph 1.
[100] ibid.
[101] ibid, article 65, paragraph 5.
[102] Article 814, Constitution of Georgia (edition valid until 2017) <https://www.matsne.gov.ge/ka/document/view/30346?publication=33> [last accessed on 10 February 2023].
[103] Article 65, Constitution of Georgia <https://www.matsne.gov.ge/ka/document/view/30346?

logic of the reform, which aimed at the separation of the Prosecutor's Office from the government and its placement alongside the justice system. Taken separately, this change could be considered as a legitimate goal of giving more autonomy to the Prosecutor's Office, which, according to the authors of the reform, could be achieved by distancing it from the Cabinet of the Government. However, below will be presented reasoning, that points to the persisting problem of political autonomy of the Prosecutor's Office in the same constitutional framework;

The second issue concerns reference to the collegial body - the Prosecutorial Council - in the text of the Constitution and its consideration as a guarantor of the depoliticized selection of the Prosecutor General. This change also indicates the intention of increasing the role of collegial bodies instead of political bodies. Before the constitutional reform of 2017-2018 selection and nomination of the Prosecutor General was the competence of the Minister of Justice.[104] After a month of consultations with lawyers, the Minister had the right to select and nominate at least three possible candidates.[105] Later, these candidates were reviewed by the Prosecutorial Council and a list of selected candidates was drawn up, from which the final candidate was supported by the Cabinet of Ministers and elected by the Parliament.[106] After the 2017-2018 constitutional amendments, the Minister of Justice no longer participates in the process of selection of candidates. The selection and nomination of a candidate became the exclusive authority of the Prosecutorial Council. According to the new legal framework, it is the Prosecutorial Council that initiates the consultations to select candidates.[107] The Cabinet of Ministers no longer participates in the process and the nominated candidate is directly presented to the Parliament for election. This change, at first glance, may seem to exclude excessive participation of the executive power, and in this way, strengthen the principle of depoliticized selection. However, even in this case, the contradictions that remained even after this reform and that prevented the institutional independence of the Prosecutor's Office should be taken into account. In this discussion, the manner of formation of the Prosecutorial Council as a body with the central role in the selection is particularly noteworthy. The non-prosecutor members of the Prosecutorial Council are elected by the Parliament with the majority of the full composition, and the degree of political influence in this process is clear.[108]

The third issue is related to the election of the Prosecutor General in the Parliament by the majority of the full composition. This is the most important aspect in this discussion because it can show more clearly the logic of the constitutional reform. The new

publication=36> [last accessed on 10 February 2023].

[104] Article 91, Law of Georgia on Prosecutor's Office (annulled from December 16, 2018) <https://www.matsne.gov.ge/ka/document/view/19090?publication=19> [last accessed on 10 February 2023].

[105] ibid, article 91, paragraph 1.

[106] ibid.

[107] ibid, article 16, paragraph 4.

[108] Article 19, paragraph 2, the Organic Law of Georgia on Prosecutor's Office <https://matsne.gov.ge/ka/document/view/4382740?publication=9> [last accessed on 10 February 2023].

constitutional framework preserved the previously existing balance of power between political groups, as it retained the tradition of election of the General Prosecutor by a majority vote of the Parliament.[109] Although depoliticization of the system was defined as the key argument of the constitutional reform[110], the 2017-2018 reform maintained dominance of the parliamentary majority and failed to introduce a new constitutional mechanism to promote broad political participation in the process, which would have "insured the system against the appointment of a candidate on a political basis"[111]. The argument mentioned above should be taken into account in the discussion here, namely, that the influence of the parliamentary majority on the formation of the Prosecutorial Council itself, which presents the selected candidate to the Parliament, is high.

4. THE SUPREME COURT OF GEORGIA

Another example of juridification is the change in the way judges of the Supreme Court are nominated. Before the constitutional amendments, the candidates for the Supreme Court judges were nominated by the President and elected by the Parliament. In this case too, based on the argument of depoliticization, the Constitutional Commission presented a new version of the process of selection of judges. According to the new constitutional framework, candidates for the Supreme Court justices are nominated by the Supreme Council of Justice and elected by the Parliament by a majority of the full composition[112]. As a result of the constitutional reform, judges are appointed for life instead of a 10-year term.

Before the constitutional changes of 2018, the Supreme Court was the only court in the system of common courts, which was formed by a different procedure, based on the participation of the President and the Parliament. Unlike the Supreme Court, the judges of the courts of the first and second instances (except for some differences in the transitional period) were appointed for life by the High Council of Justice.[113]

The model operating in the lower instances provided to the Constitutional Commission and the Parliament as a whole with sufficient information to evaluate the system dominated by the Supreme Council of Justice, and accordingly, to make a decision on the further expansion of its mandate. Despite the strong opposition to the transfer of

[109] Article 91, paragraph 4, Law of Georgia on Prosecutor's Office (annulled from December 16, 2018) <https://www.matsne.gov.ge/ka/document/view/19090?publication=19> [last accessed on 10 February 2023].
[110] Human Rights Education and Monitoring Center, supra note 13, 12.
[111] ibid, 13.
[112] Article 61, paragraph 2, Constitution of Georgia <https://www.matsne.gov.ge/ka/document/view/30346?publication=36> [last accessed on 10 February 2023].
[113] Article 36, paragraph 4, Organic Law of Georgia on Common Courts <https://www.matsne.gov.ge/ka/document/view/90676?publication=47> [last accessed on 10 February 2023].

the right to nominate candidates for membership of the Supreme Court to the Supreme Council of Justice[114], the argument of "depoliticization" won in this case as well.

Systemic and fundamental flaws in the context of the selection and appointment of judges in lower courts were broadly documented and discussed by observers[115]. An opinion was expressed that the Supreme Council of Justice could not ensure the selection of candidates in a transparent, impartial and objective manner, and the Council's decisions did not contain proper reasoning.[116] According to NGOs, some judges were promoted without sufficient justification, while others were dismissed from the judiciary, allegedly for insubordination[117]. Their monitoring groups emphasized the power of a group of influential judges operating in the Georgian judicial system[118]. Although similar opinion already existed during the constitutional reform, the reform strengthened the role of the widely criticized High Council of Justice.

As with the election of the Prosecutor General, the constitutional reform preserved the sole influence of the parliamentary majority in regard to judges as well[119]. On the one hand, the exclusive right to nominate candidates was transferred to the Supreme Council of Justice, and on the other hand, the power to make the final decision was retained by the parliamentary majority, without the need to reach a consensus with the political opposition. The only balancing factor, which is important to note in the context of the 2017-2018 reform, is related to the increase of the number of votes required for the election of non-judge members of the Supreme Council of Justice by the Parliament. Differently from the election of non-prosecutor members of the Prosecutorial Council, where the dominance of the parliamentary majority is evident, the non-judge members of the Supreme Council of Justice are elected by the Parliament with a majority of at least three-fifths of the full composition[120]. This increases the role of the parliamentary minority in the process of formation of the Supreme Council of Justice, although the role of the minority remains neglected in the case of the selection of judges of the Supreme Court and the Prosecutor General.

The examples discussed in this chapter reveal the connection between the changes made in the justice sector during the constitutional reform of 2017-2018 and the trend

[114] Coalition for an Independent and Transparent Judiciary, "Opinion of the Coalition on the new draft of the Constitution of Georgia" (2017) <http://www.coalition.ge/index.php?article_id=153&clang=1> (in Georgian) [last accessed on 10 February 2023].

[115] Coalition for an Independent and Transparent Judiciary, supra note 12, 40.

[116] Georgian Young Lawyers' Association and Transparency International - Georgia, "Three-year summary report of the monitoring of the High Council of Justice (2012-2014)", (2015) 8 <https://gyla.ge/files/news/იუსტიციის%20უმაღლესი%20საბჭოს%20მონიტორინგის%20სამწლიანი%20ანგარიში.pdf> (in Georgian) [last accessed on 10 February 2023]; Georgian Young Lawyers' Association and Transparency International - Georgia, supra note 13, 24.

[117] Coalition for an Independent and Transparent Judiciary, supra note 12, 13.

[118] ibid.

[119] Article 61, paragraph 2, Constitution of Georgia <https://www.matsne.gov.ge/ka/document/view/30346?publication=36> [last accessed on 10 February 2023].

[120] ibid, Article 64, paragraph 2.

of juridification. The next part of the paper will analyze what risks may be associated with such a trend in the country.

5. WHAT CHALLENGES ARE ASSOCIATED WITH JURIDIFICATION IN GEORGIA?

Juridification is associated with certain limitations and problems that must be taken into account. The failure of legislative regulation is broadly viewed by Teubner as a natural consequence of the complex nature of the juridification process[121]. This process is accompanied by weaknesses and problems, characteristic to it, and there is an opinion that "the biggest problem with juridification is that it weakens the democratic process."[122] This part of the study analyzes possible contradictory results of the 2017-2018 constitutional reform in Georgia. In particular, in the present paper, we try to analyze what challenges can be created as a result of focusing on legal formalism and transferring significant power to collegial, non-elected bodies without seeking consensus among political forces in decision-making.

The reforms described above subordinated important issues to formalized and professionalized systems, and in this way, weakened political responsibility for important processes. Tushnet discusses an important aspect of interrelation between the political power and judicial bodies, noting that the delegation of power from elected government officials to unelected bodies (i.e., "judicial elites") "may be particularly attractive when political elites believe that they share the views of judicial elites on this issue".[123]

The juridification trend enhanced by the constitutional reform has had significant side effects that need to be addressed. In case of the Georgian justice system, weak democratic legitimacy of the justice sector and depoliticization of systemic problems can be considered as such side effects. Both issues will be discussed below.

6. WEAK DEMOCRATIC LEGITIMACY

In a broad sense, legitimacy can be defined as "the right to rule and recognition of this right by the ruled."[124] Legitimacy cannot be reduced only to legal rules and norms, more precisely, "legality is a visible element of legitimacy, although it cannot exhaust it."[125]

[121] Teubner, supra note 1, 24.

[122] Fergal Davis, 'The Human Rights Act and Juridification: Saving Democracy from Law' (2010) 30 Politics 91, 95.

[123] Mark Tushnet, 'Political Power and Judicial Power: Some Observations on Their Relation' (2006) 75 Fordham Law Review 755, 761.

[124] Mike Hough and Stefano Maffei, 'Trust in Justice: Thinking about Legitimacy' (2013) 12 Criminology in Europe: Newsletter of the European Society of Criminology 4, 5.

[125] David Beetham, The Legitimation of Power (Basingstoke: Macmillan Education UK 1991) 4.

The institutional legitimacy of the justice sector can be evaluated by "normative" and "empirical", i.e., objective and subjective criteria.[126] From a normative point of view, the justice system can be considered legitimate if it corresponds to the objective criteria defined in advance.[127] However, this is only one part of legitimacy, as it does not measure actual or "perceived legitimacy,"[128] which represents the extent to which people recognize the legitimacy of power in real life.

Among several aspects of institutional legitimacy are procedural justice and fair treatment, effectiveness, "moral authority," or the belief, that state institutions respect and reinforce the same moral standards as society.[129] There is an opinion, that there is a significant correlation between procedural justice and the legitimacy of state institutions.[130] A particularly important aspect of the legitimacy of courts is the appointment of judges.[131] While discussing the connection between legitimacy and direct election of judges, Rosanvallon considered it necessary to rethink such connection in regard to "institutions of justice".[132] In his opinion, for the purposes of legitimacy, a "certain unanimity" between political parties should be ensured in regard to appointment of judges.[133]

For the purposes of this paper, it is important to assess what impact did juridification, encouraged by the 2017-2018 reforms can have on the legitimacy of the justice sector, which does not have an "autonomous source of legitimacy". [134]Again, it should be noted that legitimacy is not limited to "legal validity"[135] or to comply with pre-existing legal norms.

As mentioned in the previous chapter, the constitutional reform strengthened the legal elements and increased the special role of the non-elective collegial bodies in the process of appointing the judges of the Supreme Court and the Prosecutor General. The changes limited the role and discretion of political subjects. With the legitimate argument of depoliticizing the justice system, legal procedures replaced political processes, although, as stated previously, constitutional reform, in both cases, preserved the dominance of the parliamentary majority over the final decision-making process.

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126 Hough and Maffei, supra note 124, 5.
127 Mike Hough and others, 'Procedural Justice, Trust, and Institutional Legitimacy' (2010) 4 Policing: Journal of Policy and Practice 203, 204.
128 ibid.
129 ibid, 205.
130 Hough and Maffei, supra note 124, 7.
131 Rosanvallon, supra note 92, 155.
132 ibid, 161.
133 ibid, 163.
134 Trägårdh and Oñati International Institute for the Sociology of Law, supra note 7, 47.
135 Beetham, supra note 125, 4.

How does this relate to the issue of legitimacy more broadly? Naturally, there is not just one legitimate way of shaping justice institutions, or just one kind of instruction as a response to the "independence-accountability paradox" of judicial institutions.[136]

As mentioned above, "unanimity" or political consensus is a crucial aspect of the legitimacy of judicial institutions. This idea is shared by Kelemen, who emphasizes the importance of the selection procedure for the democratic legitimacy of courts, noting that "higher courts are not created to represent the current majority (that is the task of the parliament)." [137]

In contrast, the Supreme Court judges and the Prosecutor General are elected by the Parliament by a full majority. This strengthens the concentration of power in the hands of the ruling majority. In this way, the Constitution paves the way for one-party appointments and rejects the idea of consensus necessary for legitimacy. As Menabde points out, candidates can gain the necessary trust through "political agreement, not mathematical rationing of criteria," which was completely ignored during the constitutional reform.[138]

It is very important to find a proper balance between the law and politics in the process of formation of judicial bodies. "Legal Standardization" may swallow democracy and lead to "technocracy".[139] A proper balance between law and politics should ensure, that the bureaucratization of important aspects of public life does not weaken the idea of political participation[140]. A democratic system must first of all be seen as a system, that enjoys collective trust and legitimacy because it represents all groups in society. Consensus-oriented decision-making can be considered a crucial element of such system. This issue is even more relevant in the modern era, when the "distance between institutions and the population" is more evident and governance is becoming more technocratic.[141] Under these conditions, juridification tends to further reduce the role of consensus, as it itself feeds on conflicting interests. Therefore, this approach reduces "the number of people, sitting at the negotiating table for the purpose of reaching of a consensual decision".[142]

The 2017-2018 constitutional reform left the election to the most important positions in the judiciary and Prosecutor's Office in the hands of the parliamentary majority and ignored the idea of multilateral political consensus.

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[136] Shapiro, supra note 93, 264.
[137] Kelemen, supra note 3, 65.
[138] Vakhtang Menabde, 'Demise of Politics - Selection of the Composition of the Supreme Court on the Existing Notions of Status Quo and Prospects of the Reform' (2015) 8 European Constitutional Law Review 46, 66.
[139] ibid, 68.
[140] Magnussen and Banasiak, supra note 6, 333.
[141] Loughlin, supra note 18, 372.
[142] Kelemen, supra note 3, 67.

7. DEPOLITICIZATION OF SYSTEMIC PROBLEMS

In some jurisdictions, legislative reforms not only fail to achieve their goals, but also create new threats that require careful consideration. Teubner called this phenomenon a "legal irritants"[143] and emphasized how legal initiatives lead to autonomous or unintended processes in the system, in which they are introduced. As David Levi-Faur points out, "subsystems have the capacity to be cognitively open but normatively closed."[144] These considerations may explain why seemingly positive legal reforms (for example, the institutional separation of political and judicial power) can cause contradictory results in specific contexts.

This is particularly problematic in complex political contexts, where political power is concentrated in the hands of a single political group and democratic institutions remain weak. An important aspect of such a regime is the manipulation with legislative changes to disguise the concentration of political power and the absence of democratic accountability. The authorities can implement various positively evaluated legislative reforms without any real motivation to achieve substantial changes in reality.

In case of Georgia, depoliticization of political issues and reduction of political accountability of the ruling elite can be considered as another result of juridification. As a result of the constitutional reform formation of the justice sector has become more bureaucratic, and thus a legal, rather than a political issue. The constitutional framework blurred the boundaries of political responsibility and made these issues largely a matter of professional and legal discussion.

The intrusion of the legal into politics is largely the result of the strategic decision of political actors, who in this way can deliberately create a "labyrinth" to avoid political responsibility[145]. To some extent, Tushnet describes a similar approach in regard to the interrelation between the court and elected officials.[146] Tushnet notes that sometimes "isolation of a particular issue from politics" is a solution for political leaders who want to avoid political unrest[147]. Hirschl argues that the tendency to transfer political issues from representative bodies to non-elected institutions is due to the desire of elite groups to preserve the hegemonic order from periodic changes that popular, democratic processes lead to.[148]

As a result of analyzing the constitutional reform of 2017-2018 from this perspective, it can be noted that the political burden of the ruling party has been alleviated to some

[143] Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergencies' (1998) 61 The Modern Law Review 11, 12.
[144] Levi-Faur, supra note 5, 460.
[145] Hirschl, supra note 2, 269.
[146] Tushnet, supra note 123.
[147] ibid, 760.
[148] Hirschl, supra note 55, 16.

extent. This is especially noticeable in case of the Prosecutor's Office, which is no longer part of the Cabinet of the government. Combining the constitutional provisions on the Prosecutor's Office and the court in one chapter may indicate a political intention of separating the Prosecutor's Office from institutionalized politics in order to create a "risk management defensive technique"[149] in case of public dissatisfaction with the prosecutor's system.

As mentioned above, the problem of politicization did not really disappear by separating the Prosecutor's Office from the Cabinet or by introducing new ways of selecting judges and the Prosecutor General. The lack of political consensus and concentration of power in the hands of the ruling majority, as the main source of the problem, is still present. Therefore, the separation of the Prosecutor's Office and the Cabinet or strengthening of professional entities instead of political ones in the process of selection of judges and the Prosecutor General cannot be considered as an effective mechanism for ensuring the political neutrality of the justice system.

The interest of the political group in power towards such an institutional arrangement can be explained by several reasons: based on the new constitutional design, the political authorities can no longer be formally and directly identified with the problems arising in the justice system. Hence, the government can avoid significant political upheaval or paying high political costs by distancing these issues from politics. The weakening of political accountability is largely the result of the process of juridification in the justice sector. As Hirschl argues, "handing over of controversial political "hot potato" to justice sector is a convenient way for politicians, who are unwilling or unable to resolve public disputes in the political sphere."[150] Changes in the justice sector can be seen as an attempt by politicians to avoid such issues.

By "depoliticizing" political issues, the legal narrative reduces not only the political responsibility of the ruling elite, but also the possibility of collective reflection on the part of the society. Issues of organizing the justice sector are transferred to specific knowledge systems and subjected to bureaucratic procedures. Discussions on these issues become less accessible to the public, as the process involves formalized procedures, criteria, legal details and complex professional justifications. More importantly, if things go wrong, politicians can easily distance themselves and insist that specific issues are within the responsibility of non-elected institutions. In this way, essentially political and institutional problems can be positioned as simple, individual flaws that do not represent a systemic political challenge. As discussed in the second chapter, with such a presentation of the situation, collective political activity is significantly neutralized, which also makes it difficult to "form political units with common goals."[151]

[149] Flinders and Buller, supra note 22, 297.
[150] Hirschl, supra note 2, 17.
[151] Loughlin, supra note 18, 373.

IV. CONCLUSION

The aim of this paper was to describe and evaluate the juridification trends in the justice sector of Georgia. For this purpose, the constitutional reform of 2017-2018 was analyzed, which significantly changed the balance between the legal and the political and shifted crucial issues from politics to legal and professional spheres.

The constitutional reform separated the Prosecutor's Office from the Cabinet of the government, while in the process of electing Supreme Court judges and the General Prosecutor, political entities were replaced by collegial bodies. In this way, the powers of the non-elected bodies, i.e., the Supreme Council of Justice and the Prosecutor's Council were increased. Instead of political entities, the selection and nomination of candidates became the exclusive authority of collegial bodies, through the use of formal legal procedures and criteria.

As noted in the research, the new interrelation between the political and the legal, resulting in the increase of formal legal procedures and regulation, as well as the transfer of the burden from political subjects to non-elected bodies, and disregarding of the idea of political consensus is not only unsuccessful for achieving the primary goal of depoliticizing justice, but also generates significant contradictions and side effects.

The new constitutional design could not identify the main reason for the politicization of the justice sector, which lies in the logic of the organization of political power in Georgia, and thus, could not give an answer to it. Although significant authority in the formation of judicial bodies was transferred to collegial, professional bodies, the authority of reaching of decision regarding nominated candidates remained in the hands of the parliamentary majority. The constitutional reform, which ostensibly aimed to ensure depoliticization of the judiciary, actually disregarded this idea by preserving the sole power of the majority.

Constitutional reform chose to opt towards juridification instead of a consensus-based system. Juridification is a tendency characteristic to the dominant system of liberal legalism, where important public issues are privatized by bureaucratic institutions and formal procedures. Important public issues are reduced to legal cases, systemic problems are translated into individual responsibilities, and the political field is largely depoliticized. As mentioned, juridification is a means of creating a "labyrinth" to avoid political responsibility[152]. The constitutional reform of 2017-2018 showed the intention of the creation of exactly such labyrinths through juridification.

Despite numerous contradictory outcomes of juridification, the transition from regulation to deregulation cannot be seen as an appropriate and worthwhile solution. Deregulation is still based on the primacy of competition and ignores the important

[152] Hirschl, supra note 2, 269.

idea of law, which ensures "coordinating with each other the sectoral rationality of different self-regulatory systems".[153] It is worth considering here the historical role of juridification in limiting majoritarianism after the Second World War.[154] It should also be noted, that in the past and in the present, non-democratic regimes, in the name of strengthening democracy, opted towards marginalization of the law, individual rights and restrictions on political power. Such regimes claim to represent the real people and fight against elite politics, when in reality they weaken democracy and destroy the basic democratic framework[155]. With this in mind, questioning the nature of juridification should not be seen as an automatic rejection of the progressive idea behind the law.

This paper does not have the ambition to propose specific alternatives to juridification, although it does attempt to present the faint outlines of future research in this direction. For example, instead of radical deregulation, more subtle forms of regulation need to be explored.[156] In an environment of highly differentiated and conflicting interests, the function of legal regulation should be establishing of basic framework for reaching a multilateral agreement, rather than dictating the agreement itself. The law must fulfill its crucial function and ensure fair conditions of negotiations by imposing necessary restrictions on the dominant and powerful parties. In case of the justice sector, such regulation may facilitate consensus-based political deliberation by increasing the role of different social and political groups. In this case, the legislative framework will not be a substitute for policy, but rather an enhancer of actual policy.

[153] Teubner, supra note 1, 32.
[154] Trägårdh and Oñati International Institute for the Sociology of Law, supra note 7, 50.
[155] David Landau, 'Abusive Constitutionalism' (2013) 47 U.C. Davis Law Review 189, 191; David Prendergast, 'The Judicial Role in Protecting Democracy from Populism' (2019) 20 German Law Journal 245, 246.
[156] Teubner, supra note 1, 34.

Davit Abesadze*

RECOGNITION OF THE CONTENT OF THE NORM AS UNCONSTITUTIONAL BY THE CONSTITUTIONAL COURT OF GEORGIA – THEORETICAL OBSERVATIONS AND PRACTICAL CHALLENGES

"*It is always the application of a law,*
rather than the law itself, that is before us".

ABSTRACT

Constitutional review of norms is a mechanism established by the Constitution of Georgia, the use of which naturally places the Constitutional Court of Georgia in a kind of institutional conflict with other branches or organs of the government (such as the Parliament, the Executive Power, the President), and at the same time, it is a serious interference in the democratic process, as it implies annulment of the act adopted by the body with democratic legitimacy. This is why constitutional review bodies, both in Georgia and foreign countries, exercise caution when using the mentioned mechanism. The practice of recognizing the normative content as unconstitutional, introduced by the Constitutional Court of Georgia in the last decade, is indicative of its dynamic interrelation with political branches. This practice provides the Court with the opportunity to eliminate constitutional flaws in the norm without revoking the entire norm.

Recognizing the normative content as unconstitutional gives the Constitutional Court the opportunity to localize the potential constitutional violation and to satisfy the constitutional claim/submission in such a way as to restrict its decision to the factual circumstances/reservations related to a specific case.

Despite the fact that the Constitutional Court of Georgia first used the mechanism of rescinding the normative content in 2011, there is still no unified analytical framework

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Quote from former US Supreme Court Justice Antonin Scalia in his dissenting opinion on the case City of Los Angeles, petitioner, v. Naranjibhai Patel, et al, 576 U. S. (2015) <https://supreme.justia.com/cases/federal/us/576/13-1175/> [last accessed on 15 July 2023].

or standard guiding the Court when considering the constitutionality of the normative content, rather than the entire norm. From this point of view, the observation of the practice reveals, that identification of the normative content to be declared void requires judicial judgment and a creative approach to some extent, which should be covered by the appropriate framework, related to assigning the specific role to the Constitutional Court and defining related limitations within the scheme of distribution of power.

The aim of the paper is, on the basis of theoretical-practical observations (including comparative research) to outline the principles, which should serve as a basis for the constitutional review of the normative content. According to the opinion presented in the paper, when assessing the constitutionality of the norm, the focus on the normative content should be based on the assumption that there are situations in which the application of the entire norm would not lead to a violation of the Constitution. Also, a review of the normative content should not essentially turn into an assessment of the constitutionality of an individual decision. Separation of the normative content from the norm should not be contrary to the purpose of the legislator and should not be based on an exaggerated hypothesis regarding the application of the norm in this or that context. And finally, when recognizing the normative content as unconstitutional, the line drawn between the invalidated content, and the content, which was found as valid, should, in turn, comply with the requirements of the Constitution.

I. INTRODUCTION

The constitutional review of normative acts naturally puts the Constitutional Court in conflict with other branches/organs of the government, such as the Parliament, the Executive Power, and the President. In response, constitutional review bodies, both in Georgia and in other states, are developing mechanisms to ensure that the court does not interfere in the activities of the political branches of power more than absolutely necessary and unavoidable in a given situation, thereby safeguarding the democratic process.

The present paper aims to analyze one such mechanism, namely, the practice of the constitutional review of the normative content, introduced by the Constitutional Court of Georgia (hereinafter - the Constitutional Court) in the last decade, within the framework of which, when identifying a constitutional flaw, the Constitutional Court often no longer declares the whole norm as invalid, but instead recognizes the specific normative content of the norm as unconstitutional.

It should be noted that, until now, there is no unified and comprehensive analytical framework that provides answers to questions such as the criteria the Constitutional Court should follow when deciding whether to assess the norm in its entirety or only

in terms of specific content. In the latter case, what this content should be remains a question. Although we do not claim to provide exhaustive and final answers to the mentioned questions, we hope that the presented work will contribute to the knowledge of judicial practice, its further refinement, and in general, the development of doctrine in relation to the constitutional control of normative content.

In order to examine the above-mentioned issue, the paper reviews and compares the practice of the Constitutional Court before 2011 (i.e., before the practice of declaring the normative content invalid was introduced), and after it. The author's observations are presented as to what trends and logic can be seen from the decisions reached by the Constitutional Court at different times, from the standpoint of reviewing the content of normative acts. The factors that can explain the development of the jurisprudence of the Constitutional Court in the last decade and the theoretical-practical basis of the new approach are analyzed.

The work includes a comparative research component, specifically discussing the practice of the federal courts of the United States of America concerning the separation of 'Facial' and 'As-applied' complaints. The positions established in the American practice and doctrine are analyzed, as to when the Court should asses the norm in its entirety, and contrary to the above, when it should narrow its focus only on the assessment of the validity of the norm in a specific situation. The paper examines the relevance of the approaches and legal views developed in the USA regarding the model of reviewing normative content established by the Constitutional Court.

In the end of the paper are presented the author's conclusions as to why the Constitutional Court should give preference (as far as possible) to revocation of the normative content, instead ofrevocation of the norm in its entirety; How should the Constitutional Court determine, that in a specific case it is really possible to focus on establishing constitutionality of the normative content, and, based on what criteria it should draw the line between the normative content to be left in force, and the content, that should be invalidated.

II. REVIEW OF THE PRACTICE OF THE CONSTITUTIONAL COURT REGARDING RECOGNITION OF THE NORMATIVE CONTENT AS UNCONSTITUTIONAL

1. PRACTICE EXISTING BEFORE 2011

From its foundation and up to the present, the practice of the Constitutional Court of Georgia regarding the determination of the content of the contested normative act has not

been uniform. According to the approach prevailing until 2011, the Constitutional Court, as a rule, interpreted the contested normative act on the basis of its inner conviction, without taking into account the practice of common courts. If the Constitutional Court concluded that the norm could be interpreted in accordance with the Constitution, it would normally not uphold the claim. Such an approach is classically expressed in the following excerpt from the decision of the Constitutional Court in regard to the case of Elguja Sabauri: "When only the interpretation contradicting the Constitution is read from the normative act, in such case, the subject of the assessment becomes the normative act itself, and it should be considered as unconstitutional. Whereas in the case, when simultaneously, the interpretation corresponding to the Constitution is read from the normative act, then the subject of the assessment is an interpretation of the norm. The possibility of its dual (ambivalent) interpretation confers the characteristic of ambiguity on the norm. The constitutional presumption of the norm is applicable in case of ambiguity, and consequently, it should be interpreted in compliance with the Constitution"[1]. To some extent, such practice led to the alienation of the supporters of constitutional control from the real problems and made it less effective.[2]

It should be noted that the interpretation of the contested norm by the constitutional review body in accordance with the Constitution and, in case of doubt, finding it constitutional, is not alien to the legal systems of Europe and the USA. It is considered a compromise in the relationship between the judicial and legislative branches of power.[3] For example, according to the doctrine of constitutional avoidance, recognized by the US Supreme Court, when the validity of a law is doubted, or serious questions

[1] Judgement of the Constitutional Court on case N1/1/428,447,459 "Public Defender of Georgia, citizen of Georgia Elguja Sabauri and citizen of the Russian Federation Zviad Mania v. the Parliament of Georgia", 13 May 2009. Paragraph II-18.

[2] For example, in one of the cases, the Constitutional Court did not admit the claim and provided the following reasoning: "...the collegium comes to the conclusion, that the claimant's argumentation is based on incorrect understanding of the content of the contested norm. The interpretation of the contested norm gives different results. This position of the collegium is not changed by the fact, that the material presented by the plaintiff shows different interpretation of the contested norm in regard to a specific case by the tax authorities and common courts. According to Article 26, paragraph 3 of the Organic Law of Georgia on the Constitutional Court of Georgia "When verifying a normative act, the Constitutional Court shall take into consideration not only the literal meaning of a disputed provision, but also the intent expressed therein and its practical application, and the gist of a respective constitutional standard." This norm of the law obliges the Constitutional Court to interpret the norm not only grammatically, but also using other possible ways of explanation. As for the practice of applying the norm, its examination is relevant only when the contested norm allows for different interpretation, and it is important to find out to what extent it complies with the requirements arising from the principle of legal security". See Judgment of the Constitutional Court of Georgia on case No2/1/481 "Citizen of Georgia Nino Burjanadze v. the Parliament of Georgia", 22 March 2010. Paragraphs II-8-9.

[3] Besik Loladze and others, Constitutional Justice (East-West Management Institute 2021) 252-254 (in Georgian); Opinion of the Venice Commission: Revised Report on individual Access to Constitutional Justice, CDL-AD(2021)001, 128 <https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2021)001-e> [last accessed on 15 July 2023].

arise regarding its constitutionality, the court first determines whether the law can be interpreted in a manner that avoids the need for consideration of its constitutionality.[4] The existence of this doctrine in the USA is explained by the factor of expediency rather than legality, in particular, by the argument that courts should minimize confrontation with the legislative branch as much as possible.[5]

However, the approach described above is less effective in conditions of such a model of concentrated constitutional control[6], where the explanations formulated in the reasoning part of the Constitutional Court's decision are not binding for common courts. Only the reasoning part of the decision carries legally binding force, and simultaneously, the Constitutional Court does not review the decisions of common courts for constitutional violations. It does not require a special effort to see, that interpretation of the norm by the Constitutional Court based on its own inner conviction and in accordance with the Constitution in conditions, when common courts have offered different interpretations of the content, and when the Constitutional Court does not have the leverage to change such interpretation, also creates certain reputational risks for the body exercising constitutional control.[7]

As it appears, to overcome the inconvenience described above and due to other practical considerations, lately the Constitutional Court has established a different approach towards the review of norms. In many cases, it refuses to declare a norm as completely constitutional or completely unconstitutional.[8] According to this practice, "if several

[4] Antonin Scalia and Bryan A. Garner, Reading Law: The Interpretation of Legal Texts (West Group 2012) 247-248.

[5] ibid 249. On the necessity of self-restraint by the Constitutional Court, see Giorgi Khubua, 'Between Constitutional Jurisprudence and Politics' (2016) 9 Constitutional Law Review 13-14 (in Georgian).

[6] It means a judicial arrangement within which constitutional control is separated from justice. The concentrated model differs from the diffused model, within the framework of which judicial bodies (common courts) also consider constitutional disputes (for example, in the USA). For more detailed information see Opinion of the Venice Commission, supra note 4, 9-19.

[7] In contrast to the above, the use of the constitutional avoidance doctrine by the Constitutional Court should be considered justified in a case, where there is no authoritative definition of a specific norm proposed by the common courts, and therefore, the Constitutional Court itself has to clarify the true content of the norm. see Decisions of the Constitutional Court of Georgia, by which the Court did not satisfy the claim, including on the grounds, that the challenged norms were subject to relevant interpretation of the Constitution, and the claimants have not submitted any examples from the practice of the common courts to invalidate the aforementioned: Judgment of the Constitutional Court on the case N1/2/503,513 "Citizens of Georgia Levan Izoria and Davit-Mikheil Shubladze v. the Parliament of Georgia", 11 April 2013; Judgment of the Constitutional Court on the case N1/3/538 "Political union "Free Georgia" v. the Parliament of Georgia", 24 June 2014. In addition, according to current legislation, the Constitutional Court is authorized to re-evaluate the constitutionality of the norm (within the new proceedings) if the practice of the common courts subsequently contradicts the interpretation of the norm by the Constitutional Court. see Article 211 of the Organic Law of Georgia on the Constitutional Court of Georgia, <https://matsne.gov.ge/ka/document/view/32944%23?publication=33> [last accessed on 15 July 2023].

[8] Besik Loladze and others, supra note 4, 80-81.

rules and interpretations are read in the contested norm, one of which is unconstitutional, the Court shall no longer recognizes the disputed norm as unconstitutional as a whole, but shall assess it, and if necessary, recognizes the specific normative content as invalid.”[9] Also, with the changed practice, “the Constitutional Court, as a rule, accepts and considers the legislative norm with the normative content, with which it was used by the common court” and it no longer replaces the definition proposed by the common court with its own interpretation.[10]

2. PRACTICE ESTABLISHED AFTER 2011

The Constitutional Court recognized the content of the normative act as unconstitutional for the first time in the judgment of December 22, 2011, in the case “*Public Defender of Georgia v. the Parliament of Georgia*”[11]. The contested provision was Article 2, paragraph 2 of the law of Georgia “On Military Reserve Service,” which states that it is “the duty of each and every citizen of Georgia to serve in Military Reserve pursuant to this norm.” The Public Defender requested in the Constitutional claim recognition of the mentioned norm as unconstitutional on the grounds, that the appealed provision, in violation of the right to freedom of belief and equality, did not provide for the possibility of refusing to go through the reserve service by persons, who have conscientious objection. Although the Constitutional Court upheld the argumentation of the Public Defender, instead of deeming the norm unconstitutional in its entirety, by its judgment, it declared invalid only the part of its normative content, which concerned the duty to perform military reserve by those persons who refuse it on the grounds of freedom of belief.[12]

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[9] Judgment of the Constitutional Court of Georgia on case N3/7/679 ““Rustavi 2 Broadcasting Company LLC” and “TVC Georgia LLC” v. the Parliament of Georgia”, 29 December 2017. Paragraph II-32.

[10] See excerpt from the decision of the Constitutional Court of Georgia in the case of Liberty Bank: “The common courts within the scope of their competency deliver final decision on normative content of the law, on its practical use and therefore on its enforcement. Therefore, the interpretation of the provisions made by common courts has huge importance for determining real content of the law. As a general rule the Constitutional Court considers and assesses the legal provision with the same normative content as it was used by a common court. However, several exceptions might exist from this general rule, among them in cases when the Constitutional Court is certain that the interpretations of the law made by same instance courts are contradictory. In such cases the content of the provision cannot be considered to be ultimately defined by common courts. Non-uniform practice of interpretation of the provision might also indicate to its vagueness and unconstitutionality. Besides that, in exceptional cases the Constitutional Court is also authorized not to agree with the interpretation of the provision made by the common court if it is clearly unreasonable”. See the Judgement of the Constitutional Court of Georgia on the case N1/2/552 “JSC Liberty Bank v. the Parliament of Georgia”, 4 March 2015. Paragraph II-16.

[11] Judgement of the Constitutional Court of Georgia on case No1/1/477 “Public Defender of Georgia v. the Parliament of Georgia”, 22 December 2011.

[12] It should be noted, that in the judgement the Constitutional Court did not discuss its own competence regarding the recognition of the normative content as unconstitutional, despite the fact that the decision

With the aforementioned decision, the Constitutional Court did not establish a tangible analytical framework or standard, as to what grounds did it consider appropriate in each specific case to discuss the constitutionality of a specific normative content of a provision, instead of considering it in its entirety. At the end of the reasoning part of the judgment, the Constitutional Court states that "neutral laws, through the establishment of general obligations, cannot account for interests of all the citizens equally." This, however, does not imply that "general obligations shall not be introduced through law or that they are essentially in conflict with the Constitution because they violate rights of specific people."[13] Based on the above it can be assumed, that in the opinion of the Constitutional Court, consideration of the normative content becomes relevant when the application of the norm does not automatically lead to violation of the Constitution in all possible circumstances of its application, but unconstitutional outcome occurs only in some constellations of application of the norm. However, as we will see below, this short description does not fully explain the logic of the subsequent decisions of the Constitutional Court and does not answer all relevant questions regarding the constitutional review of the normative content.

From a formal point of view, it is true that the annulment of the normative content by the Constitutional Court is carried out within the mandate of the negative legislator[14].

significantly changed the model of constitutional review, that was in effect before that. The mentioned novation is proposed in the judgement as a given fact, an admissible mechanism, without an additional study of its legal validity, which has been rightly criticized in the legal literature. See Ana Pirtskhalashvili, 'The real control of the Constitutional Court - still beyond the revision of the Constitution' (2017) Scientific Journal "Academic Herald" "Legal, Political and Economic Aspects of Revision of the Constitution of Georgia" 11 (in Georgian); Regarding the competence of the Constitutional Court to recognize the normative content as unconstitutional, see Also Paata Javakhishvili, 'Georgian Constitutional Court and Actual Real Control' (2017) 1 Law Journal 345-346 (in Georgian).

In this regard, we would like to note, that both the 2011 and current versions of the Constitution of Georgia and the Organic Law of Georgia "On the Constitutional Court of Georgia" do not explicitly provide for recognition of the normative content as unconstitutional, but generally refers to declaration of the legal "act or its part" as invalid. Nevertheless, we think that the practice of reviewing of the normative content can be justified by the competence granted by the legislation to declare a part of a normative act unconstitutional, which is not hindered by the fact, that the text of the norm published in the "Legislative Herald of Georgia" remains unchanged when the Constitutional Court recognizes the normative content as unconstitutional, e. i., formally the norm is not abolished, but a rule with an unconstitutional content included in the norm (sub-norm) is identified, which is declared invalid.

[13] Judgement of the Constitutional Court of Georgia on case N1/1/477 "The Public Defender of Georgia v. the Parliament of Georgia", 22 December 2011. Paragraph II-81.

[14] Regarding the function of the Constitutional Court as a negative legislator, see András Sajo, Limiting Government, an Introduction to Constitutionalism (Cézanne Publishing 2003) 285; Besarion Zoidze, Constitutional Control and Order of Values in Georgia (German Society for International Cooperation (GIZ) 2007) 61-63 (in Georgian); Judgement of the Plenum of the Constitutional Court of Georgia on case N1/466 "The Public Defender of Georgia v. the Parliament of Georgia", 28 June 2010. Paragraph II-18. The judgement of the Plenum of the Constitutional Court of Georgia on the case "Lali Lazarashvili v. Parliament of Georgia" also contains an important definition of the function of a negative legislator: "The Constitutional Court is authorized only to annul the contested norm in its entirety and/or any of

The use of the mentioned instrument, unlike the standard cases of revocation of a norm, needs to be treated with more caution since, by revoking the normative content, the court actually transforms the norm and, in this sense, even creates a new norm, which goes beyond the performance of the function of a positive legislator.[15] At the same time, the risk of exceeding the competence increases the more, the less the normative content declared invalid (that is, the boundary, that the Constitutional Court sets in the norm by canceling the normative content) is reflected in the existing legal framework, i.e. in its text, structure and history.

Returning again to the judgement adopted by the Constitutional Court in the case, related to compulsory military reserve service, we have reason to assume, that at the stage of annulment of the normative content, after the Constitutional Court established a violation of the constitutional right, it took into account another legal act in force at that time, which regulated similar relationship, namely, the Law of Georgia on "Non-military alternative labor service", which already established a relevant exception for persons with the right to conscientious objection. We mean one of the provisions of the above-mentioned law, according to which "a citizen who, in accordance with the legislation of Georgia, must fulfill his military duty, but refuses military service on the grounds of freedom of conscience, religion or belief", would be called for non-military, alternative work. As we can see, the normative content declared unconstitutional by the Constitutional Court, "which establishes the duty to perform military reserve service by those persons, who refuse military reserve service on the grounds of freedom of belief"[16], is similar to the provision in the Law of Georgia on "Non-military alternative labor service", which makes us think, that the Constitutional Court relied on the latter as an indication of the legislator's probable will, when formulating the content of the norm.

From the point of view of acting within the mandate of a negative legislator, even less controversial are the cases, when the Constitutional Court, while formulating the normative content, relies on the text of the law or bylaw, of which the challenged norm is a part. For example, in the case "Citizens of Israel - Tamaz Janashvili, Nana Janashvili,

its parts/normative content, although it cannot establish a new order, extend the validity of the contested norm, etc. Thus, the decision of the Constitutional Court can only be in the form of recognition of any normative content of the contested norm as unconstitutional, and finding it invalid." See Judgement of the Constitutional Court of Georgia on Case N3/6/642 "Citizen of Georgia Lali Lazarashvili vs. The Parliament of Georgia", 10 November 2017. Paragraph II-20.

[15] In connection with the transformation of the negative legislator's function of the Constitutional Court when finding the normative content invalid, see Dimitri Gegenava and Paata Javakhishvili, the Constitutional Court of Georgia: Attempts and Challenges of Positive Legislation, Lado Chanturia 55 (Sulkhan-Saba Orbelian University Publishing House 2018) 125-127, 132 (in Georgian).

[16] Judgement of the Constitutional Court of Georgia on case No. 1/1/477 "The Public Defender of Georgia v. the Parliament of Georgia", 22 December 2011. The first paragraph of the reasoning part of the judgement.

Irma Janashvili, as well as citizens of Georgia - Giorgi Tsakadze and Vakhtang Loria v. the Parliament of Georgia"[17] Article 426, Part 4 of the Civil Procedure Code of Georgia was contested in relation to the first paragraph of Article 42 of the Constitution of Georgia (the first paragraph of Article 31 of the current edition of the Constitution - the right to a fair trial), on the basis of which the application requesting quashing of the decision in a civil case and reopening of proceedings on the grounds of newly discovered circumstances was considered inadmissible after expiration of 5 years from the entry of the decision into legal force.

In this case, the Plenum of the Constitutional Court recognized as unconstitutional the content of the appealed norm, which provided for an extension of the statute of limitations for annulment of the decision directly to the persons defined by subparagraph "c" of the first paragraph of Article 422 of the Civil Procedure Code of Georgia (i.e., to the persons, who were not invited to the hearing of a civil case). Consequently, the Constitutional Court narrowed down the content of the contested norm by referring to the relevant provision of the law, using the limit established by the legislator in respect of the delimitation of the relations, and refused to further specify the norm by referring to such concepts, that were not provided for by the law. This is noteworthy, because the reasoning provided in the motivational part of the decision itself, in contrast to its resolution part, showed signs of a more nuanced approach.

In particular, the Plenum explained in the motivational part that, if the case involved a dispute between private individuals, in which the interests of the state were not engaged, in such a case the appealed norm would not be considered unconstitutional.[18] The Plenum based its reasoning on unconstitutionality of the norm on the argument that "the 5-year statute of limitations disproportionately limits the right to a fair trial of persons ... provided for in subsection (c) of Article 422 in the event, when a court decision ... is made in favor of the State, and at the same time, in case of existence of some of the grounds provided for in Article 423 of the Civil Procedure Code of Georgia, and besides, recognition by such persons of a court decision as invalidated is a necessary precondition for protection and restoration of their rights."[19] For the purposes of the present discussion, it is interesting that the Plenum, in contrast to the motivational part, did not separate, in the resolution part of the judgment, the decisions in favor of the state and those in favor of private individuals. It recognized the challenged norm as completely unconstitutional in this sense, specifically concerning persons defined by subsection 'c' of the first part of Article 422 of the Civil Procedure Code.

Similarly, the Constitutional Court adopts a cautious approach in its judgement on the

[17] Judgment of the Plenum of the Constitutional Court of Georgia on case No. 3/1/531 "Citizens of Israel Tamaz Janashvili, Nana Janashvili and Irma Janashvili v. the Parliament of Georgia" 5 November 2013.
[18] ibid, paragraph II-34.
[19] ibid, paragraph II-38.

case ""Metalinvest LLC" v. the Parliament of Georgia"[20], where Article 9, Paragraph 4 of the Law of Georgia "On Entrepreneurs", which states, that - "If at the moment of signing the agreement a contracting partner knows about restrictions on the business entity's management powers, the represented business entity may declare the transaction null and void within eighteen months after the date of signing the agreement. The same rule shall apply, if the authorized representative and the contracting partner are acting in concert intentionally to cause damage to the business entity represented by the representative", - was contested in relation to the first paragraph of Article 21 of the Constitution of Georgia (the first paragraph of Article 19 of current version of the Constitution - right to property). In respect of this case too, the Constitutional Court recognized the contested norm as unconstitutional in its entirety (specifically, the words "within eighteen months after the date of signing the agreement"), despite the fact that in the motivational part of the decision, it identified and separated completely valid constellations within the norm.

In particular, the Constitutional Court distinguished two cases from each other: when the conclusion of a transaction by an unauthorized person contained signs of an offence, and when on the contrary, the transaction was not concluded in a criminal manner. Regarding the first case, the Court explained that "there is no legitimate purpose that the contested norm can serve in the case, when it is related to a contract concluded by means of a criminal offense."[21] As for the second case, the Court noted, that the norm would acquire an unconstitutional content "in conditions when, despite proper supervision of the activities of the head/representative by the entrepreneur (partner), as a result of dishonest (and perhaps illegal) actions of the signatories of the transaction, the information about the transaction is hidden and unavailable to the entrepreneur".[22] In contrast to the above, "in the absence of supervision mechanisms in the enterprise, or in case of insufficient engagement of the entrepreneur (partners) in the enterprise's activities", according to the Court, the existence of such a short deadline for submitting a claim did not lead to an unconstitutional result.[23] However, as mentioned above, the Constitutional Court did not consider it necessary to separate the constitutional content of the norm from the unconstitutional content in the resolution part of the decision, and it recognized the norm invalid in its entirety.

The first decision in the practice of the Constitutional Court, where it did not base the annulment of the normative content on the line explicitly drawn in the normative act regulating the same or similar relationship and established a completely new demarcation line in the norm, was the Judgment of the Plenum of May 23, 2014, on the

[20] Judgement of the Constitutional Court of Georgia on case No. 1/1/543 ""Metalinvest" LLC v. the Parliament of Georgia", 29 January 2014.
[21] ibid, paragraph II-62.
[22] ibid, paragraph II-50.
[23] ibid, paragraph II-54.

case "*Citizen of Georgia Giorgi Ugulava v. Parliament of Georgia*"[24]. In the mentioned case, the Constitutional Court found unconstitutional in relation to the first and second paragraphs of Article 29 of the Constitution of Georgia (Article 25 of the current version of the Constitution - the right to hold public office) the normative content of Article 159 of the Criminal Procedure Code of Georgia ("An accused person may be removed from his/her position (work) if there is a probable cause that, by staying at that position (work), he/she will interfere with an investigation, with the reimbursement of damages caused as a result of the crime, or will continue criminal activities"), which provided for dismissal of persons elected by secret ballot on the basis of universal, equal and direct suffrage of local self-government. The Constitutional Court did this against the background, when criminal procedural legislation in force at that time did not even contain any reference to such officials.

In general, the study of the practice of the Constitutional Court confirms that, in the majority of cases, it does not consider it necessary to dwell additionally upon issues related to the review of normative content. Namely, such issues include the criteria the Court uses to decide whether to make the entire norm or its normative content the subject of review, and in the latter case, the criteria it uses to determine the formulation of the normative content under consideration. The reasoning often concerns establishing a constitutional violation, and not selecting a remedy for the elimination of the violation. A noteworthy exception is the judgement of the Plenum No. 3/7/679 of December 29, 2017, on the case ""Broadcasting Company Rustavi 2 LLC" and "TVC Georgia LLC" v. the Parliament of Georgia", which contains important clarifications regarding the standard of review of constitutionality of vague norms, or norms of general character, which can be broadly interpreted.[25]

[24] Judgment of the Plenum of the Constitutional Court of Georgia on the case No. 3/2/574 "Citizen of Georgia Giorgi Ugulava v. Parliament of Georgia", 23 May 2014.

[25] Two types of ambiguity of the norm differ from each other in nuances: 1. True ambiguity, i.e., a situation where the text of the norm is ambiguous in the classical sense of the word, since it can be understood in two or more different meanings at the same time, which creates uncertainty. As an example of this type of ambiguity, we can refer to the judgement of the Plenum "Young Lawyers Association of Georgia and Citizen of Georgia - Ekaterine Lomtatidze v. Parliament of Georgia", namely, the contested Article 9, paragraph 2 of the Law of Georgia "On Operative-Investigative Activities", in connection with which the Constitutional Court had to determine, whether the said norm, in conjunction with other norms of the law, allowed to carry out certain operative-search measures without a judge's order and absence of urgent necessity. The Constitutional Court determined, that the norm created ambiguity in this respect and recognized it as unconstitutional. 2. Ambiguity in a broad sense, e. i. a situation where semantically the meaning of the norm is clear, however, due to the fact, that term/terms used in the norm can be interpreted broadly, it becomes difficult in apply it to specific cases. An example of this is the judgment of the Plenum on the case "Citizens of Georgia - Aleksandre Baramidze, Lasha Tugushi, Vakhtang Khmaladze and Vakhtang Maisaya v. the Parliament of Georgia", where Article 314, paragraph 1 of the Criminal Code of Georgia was contested, which provided for criminal liability for espionage, namely processing of information "to the detriment to the interests of state …upon assignment of a foreign organization". Taken separately, the said norm was not vague in the sense, that it clearly conveyed the content and purpose of the

In the aforementioned case, the Court explained that vagueness, taken in isolation, cannot be the basis for declaring a norm unconstitutional in its entirety and, instead, attention should be focused on its specific normative content, which is problematic for the plaintiff.[26] It is significant that, as an exception, the Constitutional Court indicated the regulations establishing responsibility, in which case, according to the Court, on the basis of "paragraph 5 of Article 42 of the Constitution of Georgia [paragraph 9 of Article 31 of the current version of the Constitution - nullum crimen sine lege[27] principle] the vagueness of the disputed norm taken separately, can serve as grounds for recognizing it as unconstitutional".[28] From this point of view, the Constitutional Court partially based its judgement on the decision of the Second Cillegium of May 14, 2013 on the case "Citizens of Georgia - Aleksandre Baramidze, Lasha Tugushi, Vakhtang Khmaladze and Vakhtang Maisaya v. Parliament of Georgia", which concerned the first paragraph of Article 314 of the Criminal Code of Georgia, more specifically, the constitutionality of the words - "as well as collection or transfer of other information to the detriment of Georgia upon instructions of a foreign intelligence service foreign organization".

By the above-mentioned decision, the Second Collegium considered the words "or foreign organization" to be against the constitutional guarantee of certainty of the norms determining responsibility and pointed out, that: „In terms of foreseeability of the criminal law determining a crime, it is important to be able to establish the real content and scopes of each element of it, in order that an addressee will correctly perceive the law and carry out his action in accordance with its requirements, besides, in order to be protected from the arbitrariness of the law-enforcer …Within the context of punishment for collection and transfer of information by commission of a foreign organization, the content of the disputed norm is not explicitly and clearly defined. The law-enforcer and a person acting in the sphere of expression in every specific case should determine espionage performed by a commission of which organization shall be detrimental to the interests of Georgia. The given rule provides a very wide possibility for interpretation and in every specific case, the decision of the issue of criminal punishment for action shall considerably depend upon the individual evaluation of the law-enforcer".[29]

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norm at an abstract level, but the problem lay in its indefinite nature, since "The given rule provides very wide possibility for interpretation and in every specific case, decision of the issue of criminal punishment for an action shall considerably depend upon individual evaluation of the law-enforcer". (Infra note, II-36). Scalia and Garner, supra note 5, 33-41, 56-58, 343-346, 349-351.

[26] Judgement of the Constitutional Court of Georgia on case No. 3/7/679 ""Rustavi 2 Broadcasting Company LLC" and "TVC Georgia LLC" v. the Parliament of Georgia", 29 December 2017. Paragraphs II-30-32.

[27] Latin for "no crime without the law".

[28] Judgement of the Constitutional Court of Georgia on case No. 3/7/679 ""Rustavi 2 Broadcasting Company LLC" and "TVC Georgia LLC" v. the Parliament of Georgia", 29 December 2017. Paragraphs II-33.

[29] Judgement of the Constitutional Court on the case N2/2/516,542 "Citizens of Georgia - Aleksandre Baramidze, Lasha Tughushi, Vakhtang Khmaladze and Vakhtang Maisaya v. the Parliament of Georgia", 14 May 2013. Paragraphs II-31, 36.

Therefore, in accordance with the standard established in the case of "Broadcasting Company Rustavi 2 LLC" and "TVC Georgia LLC", in case of a norm containing undefined concepts and terms, as a rule, the Constitutional Court will not assess the norm in its entirety, i.e., all its constellations, but shall examine only the content (sub-norm), which is problematic for the plaintiff. Norms establishing responsibility are an exception, since in relation to them, depending on the essence of the basic right, the indeterminacy of the norm itself becomes the object of assessment.[30] However, there is a certain contradiction between the opinion expressed in the decision of the Plenum and the reasoning developed in the decision of the second collegium, since by the decision of the collegium the norm of the criminal law was also declared unconstitutional in its entirety in relation to paragraphs 1 and 4 of Article 24 of the Constitution (the first sentence of the first paragraph of Article 17 of the current edition of the Constitution, paragraphs 2 and 5 - freedom of expression) due to its "chilling effect": "While establishing the liability in the sphere of freedom of expression, it should necessarily comply with such standard of certainty which excludes "chilling effect" with respect to freedom of expression left outside of the regulation that defines the responsibility. The disputed norm upon the presence of certain preconditions (causing detriment to the interests of Georgia) establishes the criminal liability for relations with a wide group of persons (foreign organizations). However, the legislator leaves the issue of collection and transfer of information by a commission of which foreign organization shall be punishable for interpretation, in the hope and fate of the law-enforcer, on one hand, and to the possible subjects of the norm, on the other hand. [...] the disputed norm has "chilling effect" on the freedom of expression, because in reality it has considerably

[30] It is noteworthy that, according to the practice of the Constitutional Court, in case of establishing the vagueness or indeterminacy of the norm establishing responsibility, the Constitutional Court may not recognize it as unconstitutional in its entirety, and may instead, only invalidate its specific normative content. In particular, in the case "Giorgi Beruashvili v. Parliament of Georgia", the Constitutional Court discussed the constitutionality of the words "or other anti-social action", provided in the first paragraph of Article 171 of the Criminal Code of Georgia (First paragraph of Article 171 – "Persuading minors to get involved in beggary or other anti-social activities" was declared as punishable action) and established, that the normative content of the wording "or other anti-social activities" in paragraph 1 of Article 171 of the Criminal Code of Georgia, which provides for the possibility of imposing liability on a person for persuading a minor to commit a crime, contradicted the requirements of the first sentence of paragraph 9 of Article 31 of the Constitution of Georgia. Nevertheless, the Constitutional Court did not completely invalidate the contested norm (i.e., words - "or other anti-social action"), but declared invalid only its normative content, which provided for imposition of liability on a person for persuading a minor to commit an offence. Judgement of the Constitutional Court of Georgia on case No. 2/1/1289 "Giorgi Beruashvili vs. Parliament of Georgia", 15 July 2021.
We think that, based on the nature of the basic right established by the first sentence of Article 31, paragraph 9 of the Constitution, and taking into consideration its importance (and the decision of the Plenum of 2017), the Constitutional Court could have decided the issue of the constitutionality of the norm in a broader sense and recognized it as invalid. Presumably, in this case, the Constitutional Court took into account the fact that, according to the Criminal Procedure Code of Georgia, the recognition of the criminal law as unconstitutional has retroactive effect and leads to the revision of the judgments passed in the past.

more effect of restriction of the right than this is envisaged by the disputed norm, which the legislator wanted to restrict and which is necessary for the existence of a democratic society".[31]

Taken separately, in isolation, this reasoning reflected in the Collegium's judgement could be considered as a confirmation of the conclusion, that the norm that establishes responsibility in the field of freedom of expression, and due to its indeterminacy produces a "chilling effect", and if we extend this logic further, all norms limiting freedom of expression in general, which have such "chilling effect", are subject to annulment by the Constitutional Court in their entirety and should not be "saved" by such a surgical mechanism, as separating the unconstitutional normative content and declaring only such content invalid.

We believe, that such a conclusion would not be valid and the position proposed in the judgement of the Plenum of 2017 is more justified, which considers it permissible to discuss the unconstitutionality of the norm on the grounds of indeterminacy only in the context of Article 42, paragraph 5 of the Constitution of Georgia (Article 31, paragraph 9 of the current edition of the Constitution Clause - nullum crimen sine lege principle).[32] In addition, if we were to logically extend the argumentation of the Collegium's judgement of 2013, it would become relevant in relation to other basic rights, the constitutionality of restrictive norms of which could potentially be tested in the light of the Standard of certainty. Consequently, we would be forced, in each such case, to focus on the disputed norm as a whole, instead of the problematic normative content embedded in it. Obviously, such an approach would contradict the decision of the Plenum of 2017, which clearly established, that the basis for asserting the unconstitutionality of broadly interpreted, general norms cannot be their vagueness taken separately (except for challenging the norm in relation to Article 31, paragraph 9 of the Constitution), but the plaintiff should indicate to the problematic normative content and present relevant arguments to the Constitutional Court specifically in relation to it.

The approach developed in the decision of the Plenum is confirmed by the decision reached by the Constitutional Court in 2022 on the case "Giorgi Logua v. Parliament of Georgia", within the framework of which, due to the vagueness of the term "pornographic works", the first paragraph of Article 255 of the Criminal Code of Georgia was declared unconstitutional in relation to the first sentence of paragraph 9 of Article 31 of the Constitution of Georgia. In relation to the first sentence of paragraph 9 of the article. It

[31] Judgement of the Constitutional Court on the case N2/2/516,542 "Citizens of Georgia - Aleksandre Baramidze, Lasha Tughushi, Vakhtang Khmaladze and Vakhtang Maisaya v. the Parliament of Georgia", 14 May 2013. Paragraph II-26.

[32] Judgment of the Constitutional Court of Georgia on case No. 3/7/679 ""Rustavi 2 Broadcasting Company LLC" and "TVC Georgia LLC" v. the Parliament of Georgia", 29 December 2017. Paragraph II-33.

is noteworthy, that the votes of the judges in this case were divided into two regarding the issue, of whether the claim should be granted in the aspect of the constitutionality of the norm in relation to the basic right of freedom of expression. If the Court had upheld the standard established by the judgment of the second collegium in 2013, it logically should have recognized the challenged norm as unconstitutional in terms of freedom of expression. However, we believe the court, quite rightly, did not follow such a path, and after declaring the norm to be invalid in its entirety in relation to paragraph 9 of Article 31 of the Constitution, it did not further reason on its constitutionality in terms of the first paragraph of Article 17 of the Constitution.[33] The court substantiated this decision as follows: "Since it is impossible to precisely identify the actions prohibited by the contested norm, the Constitutional Court is deprived of the opportunity to evaluate this vague and amorphous content and scope in relation to other rights guaranteed by the Constitution of Georgia, including the freedom of expression or freedom of information protected by Article 17 of the Constitution of Georgia, and come up with accurate and objective reasoning as to the extent, to which the disputed norm limits the rights provided for by this norm of the Constitution… It is neither possible nor expedient for the Constitutional Court to hypothetically discuss the above-mentioned issues within the scope of the present claim and the normative reality... This would be tantamount to the Court first assigning a precise specific content to a norm it considers vague, and then offering its own interpretation of the norm, after which it should assess the constitutionality of the content of the norm, as understood by it, in relation to freedom of expression or other norms of the Constitution … The disputed norm presumably contains a whole range of normative content, in regard to which completely different approaches may be used, to which the plaintiff points out himself. However, at this stage, the Constitutional Court does not consider it possible, and even more so, justified to focus on one or several alleged normative contents, as long as the existence of these normative contents is not confirmed by a foreseeable and unambiguous law. The Court also takes into account that the plaintiff himself is requesting recognition of the entire norm, i.e., the first paragraph of Article 255 of the Civil Code as unconstitutional, and not establishing the unconstitutionality of any of its normative content."[34]

Therefore, it can be concluded that, according to current practice the Constitutional Court usually does not recognize the norm as invalid in its entirety due to its vague content, but will focus on the problematic normative content indicated by the claimant/ author of the submission. Regulations establishing responsibility are an exception from

[33] In this case, paragraph 6 of Article 21 of the Organic Law of Georgia on the Constitutional Court of Georgia came into force, according to which, if the votes of the members present at the plenum/college session are equally split when making a decision on a constitutional claim, the constitutional claim will be dismissed.

[34] Judgement of the Constitutional Court of Georgia on case No. 1/8/926 "Giorgi Logua vs. Parliament of Georgia", 4 November 2022. Paragraph II-50.

this rule. In such cases, the vagueness of the disputed norm may become the basis for recognizing it as unconstitutional in its entirety when assessing it in relation to paragraph 9 of Article 31 of the Constitution.

Based on the above, it is interesting to establish, which standard applies/should apply in other cases apart from the standard established for vague/indeterminate norms: when a normative act will be subject to scrutiny in its entirety, without its deconstruction into sub-norms, and contrary to this, when should/can the focus of consideration of the norm be only specific normative content, and in the latter case, what this content should be.

III. THEORETICAL-PRACTICAL VALIDITY OF THE NEW APPROACH

We have to agree with the assessment expressed in the legal literature, according to which, the Constitutional Court most likely introduced the practice of recognizing the normative content as unconstitutional[35] due to the unavailability[36] of the real constitutional control mechanism of individual decisions, namely the fact, that the Constitutional Court does not have the authority, unlike, for example, the German Federal Constitutional Court, to decide the dispute *in concreto*. Under the conditions of normative constitutional control,[37] the purpose of the constitutional dispute is to determine the constitutionality or unconstitutionality of the norm *in abstracto* (even when in order to file a claim, it is necessary to demonstrate direct interference of the public authority with his constitutional right by the plaintiff), since the satisfaction of the claim is followed by a declaration of invalidity of the norm universally, in relation to all persons, but not necessarily interference in the relations, that arose on the basis of the norm in the past, and solving the problem of a specific claimant/subject in this way. Moreover, neither the exclusive nor the main goal of normative constitutional review is to find out whether the subject's (plaintiff's) constitutional right has been violated, as the Constitutional Court, in the absence of real control, usually does not have the leverage to compensate the subject for the damage caused to him/her by an official act.[38]

[35] It refers to a model of constitutional control, where a competent body (for example, the Constitutional Court) can assess the constitutionality of individual decisions (including judicial acts).

[36] Loladze and others, supra note 4, 73-76, 255-257; Gegenava and Javakhishvili, supra note 16, 124-125.

[37] In the system of normative constitutional control, a constitutional dispute can be raised only for the purpose of appealing the norm and not the individual decision made on its basis. For more details, see the study of the Venice Commission: Study on Individual Access to Constitutional Justice, CDLAD(2010)039rev, 77 <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=cdl-ad(2010)039rev-e> [last accessed on 15.07. July 2023].

[38] Opinion of the Venice Commission: CDL-AD(2018)012 Georgia - Amicus Curiae brief for the Constitutional Court on the effects of Constitutional Court decisions on final judgments in civil and administrative cases, 30-33 <https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2018)012-e> [last accessed on 15 July 2023].

In this case, the main goal of the constitutional proceedings is to find out whether the relevant legal norm violates the Constitution, and if its unconstitutionality is proven, to protect the constitutional order by declaring the norm invalid.[39]

Recognizing a norm as unconstitutional places the Constitutional Court in an institutional conflict with other branches of government, such as the Parliament, the Executive Power, and the President. It is a significant interference in the democratic process, as it involves invalidating decisions made by bodies with democratic legitimacy.[40] That is why the courts, not only in Georgia, but also in other states, try to apply this lever only in extreme cases, when its use is unequivocally necessary to protect the constitutional order and the rule of law. As already mentioned, the doctrine of constitutional avoidance, recognized in the theory and practice of the law, is an expression of this kind of dynamics of the relationship between the judiciary and the political branches. In principle, the same can be said about the practice established by the Constitutional Court of Georgia regarding the recognition of a normative content as unconstitutional, which allows it to avoid the possibility of complete invalidation of a normative act with every new and constitutionally questionable decision adopted by common courts, and on the basis of the doctrine of constitutional avoidance, leave in force otherwise fully valid normative content.

In addition, narrowing down the subject of the dispute by focusing on the normative content is generally better suited to the role of the court as a non-political branch of government in the system of separation of powers, and such an approach is justified by the dynamics of the relationship between the Constitutional Court and the common courts within the judicial branch itself. Focusing on the normative content contributes to the development of the institutional dialogue between the Constitutional Court and common courts. In such a situation, the interpretation of the norm by a common court in a constitutionally questionable manner (*in abstracto*) results in the Constitutional Court declaring this interpretation invalid, which leaves enough space for the common courts to interpret the norm in accordance with the Constitution in subsequent cases.

Therefore, focusing on a specific normative content instead of the entire norm gives the Constitutional Court the opportunity to localize a potential constitutional violation and to satisfy a constitutional claim or submission in such a way, as to limit its decision to the factual circumstances/reservations related to a specific case. Although, due to its mandate, the Constitutional Court in such cases does not exercise real control over

[39] Opinion of the Venice Commission: CDL-AD(2021)001 Revised Report on individual Access to Constitutional Justice, 36 <https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2021)001-e> [last accessed on 15 July 2023].

[40] Regarding the antagonistic relationship between the Constitutional Court and the Parliament, see Giorgi Khubua, "Between Constitutional Jurisprudence and Politics" (2016) 9 Constitutional Law Review 14-15 (in Georgian); Gegenava, supra note 16, 137-138.

the decisions of the common courts, and its response will not necessarily result in an effective solution to the plaintiff's problem. However, compared to the previous practice, constitutional proceedings with this new approach are closer to the real problems posed by the plaintiffs.

The reflection of constitutional standards and values in the practice of common courts, together with establishing the practice of invalidation of the normative content, is facilitated by the approach introduced by the Constitutional Court in the last decade, according to which it usually accepts the interpretation proposed by a common court as an authoritative interpretation of the challenged norm, even if this interpretation does not represent, according to the Constitutional Court, the most reasonable/correct interpretation of the norm, including such interpretation, that would dispel doubts related to constitutionality.[41] The combination of these two approaches—reviewing the normative content and considering the interpretation proposed by the common courts as authoritative—provides an opportunity to ensure that constitutional proceedings in Georgia are not detached from reality. Within the framework of the existing model of constitutional control, this approach effectively realizes the values protected by the main law.

IV. CONSIDERATION OF THE PROBLEM ON THE EXAMPLE OF THE USA

In regard to the review of the normative content, a parallel can be drawn with the practice established in the USA in terms of separating "Facial" and "As-applied" types of complaints. In the USA, where the federal courts are competent to directly use the norms of the Constitution to resolve disputes and there is no separation between constitutional control and justice, it is considered, that the norm can be found unconstitutional in its entirety (facially invalid) only in exceptional cases. As the US Supreme Court explained in regard to the case United States v. Salerno, we have such an exceptional case where it is determined, that the norm would not be constitutional

[41] The question of which interpretation will be considered as the authoritative interpretation of the norm for the purposes of constitutional proceedings requires a separate discussion and is beyond the scope of this paper. We will only note briefly, that if the resource of interpretation of the norm in the system of common courts is not exhausted (i.e., there is no decision of the court of the final instance), it is logical and appropriate for the Constitutional Court not to consider the existing definition as authoritative a priori and to evaluate the correctness of the interpretation itself. And, on the contrary, if there is a decision of the court of the final instance on the issue, it is appropriate for the Constitutional Court to rely on the definition given in it, however inappropriate it may be. An exception to this can be the rare and theoretical case, when the interpretation made by the court of the final instance itself is so vague, that it is impossible to make sense of it, as well as when there are several conflicting decisions of the court of the final instance and the said conflict is not overcome by the same court.

under any constellation.[42] The US Supreme Court provides the following arguments against recognizing the norm unconstitutional as a whole: 1. Claims based entirely on the assertion of the unconstitutionality of the norm (and not on its application to the specific situation) are often speculative and contain the risk of premature and detached interpretation of the norm; 2. Upholding of such a claim also contradicts the fundamental principle of judicial self-restraint, according to which the court should not, without necessity, raise constitutional issues in advance, nor establish a constitutional rule broader, than the specific facts require; 3. Complying with such a demand threatens the democratic process, and in particular, the enforcement of the will expressed by the elected representatives in accordance with the Constitution.[43]

It is noteworthy, that the above-mentioned observation, which points to a rather strict test to overcome in order to declare a norm unconstitutional in its entirety (this test, as mentioned, requires that the norm should not be considered constitutional within the framework of any constellation), in turn, needs to be clarified, and it does not fully describe the US jurisprudence established by the federal courts. As evidenced by the practice of the US Supreme Court, it is quite common, that the court does not limit itself to examining the constitutionality of one aspect of a norm, and instead, assesses it as a whole.[44] An overview of the mentioned practice reveals, that the separate doctrinal tests used by the US federal courts when checking the constitutionality of norms make it possible, and sometimes even necessary, to discuss the legal validity of the norm as a whole.[45]

For example, the Supreme Court of the United States considers it admissible to recognize the norm establishing liability as completely unconstitutional due to its vagueness, even though the application of such norm to some cases may not be at all questionable from the standpoint of an objective observer. As a result, it will be considered unconstitutional to use a vague norm determining responsibility even in a situation when, based on the specific circumstances of the case, the addressee should have known, that his action would undoubtedly fall within the scope of the norm. As U.S. Supreme Court Justice Antonin Scalia famously observed in relation to one case, a statute prohibiting a group of people from congregating on a sidewalk and engaging in "annoying" conduct to passersby is completely (in all constellations) unconstitutional

[42] United States v. Salerno, 481 U. S. 739, 745 (1987) <https://supreme.justia.com/cases/federal/us/481/739/> [last accessed on 15 July 2023].

[43] Washington State Grange v. Washington State Republican Party, 552 U. S. 442, 450-451 (2008) <https://supreme.justia.com/cases/federal/us/552/442/> [last accessed on 15 July 2023].

[44] Richard H. Jr. Fallon, 'Fact and Fiction about Facial Challenges' (2011) 99(4) California Law Review 915-974, 917-918.

[45] Richard H. Jr Fallon, 'Facial Challenges, Saving Constructions, and Statutory Severability' (2020) 99(2) Texas Law Review 215-282, 219.

because of its vagueness, even though, for example, spitting in the face of a passerby will undoubtedly be considered an "annoying" act.[46]

In addition to the above, according to the approach established in the USA, norms that are worth extra protection limit the constitutional good, and therefore, their validity is checked by a strict assessment test (strict scrutiny), and in the event of identification of a flaw, they can be declared as unconstitutional in their entirety, despite the fact, that identification of problematic normative content and its surgical removal may be physically achievable.[47] Even when the regulation of a specific person's conduct/action for the purposes of the Constitution, taken separately, does not necessarily create a problem, the court may still refuse to enforce such a norm if its application causes a significant number of other cases leads to a violation of the Constitution. In applying the strict assessment test, courts examine whether the norm serves an overriding public interest and whether the proposed regulation is narrowly aimed at achieving that goal. In particular, when the regulation interferes more in the scope of constitutionally protected expression, than can be justified by an overriding public interest, the court in

[46] Johnson v. United States, 576 U. S. 11 (2015) <https://supreme.justia.com/cases/federal/us/576/13-7120/> [last accessed on 15 July 2023].

[47] Richard H. Jr Fallon, 'As-Applied and Facial Challenges and Third-Party Standing' (2000) 113(6) Harvard Law Review 1321-1370, 1138, 1346-1347. It should be noted that, based on the structure and text of the US Constitution, the list of rights (fundamental rights), restriction of which is examined by the US federal courts within the framework of a strict assessment test, is quite narrow. Except for cases of substantive restriction of freedom of speech, in fact, the mentioned test is relevant only in deciding the following two categories of cases: 1. With regard to the guarantee of a due process, when the issue is related to the violation of such a component of right to privacy, which has been recognized and protected historically; For example, in case Washington v. Glucksberg, the US Supreme Court did not consider voluntary euthanasia to be a right with similar characteristics, and evaluated intervention in this right through application of less stringent rational assessment test; In contrast to the mentioned, physical inviolability and upbringing of children, in court practice are considered such traditional rights, interference in which will be assessed by a strict assessment test; 2. In relation to the right to equality, when the issue is related to unequal treatment violating the fundamental rights, protected by the Constitution (for example, when there is different treatment in relation to the exercise of the right of the freedom of expression), on the grounds of race, ethnic origin and/or, if the victim of unequal treatment is another historically vulnerable and isolated group (minority), the need of protection of which is also evident taking into consideration historically formed/existing stereotypes. See SanAntonio School Districtv. Rodriguez, 411 U. S. 1, 411 U. S. 16, 28 (1973) <https://supreme.justia.com/cases/federal/us/411/1/> [last accessed on 15 July 2023]. Therefore, only a rational and not a strict test is applied to assess unequal treatment on the ground of age. See for example, Massachusetts Bd. of Retirementv. Murgia, 427 U.S. 307 (1976) <https://supreme.justia.com/cases/federal/us/427/307/> [last accessed on 15 July 2023], where using the rational test, the norm, that required police officers who reached the age of 50 to retire due to mental retardation, was deemed constitutional (Cleburne v. Cleburne LivingCtr.), as well as in case of such grounds, as property status (San Antonio Indep. Sch. Dist. v. Rodriguez). Less restrictive than the strict assessment test, but stricter than the rational test (intermediate scrutiny) is used for assessment of differentiation on the ground of gender and birth out of wedlock. See Clark v. Jeter, 486 U.S. 456 (1988) <https://supreme.justia.com/cases/federal/us/486/456/> [last accessed on 15 July 2023].

many cases refuses to partially "save" the norm by isolating the problematic normative content and recognizes it as unconstitutional in its entirety.[48]

Ordinarily, a norm adopted to achieve an illegitimate goal will also be considered unconstitutional in its entirety, if the purpose of the constitutional test used by the court to assess interference with rights is to establish the intention of the norm/legislator. In such a case, it is considered that the unconstitutional purpose completely permeates the norm, which excludes the identification of any of its constitutional normative content.[49]

We think, that the opinion is valid, according to which the choice between considering the norm unconstitutional on the whole, and recognizing its normative content as unconstitutional belongs to the field of judicial discretion, and is based more on arguments of practical expediency than on a formal-theoretical consideration and analysis regarding which approach is consistent with the constitution and which one is not.[50] Undoubtedly, the complete annulment of the norm, compared to the annulment of its normative content, is a much more severe sanction, that the court can use to respond to the constitutional violation and to prevent the adoption/issuance of an unconstitutional norm in the future: "When constitutional values are particularly vulnerable, the Supreme Court may apply tests, that invoke a strong defense mechanism, that necessitates repealing of a statutory provision in its entirety, and precludes step-by-step correction of the flaws of the in each subsequent case. This approach is the most appreciable when a constitutional provision protects expression or conduct, that is particularly prone to be influenced by a chilling effect, and at the same time, the legislature may show unusual inertness towards protection of this constitutional value without establishing a meaningful preventive mechanism by the courts".[51]

V. WHICH APPROACH SHOULD THE CONSTITUTIONAL COURT CHOOSE?

We think, that in Georgian reality, the direct transposition of the practice of the US Supreme Court and taking it as a guideline for determining in which cases the

[48] However, in the disputes related to the freedom of expression, according to the practice of the US Supreme Court, it is not always considered justified to correct the flaw of the norm by its invalidation as a whole. For example, on the case Broadrick v. Oklahoma, 413 U.S. 601 (1973) <https://supreme.justia.com/cases/federal/us/413/601/> [last accessed on 15 July 2023] the US Supreme Court has explained, that application of such a strict mechanism is more appropriate in relation to restrictive norms, restricting verbal rather than a behavioral/action-related form of expression. Also, the number of cases where the application of the norm leads to unconstitutional results should not be insignificant compared to the cases of legitimate application of the norm.

[49] Michael C Dorf, 'Facial Challenges to State and Federal Statutes' (1994) 46(2) Stanford Law Review 235-304, 279-280.

[50] Fallon, supra note 48, 1351-1352.

[51] ibid, 1352.

Constitutional Court should discuss the constitutionality of the norm as a whole, instead of its normative content and vice versa, would not be expedient. Although there are aspects related to the given issue in US jurisprudence and legal doctrine, which are also relevant in the Georgian context, and on which we will focus in more detail below, we believe that it would not be appropriate for the Constitutional Court to give in general preference to the invalidation of the norm as a whole when identifying each constitutional violation.

First of all, it should be noted that the catalog of fundamental rights affirmed by the Constitution of Georgia, both in terms of its scope of application and the test of justification of interference with rights, differs from the Bill of Rights of the US Constitution and various constitutional tests developed by the US Supreme Court in connection with them. In addition, if we make the assumption, that the Constitutional Court of Georgia has the competence to invalidate the normative content, it is logical to conclude that, under the conditions of the concentrated constitutional justice model, where the function of authoritative interpretation of the ordinary legislation is assigned to common courts, the Constitutional Court, as a rule, should limit itself to discussing the constitutionality of the norm (and, if necessary, by declaring it unconstitutional) within the scope of the content, that the common courts have assigned to it in a particular dispute. Such an approach leaves the opportunity for common courts to develop the practice of interpreting a norm, and to exhaust the resource of its interpretation in accordance with the Constitution within the framework established by the Constitutional Court, which, on the one hand, contributes to the development of constructive institutional dialogue between the Constitutional Court and common courts, and, on the other hand, creates such a model of the relationship of the judiciary with the legislative branch of the government, in which the arguments derived from the doctrine of constitutional avoidance are taken into account.

Practice demonstrates, that at this stage the Court has a rather delicate function to perform: i.e., to determine when it is possible or advisable to deconstruct the norm into separate normative contents, instead of invalidating the entire norm, and where the line should be drawn between the normative content to be declared void and to be left in force, which requires judicial judgment and a creative approach to some extent[52]. In this process, the court must not cross that fine line beyond which only a political body can be competent to make a decision.[53]

We think, that in this case, the position of the parties themselves regarding the given issue can significantly assist the court.[54] Moreover, in the process of formulating the

[52] Fallon, supra note 46, 236.

[53] Fallon, supra note 48, 1333; Dorf, supra note 50, 958.

[54] In the practice of the US Supreme Court, for example, there was a case when, when assessing the constitutionality of norms of the same content adopted by different states, in regard to one case the court

normative content, reconciliation/comparison of the demands of the parties, their proposed arguments, and positions, is a kind of risk insurance mechanism for the Constitutional Court, so that it does not cross the above-mentioned important line. Nevertheless, on the basis of the analysis of the decisions of the Constitutional Court of Georgia it is clear that as a rule, neither at the stage of establishing admissibility of a claim/submission, nor at the stage of the substantive consideration of the case, the positions of the parties are properly examined regarding whether the norm should be assessed as a whole, or its normative content needs to be examined, and/or what should this content be?

Below are the criteria that we think the Constitutional Court should take into account in relation to the review of the normative content. The mentioned conditions are cumulative and therefore, the norm, which is not subject to deconstruction (disintegration into normative content) according to any of the below-mentioned criteria, must be evaluated by the Constitutional Court in its entirety.

1. THE SCOPE OF APPLICATION OF A NORM

First of all, the Constitutional Court must assess whether there is, potentially, such a case/constellation of application of the norm, when the relevant constitutional provision/right would not be violated. The mentioned assessment, to a significant extent, depends on the doctrinal test that the Constitutional Court applies in regard to different practical implementation of a specific constitutional provision.[55] Only after the Constitutional Court has established that there is a case or cases of constitutional application of the disputed norm, it makes sense to continue further discussion of separation of its certain content from the norm. We would like to add here, that in Georgian reality, based on the reasoning already mentioned above in the paper, we believe that the Constitutional Court should be more careful in developing such tests, that would make it necessary to discuss the constitutionality of the entire norm within the framework of each subsequent constitutional dispute, instead of its normative content.

It is a matter of practical importance, that after the Constitutional Court decides that the implementation of the constitutional provision does not require shifting the focus to the entire norm, how (i.e., based on which methods of interpretation and which sources) it

considered the norm to be unconstitutional in its entirety, while in regard to another case, it separated the problematic normative content from the norm and in other respects left it in force. The court justified this by the fact that in case of the first dispute, the parties themselves did not raise before the court the issue of separating the norm in this way, and the court did not/could not assess/take into account such possibility independently. See Ayotte v. Planned Parenthood of Northern New Eng., 546 U.S. 320, 330-331 (2006) < https://supreme.justia.com/cases/federal/us/546/320/> [last accessed on 15 July 2023].

[55] Fallon, supra note 48, 1342, 1352, 1354-1355.

should assess whether the contested norm physically has the resource of constitutional application. We think that adherence to the principle of constitutional avoidance and respect for the role of common courts requires the Constitutional Court to act on the presumption, that the norm has the resource of such an application and not to discuss in advance hypothetically the possibility of unconstitutional application of the norm to a different situation. Only if it is clear, that the normative content to be deemed unconstitutional completely exhausts the content of the norm, it can be assumed that the norm does not have the resources of constitutional application and, therefore, it should be declared invalid.

EXAMPLE

In the case "Constitutional Submission of Kutaisi Court of Appeals on the Constitutionality of Article 19, paragraph 3 of the Law of the Autonomous Republic of Adjara on "Management and Disposal of the Property of the Autonomous Republic of Adjara", was disputed paragraph 3 of Article 19 of the Law, which established the following: "The user of the property, who does not have a document confirming the right to legitimate use of this property and who uses the property for entrepreneurial activities (for commercial purposes), is obliged, according to the written request of the Ministry, to pay the fee for transfer of the property into use to the republican budget of the Autonomous Republic of Adjara, in accordance with the market value (established on the basis of expert/audit report), for the entire period of use, but no more than from the moment of registration of the property in the ownership of the Autonomous Republic of Adjara.".[56] *The norm was appealed in relation to article 3, paragraph 1, subparagraph "p" of the Constitution of Georgia (article 7, paragraph 1, subparagraph "b" of the current version of the Constitution), according to which criminal, penitentiary, civil, administrative, labor and procedural legislation falls within the exclusive competence of the supreme state authorities of Georgia. The Constitutional Court concluded, that in this case, the law adopted by the Supreme Council of the Autonomous Republic of Adjara encroached on the exclusive competence of the Parliament of Georgia and, therefore, recognized the contested norm as unconstitutional in its entirety.*

In the given situation, of course, after the Constitutional Court confirmed the fact that the Supreme Council of the Autonomous Republic of Adjara adopted the law in violation of its competence, declaring it unconstitutional in its entirety was the only logical and correct decision, as there was no constellation within which the norm would not violate the Constitution.

[56] Judgment of the Constitutional Court of Georgia on case No. 3/4/641 "Constitutional Submission of Kutaisi Court of Appeal on the Constitutionality of Article 19, paragraph 3 of the Law of the Autonomous Republic of Adjara on Management and Disposal of the Property of Autonomous Republic of Adjara", 29 September 2016.

As elsewhere, difficult and controversial cases can exist here too. For example, in the case "Citizen of Georgia Tina Bezhitashvili v. Parliament of Georgia", the Constitutional Court found unconstitutional in relation to Article 42, paragraph 9 of the Basic Law (Article 18, paragraph 4 of the current edition of the Constitution, the right to full compensation for damages inflicted by public authorities) second sentence of Article 112 of the Law of Georgia on Public Service, which stipulated, that "for the period of forced absence, the employee will be given a salary of no more than 3 months."[57] *To whom does the mentioned norm apply - to all illegally dismissed civil servants who suffered damages, or only to those civil servants whose losses exceed 3 months of official severance pay?*

2. THE POSSIBILITY OF DIVIDING THE NORM INTO SUB-NORMS (SEGMENTS OF NORMATIVE CONTENT)

Recognizing the normative content as unconstitutional should be based on the assumption that the norm can be divided into sub-norms, which independently of each other carry the general signs characteristic of a legal norm. As a result of full or partial satisfaction of a claim or a submission, the normative content considered invalid or left in force by the Constitutional Court must meet all the criteria of abstractness and generality, which are traditionally required from a norm, and it must not be limited by circumstances closely related to specific legal relations in such a way, that it becomes essentially difficult or impossible to generalize/extrapolate such norms to similar relationships in the future. Therefore, despite narrowing down the subject of a dispute, the Constitutional Court should not go beyond its mandate when reviewing the constitutionality of a normative act, and essentially should not turn into a body evaluating the constitutionality of an individual decision.

EXAMPLE

As an example of a violation of the above-referred criteria can serve the judgment adopted on the case "Evangelical-Baptist Church of Georgia", LEPL "Evangelical Lutheran Church of Georgia", LEPL "The Highest Administration of all Muslims in Georgia", LEPL "The Redeemed Christian Church of God in Georgia" and LEPL "Pentecostal Church of Georgia" v. the Parliament of Georgia.[58] *The following words of the first paragraph of Article 63 of the Law of Georgia "On State Property" were disputed in relation to the right to equality in the mentioned case: "The Government*

[57] Judgment of the Constitutional Court of Georgia on case No. 2/3/630 "Citizen of Georgia Tina Bezhitashvili vs. Parliament of Georgia", 31 July 2015.

[58] Judgment of the Constitutional Court of Georgia on case No. 1/1/811 ""Evangelical-Baptist Church of Georgia", LEPL "Evangelical Lutheran Church of Georgia", LEPL "The Highest Administration of all Muslims in Georgia", LEPL "The Redeemed Christian Church of God in Georgia" and LEPL "Pentecostal Church of Georgia" v. the Parliament of Georgia", 3 July 2018.

of Georgia makes a decision on the transfer of state property into ownership free of charge. Based on the decision of the Government of Georgia, state property can be transferred free of charge to internally displaced persons from the occupied territories of Georgia, as well as to the Apostolic Autocephalous Orthodox Church of Georgia". By the decision of the Court, the normative content of the words on transferring of the state property free of charge to the "Apostolic Autocephalous Orthodox Church of Georgia" was declared unconstitutional.

The following critical opinion stated in the concurring opinion of Judge Eva Gotsiridze attached to the said judgment is noteworthy: "Although it is true that the Constitutional Court is in the role of a negative legislator, and its function is only to identify and invalidate a norm or some of its unconstitutional normative content, this does not mean that by declaring a specific normative content of individual words as unconstitutional, it should make the constitutional normative content of the norm difficult to foresee, or sometimes make it completely impossible to understand, whether this norm continues to operate even with some constitutional normative content. This issue is necessary for legal certainty for those, who have to apply it, as well as those, in regard to whom it should be applied; especially in the period of time, before the legislator legalizes the new edition of the norm, and even more so, when a new norm will not be adopted at all."[59]

3. TAKING INTO CONSIDERATION THE INTENT OF THE LEGISLATOR (LAW)

Severing of the normative content and its subsequent invalidation should not contradict theintent of the legislator (law): if the legislator would not have adopted the norm with the content, that is assigned to it as a result of invalidation of the normative content considered unconstitutional, in such a situation the Constitutional Court should refrain from assessing of the normative content and instead focus on the norm.[60] For example, according to interpretation of the US Supreme Court, after the Court determines that a part of the norm, or separate cases of its application are unconstitutional, the Court must answer the question, if the legislator, in case of partial invalidation of the norm, would have preferred to keep the norm with the remaining (narrowed) content, or its entire revocation.[61]

[59] The same can be said in regard to Judgment of the Constitutional Court of on case №1/2/671 ""Evangelical-Baptist Church of Georgia", NNLE "Word of Life Church of Georgia", LEPL "Church of Christ", LEPL "Pentecostal Church of Georgia", NNLE "Trans-Caucasus Union of the Seventh-Day Christian-Adventist Church", LEPL "Caucasus Apostolic Administration of Latin Rite Catholics", NNLE "Georgian Muslims Union" and LEPL "Holy Trinity Church" v. the Parliament of Georgia", 3 July 2018.

[60] For more details, see Emily Sherwin. 'Rules and Judicial Review' (2000) 6(3) Legal Theory 299-322.

[61] Ayotte v. Planned Parenthood of Northern New Eng., 546 U.S. 320, 330 (2006) < https://supreme.justia.com/cases/federal/us/546/320/> [last accessed on 15 July 2023].

4. AVAILABILITY AND PREDICTABILITY OF THE NORMATIVE CONTENT

Another requirement can be considered as a direct continuation of the above-mentioned criterion, which must be met when the normative content is recognized as unconstitutional. In particular, in the process of formulating the normative content to be repealed, the Constitutional Court should not essentially become a positive legislator: such a situation will arise if the normative content, which the Court leaves in force, does not properly reflect the structure and history of the normative act, as a result of which the newly formed norm is rather a result of the Court's creativity, than that of the norm-maker.[62] Abrogation of normative content should not be based on hypothetical reasoning or exaggerated hypothesis on the part of the Court regarding separation of the norm into sub-norms in one way or another."[63] The easier available or tangible is the wording of the Court, which it should use as a basis for invalidation of the unconstitutional normative content, the less is the risk of exceeding its competence and interfering with the competence of the legislator by the Court. In connection with this, in the first chapter of the paper we have already mentioned that, from the point of view of acting within the mandate of the negative legislator, less controversial are the cases, where the Constitutional Court, when canceling the normative content, relies on the limits explicitly set by the legislator in the normative act regulating the same or similar relationship.

The US Supreme Court explains in one of its judgments, that in order to solve this issue, it is important to determine how clearly the court has articulated in its own practice the permissible scope of interference with the right, which should guide it in assessing the impact of application of the challenged norm on different constellations, and how easily the court will be able to cross the line between the constitutional and unconstitutional normative contents of the norm.[64] If the constitutional framework/principles that regulate a given legal relationship are vague, or it is difficult to draw the appropriate line in the norm, the court will not sever the norm into sub-norms and evaluate it as a whole.[65]

[62] Fallon, supra note 48, 1333-1334.

[63] "The Supreme Court, as a rule, does not consider itself obliged to hypothetically sever the law in such a way, which does not follow from the text of the challenged law itself or, as in the case of Ayotte - from existing constitutional norms and principles." Fallon, supra note 45, at 958; Fallon, supra note 46, at 263-264.

[64] See supra note 62 supra, 329.

[65] ibid.

EXAMPLE

In the case "Political Union of N(N)LE Citizens Political Union "New Political Center", Herman Sabo, Zurab Girchi Japaridze, and Ana Chikovani against the Parliament of Georgia", was disputed constitutionality of the first sentence of paragraph 2 of Article 203, of the Election Code (The procedure for compiling a party list for the parliamentary elections to be held before the parliamentary elections of Georgia of 26 October 2024 shall be defined by a political party or an electoral bloc in such a way that at least one person of each four persons on the party list submitted to the CEC chairperson must be of a different gender.) in relation to the first sentence of paragraph one of Article 24 of the Constitution of Georgia (the right to participate in elections).[66] *The plenum considered unconstitutional the content of the contested norm, which stipulated that at least one person in every four on the electoral list before the parliamentary elections of Georgia of 26 October 2024 must be male.*

In this case is noteworthy the dissenting opinion of the Judge Eva Gotsiridze attached to the judgment, where she notes: "Another aspect that strengthens my doubts regarding the partial satisfaction of the claim is related to the understanding of what different normative contents the disputed norm contains. Namely: whether the normative content, that was declared unconstitutional, was really the normative content of the contested norm; What is the relationship between the content of the disputed norm, and its two different "normative contents" found as constitutional and unconstitutional, and can we perceive the given norm as a mechanical, arithmetic sum of its two above-referred normative contents [...] Between the disputed norm and its two presumed "normative contents" there is no such simple interrelationship of the part and the whole, that would seem possible to easily remove the unconstitutional normative content from the norm and retain the constitutional content. Based on the above, it is difficult for me to imagine, that the contested norm has exactly those two normative contents, one of which my colleagues considered constitutional, and the other unconstitutional. In my opinion, the contested norm has only one normative content and it implies the mandatory quota for both genders in the party lists. It is the "quota for both genders" that creates a single normative given, which is enclosed in a single legal envelope, and it is not correct to artificially divide it into two completely independent parts. Accordingly, the plenum of the Constitutional Court had to recognize the contested norm as constitutional or unconstitutional in its entirety. Instead, the Court preferred another, third solution, as a result of which in fact, it created a new norm based on the contested norm. That's why I think that the Court, intentionally or unintentionally, played the role of a positive legislator. This type of problem - the artificial division of the norm into "normative contents", may come up on the agenda again and again".

[66] Judgment of the Constitutional Court of Georgia on case No. 3/3/1526 ""N(N)LE Citizens Political Union "New Political Center", Herman Sabo, Zurab Girchi Japaridze and Ana Chikovani v. the Parliament of Georgia", 25 September 2020.

5. COMPLIANCE WITH THE REQUIREMENTS OF THE CONSTITUTION WHEN SEVERING A NORM INTO SUB-NORMS (NORMATIVE CONTENTS)

And finally, when recognizing the normative content as unconstitutional, the line drawn by the Court between the annulled content, and the content left in force, in turn, must correspond to the requirements of the Constitution, at least in terms of the provision of the basic law, in relation to which the question of the constitutionality of the norm arose.[67] The new rule, which in such a case is elaborated by the Court based on the disputed norm, should not itself contradict the corresponding provision of the Constitution. It is debatable, whether in such a case the Court should take into account not only the specific constitutional norm, with respect to which the constitutionality of the norm is considered, but also other constitutional provisions. Taking into consideration the reputational risks that may be associated with the recognition of the normative content once formulated by the Constitutional Court as unconstitutional in another case, it is appropriate for the Court to take into account at least those constitutional interests/ principles, that derive from the essence of the case, and resolve a specific dispute in such manner.[68]

EXAMPLE

In the case "Citizen of Georgia Ilia Chanturaia vs. Parliament of Georgia", the Constitutional Court considered the constitutionality of paragraph 9 of Article 212 of the Civil Procedure Code of Georgia in relation to the first paragraph of Article 42 of the Constitution of Georgia (the first paragraph of Article 31 of the current version of the Constitution - the right to a fair trial).[69] *The contested norm stipulated, that in cases of disruption of order at the hearing, disobedience to an order of the presiding judge, or disrespect towards the court, the presiding judge may, following deliberation in the courtroom, issue an order to penalize the participant of the trial and/or the person attending the hearing without oral hearing and was not subject to appealing. The Constitutional Court separated from the norm the content that referred to issuing an order on the expulsion of a person present at the proceedings without an oral hearing*

[67] Fallon, supra note 46, 236.

[68] In addition, we do not think justified the opinion, expressed in the dissenting opinion quoted above, according to which there is no possibility of further appealing of the normative situation, created as a result of the judgment of the Constitutional Court in relation to any other constitutional provision, in compliance with the general rules. See supra note 67, Judge Eva Gotsiridze's dissenting opinion on case No. 3/3/1526 " N(N)LE Citizens Political Union "New Political Center", Herman Sabo, Zurab Girchi Japaridze and Ana Chikovani v. the Parliament of Georgia", 25 September 2020.

[69] Judgment of the Constitutional Court of Georgia on case No. 2/2/558 "Citizen of Georgia Ilia Chanturaia v. Parliament of Georgia", 27 February 2014.

and considered that in this part the norm met the requirements of the first paragraph of Article 42 of the Constitution, while in the remaining part, it considered that the norm violated the constitutional right. Accordingly, the Constitutional Court recognized as unconstitutional part of paragraph 9 of Article 212 of the Civil Procedure Code of Georgia, except for the normative content, which referred to issuing of an order on expulsion of a person present at the session without an oral hearing.

VI. CONCLUSION

In the present paper, based on theoretical-practical observations (including comparative research), we tried to outline those principles, on which the constitutional review of the normative content should be based in the Georgian reality. Examination of the practice of the Constitutional Court confirmed, that until now no general framework has been established, on the basis of which it would be possible to determine when and by applying what criteria does the Constitutional Court evaluates the normative content. According to the opinion presented in the paper, it is advisable to pay more attention to the mentioned issue during constitutional proceedings and to properly indicate in the substantiation the reasons, on the basis of which preference was given to a specific alternative of elimination of the violation of the Constitution (including, if the norm as a whole becomes the subject of the Court's assessment, why it was not considered necessary to limit the focus to an examination of specific normative content, and vice versa).

As a conclusion, the paper proposes criteria, that must be met cumulatively in order for the Constitutional Court to review the normative content, namely: there must be constellations within which the application of the norm will not lead to violation of the Constitution, i.e. the norm must have a constitutionally legitimate normative content; The review of the normative content should not essentially turn into an assessment of the constitutionality of an individual decision; Separation of the normative content from the norm should not contradict the legislator'sintent and should not be based on an exaggerated hypothesis regarding the application of the norm in different contexts; When recognizing the normative content as unconstitutional, the line drawn between the repealed content and the content left in force, in turn, must comply with the requirements of the Constitution. Hence, the norm, which is not subject to deconstruction into normative contents according to any of the criteria listed above, should be assessed by the Constitutional Court in its entirety.

*George Goradze**

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

ABSTRACT

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

I. INTRODUCTION

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

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

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

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

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

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

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

Constitutional Law 228.

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

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

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

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

8 Qvortrup, supra note 6, 162.

9 Morel, supra note 4, 528.

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

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

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

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

II. POSITION OF THE PRESIDENT OF GEORGIA

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

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

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

[13] ibid, 8.

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

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

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

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

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

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

[15] ibid.

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

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

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

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

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

III. EXPLANATION USING THE BASIC PRINCIPLES OF HERMENEUTICS

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

1. GRAMMATICAL DEFINITION

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

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

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

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

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

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

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

2. SYSTEMATIC DEFINITION

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

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

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

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

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

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

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

2.1. DEFINITION IN RELATION TO THE CONSTITUTION

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

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

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

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

[29] ibid.

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

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

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

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

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

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

2.2. DEFINITION IN THE CONTEXT OF THE HIERARCHICALLY EQUAL NORM

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

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

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

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

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

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

3. TELEOLOGICAL DEFINITION

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

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

[33] Khubua, supra note 20, 193.

[34] Barak, supra note 18, 88.

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

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

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

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

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

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

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

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

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

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

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

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

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

[40] ibid, Article 138, Clause 2.

[41] ibid, Article 143, Paragraph 1.

[42] Kobakhidze, supra note 17, 84.

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

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

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

4. HISTORICAL EXPLANATION

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

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

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

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

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

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

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

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

[50] Demetrashvili, supra note 12, 11.

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

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

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

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

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

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

IV. THE IDEA OF A REFERENDUM

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

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

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

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

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

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

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

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

[61] ibid, paragraph 3.

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

V. CONCLUSION

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

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

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

*Tea Kavelidze**

CONSTITUTIONAL STATUS OF THE PRESIDENT OF GEORGIA IN THE FIELD OF FOREIGN RELATIONS

ABSTRACT

In the constitutional legal space of Georgia, coexistence of the subjects with the right to represent the country in the field of foreign relations is a very problematic issue. In the wake of the constitutional reforms implemented in Georgia in 2004, 2009-2010, and 2017-2018, the forms of state governance of Georgia were changing, which, in turn, led to changes in the powers of the President of Georgia and the executive power in the field of foreign relations. According to the Constitutional Law of October 15 2010, which came into effect from the moment of swearing-in of the President elected as a result of the next regular Presidential Elections of October 2013, the form of state governance of Georgia was changed. The change of the main characteristics of the governance model led to the risk of overlapping of competences and conflict of powers in the field of foreign relations not only between the President of Georgia, the Prime Minister, the Minister of Foreign Affairs, and other ministers, but also in the executive power itself. In addition, as a result of the constitutional reform of 2017-2018, the Constitution was revised again, which shaped differently both the governance model and the powers of the President of Georgia in the field of foreign relations.

Ensuing from the above, the article will discuss the constitutional status of the President of Georgia in accordance with the constitutional reforms implemented in the field of foreign relations and the current edition of the Constitution. The article shall overview the intersecting powers of the President of Georgia and the Government of Georgia in the field of foreign relations in conditions of the current governance model of Georgia and the constitutional experience of the countries with a governance model, similar to Georgia in terms of the President's foreign powers.

I. INTRODUCTION

The Constitutional reform was carried out in accordance with the Constitutional Law of February 6 2004, which replaced the presidential republic with a form of governance, the "conceptual basis of which is the so-called French model".[1] Consequently, instead of

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[1] Avtandil Demetrashvili and Irakli Kobakhidze, the Constitutional Law (Innovation Publishing House 2010) 67 (in Georgian).

the so-called "American presidential" governance model was introduced the "French" semi-presidential governance model.[2] By the Constitutional Law of October 15 2010, which came into force from the moment of swearing-in of the President elected as a result of the next regular Presidential Elections of October 2013, the form of state governance of Georgia was also changed, which caused certain divergence of opinion in the society, as some believed that it was a model of parliamentary governance, while others considered it a mixed model with some of the features of a republican governance model. The difference of opinion was to a certain extent preconditioned by the fact, that the model of governance, existing at that time, did not contain the features of classical parliamentary governance, but represented its different interpretation.

In accordance with the Resolution N65-I of the Parliament of Georgia of December 15 2016 on "Creation of the State Constitutional Commission and Approval of the Statute of the State Constitutional Commission", the Constitutional Commission was created again for the purpose of revising of the Constitution, within the framework of which opinions were repeatedly expressed regarding the change in the governance model, "Therefore, the faulty system of parliamentary governance, which the Constitution [...] [established], needed to be [...][revised]".[3] As a result, by changing the method of direct election of the President by adoption of the Constitutional Law of Georgia on Entering Changes to the Constitutional Law of Georgia on Amending the Constitution of Georgia[4], the existing model became more approximated to the model of parliamentary governance. Consequently, "on December 16, 2018, along with the swearing-in of the President of Georgia, the new, current edition of the Constitution of Georgia, which was elaborated on the basis of the constitutional reform of 2017-2018, came into force." [5] As a result, the powers of the Government of Georgia and the President of Georgia in the field of foreign relations were defined in a different way, which will be discussed in the present article together with the above-mentioned issues.

The issue presented in this paper is of state importance as it is related to the country's foreign policy and its image, both internally and externally, as there are gaps left in the national legislation, which allow for discretionary actions and different interpretations by the government. Consequently, the field of foreign relations is a quite problematic

[2] Avtandil Demetrashvili, Chronicles of the Constitutionalism in Georgia, the Constitutional Reform of Georgia of 2009/2010 (Seventh Publication, Regional Center for Research and Promotion of Constitutionalism 2012) 24 (in Georgian).

[3] European Commission for Democracy through Law, Opinion on the draft revision of the Constitution, 20 <https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)013-e> (in Georgian) [last accessed on 15 July 2023].

[4] On entering changes to the Constitutional Law of Georgia on Amending the Constitution of Georgia <https://matsne.gov.ge/ka/document/view/4110673?publication=0> [last accessed on 7 July 2023].

[5] Irakli Kobakhidze, Constitutional Law, State Organization Law, series of legal textbooks "RES PUBLICA" (first edition, Favorite Style Publishing House 2019) 31 (in Georgian).

issue and requires separation of competences not only between the President of Georgia and the Prime Minister, but also between the executive power as a whole and the President of Georgia. That is why in the present paper we shall discuss the powers of the President of Georgia in the field of foreign relations on the backdrop of the constitutional reforms, taking into account the governance model and foreign practices.

II. THE INSTITUTE OF THE HEAD OF STATE – THE PRESIDENT

The term "head of state", as explained by Giorgi Kverenchkhiladze, is used in the modern constitutions and scientific literature to emphasize the special status of this person, and the origin of the term itself is historically related to the role and powers of the monarch in the political-legal life of the state, which is applied both to monarchs who actually "rule" (Jordan, Oman) as well as those, who only "reign" (monarchs of the European states).[6] Giorgi Kverenchkhiladze notes, that the mentioned term is also applied to those Presidents, who independently exercise the powers of the head of state (USA, Mexico, Brazil), as well as those Presidents, who exercise the powers of the head of state in agreement with the government or on the advice of the government (Italy, Germany).[7]

It can be said, that the status of the head of state is the main characteristic of the institution of the President. "The head of state is a general concept, which existed in various forms in different states at different times, either in the form of one person or a collegial body".[8] With reduced or expanded powers, the institution of the President can be found regardless of any type of the republican government. The word "president" comes from the Latin term "praesiedens" and literally means "the one sitting in the front". It is possible, that the founders of the USA assigned this title to the Head of State, introduced by the Constitution of 1787, due to his role of the political leader of the state - the "legatee" of the Monarch, the highest official in the republican form of governance.[9] Accordingly, "the Presidential system as a form of government was created as an alternative to a Monarchy and Parliamentarism".[10]

If we look at the history of world constitutionalism, it becomes clear that the establishment ofthe institute of the President and the presidential model of state governance is

[6] Vasil Gonashvili and others, Introduction to the Constitutional Law, Ivane Javakhishvili Tbilisi State University, Faculty of Law (Meridian Publishing House 2016) 369 (in Georgian).

[7] ibid.

[8] Zaza Rukhadze, the Constitutional Law of Georgia (Young Lawyers Association 1999) 313 (in Georgian).

[9] Avtandil Demetrashvili (ed), Constitutional Law Handbook (Hollywood Publishing House 2005) 271 <https://iuristebi.files.wordpress.com/2012/12/e18399e1839de1839ce183a1e183a2e18398e183a2e183a3e183aae18398e183a3e183a0e18398-e183a1e18390e1839be18390e183a0e18397e1839ae18398e183a1.pdf> (in Georgian) [last accessed on 7 July 2023].

[10] Héctor Fix-Fierro and Pedro Salazar-Ugarte, 'Presidentialism' in Michel Rosenfeld and András Sajó (eds), The Oxford Handbook of Comparative Constitutional Law (Oxford University Press 2012) 628.

connected withadoption of the Constitution of the United States of America in 1787.[11] The founding fathers of the USA opted for a "rigid" model of separation of the state power, which implies a strict separation of powers between the legislative, the executive and the judicial branches of the state power, as well as non-interference in each other's competences. According to this model, the President should be the head of state, who would be the head of the executive power.[12] The so-called "American Model" of the Institute of the President was soon introduced in the European states as well.[13] "After the USA, in 1848, the President's position was simultaneously institutionalized only in two countries, France and Switzerland, and it is noteworthy, that these countries were not "copy-pasting" the American model of presidency, but immediately developed the so-called "European model" of president's institute."[14]

The constitutional-legal status of the President differs depending on the features of the governance models, e.g., in a Presidential Republic, the institution of the President is characterized by the expanded powers of the President. The executive power is in the hands of the President, and he/she performs the functions of the Head of State and the Head of the government at the same time.[15] In presidential systems, the President of the Republic is exclusively at the head of the executive branch of the power, and there is no dual executive power.[16]

In a parliamentary republic, the positions of the head of state and the head of the executive power are separated from each other, in particular, the duty of the head of the state is performed by the President, and the duty of the head of the executive power is performed by the Prime Minister.[17] In countries with a parliamentary system, as a rule, the functions of the head of state and the head of the government are separated, in particular, the duties of the head of state usually include representation of the country, performance of ceremonial duties, and expression of national identity, values and aspirations.[18] The head of state, the President, as a constitutional arbiter, may also have limited functions, which are expressed in the discretionary powers to appoint the Prime

[11] Dimitri Gegenava and others, The Constitutional Law of Georgia (fourth edition, publishing house of Davit Batonishvili Institute of Law, 2016) 228 (in Georgian).

[12] ibid.

[13] ibid, 229.

[14] Group of authors, supra note 9, 271.

[15] Pierre Pakte and Ferdinand Mellen-Sukramanian, Constitutional Law (28th edition, Tbilisi University Press 2012) 228 (in Georgian).

[16] Thomas Sedelius, The Tug-of-War between Presidents and Prime Ministers, Semi-Presidentialism in Central and Eastern Europe (Universitetsbiblioteket 2006) 32.

[17] Dimitri Gegenava and others, Introduction to the Constitutional Law (Sulkhan-Saba Orbeliani University Publishing House 2021) 138 (in Georgian).

[18] Elliot Bulmer, Non-Executive Presidents in Parliamentary Democracies, International IDEA Constitution-Building Primer (Second edition, International Institute for Democracy and Electoral Assistance (International IDEA) 2017) 4 <https://www.idea.int/sites/default/files/publications/non-executive-presidents-in-parliamentary-democracies-primer.pdf> [last accessed on 7 July 2023].

Minister, dissolve the Parliament, make non-political appointments, the power of veto, and etc.[19] At the same time, a collegial government has its head - the Prime Minister, who is responsible for defining, implementing and enforcing executive policies, and generally running the state.[20]

Maurice Duverger advanced the concept of a 'semi-presidential' regime: a mix of a popularly elected and powerful presidency with a prime minister heading a cabinet subject to assembly confidence.[21] According to Maurice Duverger, semi-presidentialism may be defined by three features: a) A president who is popularly elected; b) The president has considerable constitutional authority; c) There exists also a prime minister and cabinet, subject to the confidence of the assembly majority.[22] A semi-presidential system divides the executive into two (roughly) equally legitimate parts, only one of which – the prime minister – depends on assembly confidence for its survival in office,[23] while the president is elected directly.[24]

Accordingly, in a mixed model of government, the head of state is the President, although the executive branch is bicephalic in nature, with powers distributed between the President and the Prime Minister.[25] The peculiarity of the semi-presidential model is the fact, that the President is assigned certain powers in the executive branch of power, and unlike the classical parliamentary government model, has special jurisdiction that can be exercised without countersignature, which excludes the nominal nature of his/her powers.[26] As Richard Albert states, the dominance of the president in semi presidential systems is not surprising, as it embodies a compromise of sorts inasmuch as the president possesses an extraordinary range of constitutional powers, although those powers are, in turn, circumscribed by the constitutional text.[27]

The Montesquieu model of separation of powers, which is an indicator of a legal and democratic state, envisaged separation of power between the three branches of the

[19] ibid.

[20] ibid.

[21] Matthew Søberg Shugart, Semi-Presidential Systems: Dual Executive and Mixed Authority Patterns (French Politics, Palgrave Macmillan 2005) 323-324 <https://link.springer.com/content/pdf/10.1057/palgrave.fp.8200087.pdf> [last accessed on 7 July 2023].

[22] ibid.

[23] Steffen Ganghof and others, 'Australian bicameralism as semi-parliamentarism: patterns of majority formation in 29 democracies' (2018) 53 Australian Journal of Political Science 212 <https://d-nb.info/1218871288/34> [last accessed on 7 July 2023].

[24] ibid, 214.

[25] For details, see Malkhaz Nakashidze, Peculiarities of the relations of the president with the branches of government in the semi-presidential system of governance (on the example of the Republic of Azerbaijan, Georgia and the Republic of Armenia) (University Publishing House 2010) 15, 55 (in Georgian).

[26] François Frison-Roche, The Political Influence of Presidents Elected by Universal Suffrage in Post-communist Europe, European Commission for Democracy Through Law (Venice Commission), 6 <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD(2004)040-e> [last accessed on 7 July 2023].

[27] Richard Albert, 'Presidential Values in Parliamentary Democracies' (2010) 8 International Journal of Constitutional Law 226.

government. According to the mentioned model, in order to prevent accumulation of power in the hands of one person, it is distributed between the legislative, the executive and the judicial authorities, i.e. "to ensure, that no one can abuse power, it is necessary [...] that power should be a check to power."[28] Separation of powers is a "common feature" of modern constitutionalism.[29] The main essence of the distribution of power implies not only democratic governance, but also checks and balances of power by each branch of government, separation of competences between the branches of power and possibility of mutual control. As Besarion Zoidze explains, the principle of separation of powers assigns its function and responsibility to each branch of government.[30] One of the factors for determining the current governance model in the country is ensuing from the principle of the separation of powers, i.e., the relationship between the powers assigned to the institution of the President and the executive power.

III. THE FIELD OF FOREIGN RELATIONS AND THE CONSTITUTIONAL STATUS OF THE PRESIDENT - FROM REFORM TO REFORM

Both, "in the history of Georgian constitutionalism and in the history of independent Georgia, the problem of the first person of the state has always been the subject of intense discussions and consideration. During the drafting of the Constitution of the First Republic of Georgia, the problem was solved easily, i.e., according to the principle – "there is no president, there is no problem", they completely refused the institute of the head of state, and his traditional powers were distributed between the parliament and the prime minister, elected for the term of one year".[31]

If we look at the constitutional reforms of Georgia, we will see that the issue of the country's head of state, the first person and his powers were constantly undergoing changes. Until 2004, in Georgia was established the so-called "American presidential model of government", where the President enjoyed broad powers, and was both the head of state and the head of government, while the government as a collegial body did not exist. Subsequently, a substantial revision of the Constitution was carried out and the so-called "Presidential Model" was replaced by the "mixed semi-presidential" model. Consequently, "Georgia from the so-called "American model" transitioned to the "French model"".[32] The mentioned model was characterized by the bicephalic

[28] Charles Louis de Montesquieu, The Spirit of Laws (CIPDD 1994) 180-181.
[29] Albert, supra note 31, 209.
[30] Besarion Zoidze, Constitutional Control and the Order of Values in Georgia (German Society for Technical Cooperation (GTZ) 2007) 60 (in Georgian).
[31] Demetrashvili, supra note 2, 24.
[32] Malkhaz Matsaberidze, Political System of Georgia (Ivane Javakhishvili Tbilisi State University

nature of the executive power, in particular, the executive power was divided between the President and the Prime Minister.

The Constitutional law of October 15 2010, adopted on the basis of the constitutional reform of 2009-2010, defined the constitutional status of the President of Georgia in a different way. As a result of the mentioned reform, according to the Constitution of Georgia, the President was no longer "the cornerstone of the government system, but it would not be correct to "downgrade" the President depict him/her as a symbolic figure, vested with only a ceremonial or representative function",[33] especially since "the institution of the head of state is a necessary attribute of the statehood."[34]

According to the current edition of the Constitution of Georgia, the President of Georgia is the head of the state of Georgia.[35] "As a rule, the concept of the head of state implies the highest executive and the highest representative in foreign relations"[36], however, the constitutional law of 2010, which came into effect in 2013, reduced the powers of the President of Georgia in the field of foreign relations. In particular, according to paragraph 3 of Article 69 of the Constitution of Georgia, effective from 2013 to 2018,[37] the President of Georgia was not the highest representative in foreign relations, but represented Georgia in international relations. According to the current edition of the Constitution of Georgia, the President is no longer the highest representative in foreign relations. Based on the status of the President of Georgia, at first glance it is possible to conclude, that he/she no longer has effective powers and is no longer a governing link within the system of distribution of power, "although it would not be correct to vest this institution with only a ceremonial, symbolic, representative function."[38]

According to Article 73, paragraph 1, subparagraph "a" of the same version of the Constitution valid from 2013 to 2018,[39] the President of Georgia shall conduct negotiations with other countries and international organizations in

Publishing House 2019) 242 (in Georgian).

[33] Avtandil Demetrashvili, "Peculiarities of the New System of Government in Georgia" in the compendium of Gia Nodia and Davit Afrasidze (eds), From Super-Presidency to Parliamentarianism: Constitutional Changes in Georgia (Ilia State University Publishing House 2013) 31-32 (in Georgian).

[34] Demetrashvili, Kobakhidze, supra note 1, 265.

[35] Article 49, edition of the Constitution of Georgia of June 29 of 2020 <https://matsne.gov.ge/ka/document/view/30346?publication=36> [last accessed on 7 July 2023].

[36] Dimitri Gegenava and others, Constitutional Law of Georgia (second edition, Davit Batonishvili Law Institute Publishing House 2014) 229 (in Georgian).

[37] The Constitution of Georgia, which came into force after 2013 presidential elections and was in effect until December 16 of 2018, when the president-elect of Georgia in the next elections was sworn-in. <https://matsne.gov.ge/ka/document/view/30346?publication=34> [last accessed on 7 July 2023].

[38] Demetrashvili, supra note 2, 25.

[39] The Constitution of Georgia, which came into force after 2013 presidential elections and was in effect until December 16 of 2018, when the president-elect of Georgia in the next elections was sworn-in. <https://matsne.gov.ge/ka/document/view/30346?publication=34> [last accessed on 7 July 2023].

agreement with the Government, conclude international agreements and treaties, appoint and dismiss ambassadors and other diplomatic representatives of Georgia on the recommendation of the Government, accredit es of foreign states and international organisations in agreement with the Government. Before the mentioned change, the President independently concluded international treaties and agreements, as well as conducted negotiations with foreign states, accredited ambassadors and other diplomatic representatives of foreign states and international organizations, and appointed ambassadors and other diplomatic representatives with the approval of the Parliament. According to the constitution, which was effective from 2013 to 2018, the powers of the president in the field of international relations were "narrowed", since the President exercises these powers only in agreement with the government. In the opinion of the Venice Commission, the rewording of Article 73, paragraph 1, sub-paragraph "a" contained an even more problematic regulation, and "the amendment adopted during the second reading will not eliminate concerning moments", since the powers in the field of foreign relations are not fully separated between the President of Georgia and the government.[40] According to Article 69, paragraph 1 of the Constitution of the same edition, the President of Georgia is the guarantor of national independence and unity of the country and shall ensure the functioning of state bodies within the scope of his/her powers granted by the Constitution.[41] "Despite the fact that according to the Constitution the President allegedly did not [...][possess] the necessary and sufficient powers for proper performing of his/her high status and numerous functions, the President, as the first person of the state, had sufficient competence [...]."[42] The institution of countersignature was quite broadly used, according to the version of the Constitution in force from 2013 till 2018, since almost every act of the President required the co-signature of the Prime Minister to give to them legal force, and "taking into account the international practice, i.e., the constitutional legal practice, the exercise of the powers of the head of state, which to a certain extent is related to the implementation of executive powers, is subject to countersignature".[43]

According to the aforementioned edition of the Constitution, "the degree of legitimacy of the President is particularly noteworthy, as the President can always declare that he/

[40] European Commission for Democracy through Law, Final Opinion, 43 <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)028-geo> (in Georgian) [15.07.2023].

[41] The Constitution of Georgia, which came into force after t2013 presidential elections and was in effect until December 16 of 2018, when the president-elect of Georgia in the next elections was sworn-in <https://matsne.gov.ge/ka/document/view/30346?publication=34> [last accessed on 7 July 2023].

[42] Demetrashvili, supra note 2, 25.

[43] Giorgi Kverenchkhiladze, Novelties of Georgian constitutionalism: the constitutional structure of the President and the government and specificity of interrelationship in the light of the 2010 constitutional reform (Center for Constitutional Studies 2013) 7-8 <https://conlaw.iliauni.edu.ge/wp-content/uploads/2013/10/kverenchxilaZe.pdf> (in Georgian) [last accessed on 7 July 2023].

she is functionally the President of every citizen of Georgia, since he/she is the head of state elected by direct universal suffrage".[44] According to Giorgi Gogiashvili, the opinion was expressed, that the President of Georgia, with his/her functions and powers (and what is important, elected directly), was superior to the Presidents of purely parliamentary republics, but was a little weaker for the semi-presidential model.[45]

IV. THE PRESIDENT OF GEORGIA AS THE COUNTRY'S REPRESENTATIVE IN FOREIGN RELATIONS

According to article 49 of the Constitution of Georgia of current edition[46] the President of Georgia is still the Head of the state, and is the guarantor of the country's unity and national independence, also, the Supreme Commander-in-Chief of the Defence Forces of Georgia, but the President is not the highest representative in international relations, but represents Georgia in foreign relations. According to the recommendation of the Venice Commission, it was proposed to divest the President of the powers listed in the field of foreign powers, since the aforementioned power "increases the risk of conflict between the government and the President,"[47] especially since "the starting point of the 2009-2010 Constitutional Commission was to distance the President from the executive power."[48]

The degree of legitimacy of the President of Georgia is decreasing, as starting from 2024 the President of Georgia shall be elected for a term of 5 years by the Electoral College, on the basis of universal, equal and direct suffrage.[49] However, the extent to which the way the president is elected affects his actual power is debatable, since "presidents are presidents, regardless of how they came to power."[50]

At the same time, Article 52 of the current version of the Constitution[51] begins with a new sentence, in particular, the President of Georgia exercises representative powers in foreign relations with the consent of the Government. With the mentioned provision the Constitution emphasizes the fact, that the President of Georgia implements the

[44] Demetrashvili, supra note 2, 27.
[45] Giorgi Gogiashvili, Comparative Constitutional Law (World of Lawyers Publishing House 2014) 185 (in Georgian).
[46] June 29 of 2020 edition of the Constitution of Georgia <https://matsne.gov.ge/ka/document/view/30346?publication=36> [last accessed on 7 July 2023].
[47] Kverenchkhiladze, supra note 48, 5.
[48] Gegenava, supra note 41, 116.
[49] Article 50, June 29 of 2020 edition of the Constitution of Georgia <https://matsne.gov.ge/ka/document/view/30346?publication=36> [last accessed on 7 July 2023].
[50] Margit Tavits, Presidents with Prime Ministers: Do Direct Elections Matter? (Oxford University Press 2008) 235.
[51] Article 52, paragraph 1, subparagraph "a" of current the Constitution of Georgia, dated by June 29 of 2020 <https://matsne.gov.ge/ka/document/view/30346?publication=36> [last accessed on 7 July 2023].

representative powers with the approval of the government. According to the same article, the President, along with the implementation of representation in foreign relations with the consent of the government, and not in agreement with the government, as indicated in the previous edition of the Constitution, conducts negotiations with other states and international organizations, concludes international treaties, and accepts the accreditation of ambassadors and other diplomatic representatives of other states and international organizations, again, with the consent of the government. In addition, the President appoints and dismisses the heads of diplomatic missions upon nomination of the government.

According to Article 55 of the current edition of the Constitution, the Prime Minister represents Georgia in foreign relations and concludes international treaties on behalf of Georgia. Accordingly, in the Constitution of Georgia appeared a provision, according to which the power to conclude international agreements apart from the President, was also granted to the Prime Minister. In addition, according to the current version of the Constitution, ministers no longer represent the country in foreign relations within their competence.[52] However, despite the fact that the Constitution no longer contains the mentioned provision, according to Article 111 of the Law of Georgia "On the Structure, Authority and Rules of Operation of the Government of Georgia" the Prime Minister and ministers represent Georgia in foreign relations within the scope of their authority. Which means that there is still an overlap of powers in the sphere of foreign representation between the government, i.e., its head and members, and the President.[53]

According to Article 4 of the Law of Georgia on "International Treaties of Georgia", the following treaties shall be concluded with foreign states and international organizations: a) interstate agreements - on behalf of Georgia; b) intergovernmental agreements - on behalf of Georgia; c) international interagency agreements – on behalf of the ministry of Georgia, State Security Service of Georgia or on behalf of the Prosecutor's Office of Georgia.[54] A treaty shall be concluded on behalf of Georgia when the parties consent the treaty to be an interstate agreement, as well as a treaty relating to: territorial claims and armistice; human rights and freedoms; citizenship; participation of Georgia in interstate structures and other international unions (organizations); use of the territory and natural resources of Georgia; borrowing and lending of loans by the State, and issuing state guarantees.[55]

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[52] Article 78, paragraph 4, Constitution of Georgia, which came into effect after 2013 Presidential elections and was in effect until December 16 of 2018, when the president-elect of Georgia in the next elections was sworn-in. <https://matsne.gov.ge/ka/document/view/30346?publication=34> [last accessed on 7 July 2023].

[53] The Law of Georgia on the Structure, Authority and Rules of Operation of the Government of Georgia <https://matsne.gov.ge/ka/document/view/2062?publication=41> [last accessed on 7 July 2023].

[54] Law of Georgia on International Treaties of Georgia <https://matsne.gov.ge/ka/document/view/33442?publication=17> [last accessed on 7 July 2023].

[55] Article 4, paragraph 2, the Law of Georgia on International Treaties of Georgia <https://matsne.gov.ge/ka/document/view/33442?publication=17> [last accessed on 7 July 2023].

According to the amendments entered into the Law in 2018, Article 4 of the mentioned law was added to paragraph 41, according to which "the Prime Minister of Georgia represents Georgia in foreign relations. The Prime Minister of Georgia concludes interstate agreements on behalf of Georgia. The President of Georgia exercises representative powers in foreign relations with the approval of the Government. The Government of Georgia directs all actions that Georgia implements on the international level in relation to interstate agreements, including negotiations, signing of the agreements, and their recognition as binding. With the approval of the Government of Georgia, the mentioned actions or their part can be carried out by the President of Georgia".[56] These amendments already specified, that the Prime Minister of Georgia concludes such international agreements that have an interstate status. In addition, the norm contains an interesting provision, in particular, that the mentioned actions or part of them can be carried out by the President of Georgia with the approval of the Government. Consequently, the legislator allows for the possibility, that the President of Georgia is also authorized to conclude an international agreement between the states, but this requires consent of the Government of Georgia. Consequently, according to the Constitution of Georgia, as well as the Law of Georgia on International Treaties clearly establish two subjects with the right to conclude an international agreement, i.e., the Prime Minister, who concludes an international agreement, which is specified in the Law of Georgia on International Treaties as an interstate international agreement, and the President, who concludes an interstate international agreement with the approval of the Government of Georgia.

It follows from the Constitution of Georgia that the President of Georgia can conclude any type of international agreement (be it interstate, intergovernmental, or interdepartmental) with the consent of the Government of Georgia, since the Constitution does not specify what type of international agreement the President is authorized to conclude. As for the Prime Minister, Article 55 of the Constitution specifies that the Prime Minister shall conclude international agreements on behalf of Georgia. According to the Law on International Treaties, it is possible to conclude only inter-state agreement on behalf of Georgia. Based on the above, the Prime Minister can conclude only an international agreement between states.

The goal of the 2017-2018 constitutional reform was the approximation with the parliamentary governance model, as a result of which the powers of the President of Georgia were reduced, one example of which is the granting of the power to conclude international agreements to the Prime Minister in the current edition of the Constitution of Georgia. As mentioned above, before that, the power of the Prime Minister to conclude an international agreement was not provided by the Constitution, in force from 2013 to 2018, and only the President had this power in agreement with the

[56] The Law of Georgia on International Treaties of Georgia <https://matsne.gov.ge/ka/document/view/33442?publication=17> [last accessed on 7 July 2023].

government.[57] Accordingly, the powers of the President of Georgia have reduced, but it is interesting, whether it is expedient to reduce the powers of the President in the sphere of international relations.

The president, even as a nominal ruler, has to work in the international arena as a guarantor of the country's unity and national independence, and as discussed above, under the parliamentary governance model the President should be mainly engaged in the exercise of representative powers. Taking into consideration the above, it is somewhat vague, what is the purpose of distribution of the power of representation between the President and the Prime Minister, in particular, when the President can exercise the power of representation of the country with the approval of the government, while the Prime Minister can exercise this power without such approval, especially since the Constitution does not confer to either of them the status of the highest representative.

When considering this issue, it is important to refer to the constitutional experience of different countries, which have similar governance model as Georgia. Since the Constitution of Georgia proposes the establishment of a classical parliamentary republic with a weak President, the powers of the President in the field of international relations in countries with the parliamentary governance model need to be discussed.

V. THE PRESIDENT IN THE PARLIAMENTARY REPUBLIC

"The President of the Parliamentary Republic is often referred to as the "State Notary"".[58] "The parliamentary system separates the positions of the Head of the State and the Head of the Executive Power. The head of state has only formal, ceremonial and also reserve competences. In a parliamentary republic, the head of state is the President "without authority"".[59] In such a system, the head of state represents the state both in domestic and foreign relations, is a neutral arbiter in the system of separation of powers, and is also a symbol of the state's unity, loyalty, and representation of the people.[60]

It can be said that reaching an agreement on selection mechanism of the Head of State is one of the most controversial issues.[61] The crucial point is that the head of government in a parliamentary system is chosen by members of the national legislature. For this

[57] Article 73, paragraph 1, subparagraph "a" of the Constitution of Georgia, which came into force after 2013 presidential elections and was in effect until December 16 of 2018, when the president-elect of Georgia in the next elections was sworn-in. <https://matsne.gov.ge/ka/document/view/30346?publication=34> [last accessed on 7 July 2023].

[58] Dimitri Gegenava, Introduction to Georgian Constitutional Law (Sulkhan-Saba Orbeliani University Publishing House 2019) 194 (in Georgian).

[59] Lana Tsanava, 'The Head of State', compendium Dimitri Gegenava and others (ed), Constitutionalism, General Introduction, Book II (Sulkhan-Saba Orbeliani Publishing House 2020) 157-158 (in Georgian).

[60] ibid, 158.

[61] Tavits, supra note 58, 2.

reason, in a parliamentary system there is no true separation of powers between the legislature and the executive, at least in the sense, that it is in a presidential system, where the president is separated from the legislature.[62] Indirectly elected presidents are vested with the broadest power by the typical constitution in the field of military and foreign policy, in particular, many constitutions appoint the president as the Supreme Commander-in-Chief of the Armed Forces, and the constitution grants the president the right to represent the country internationally.[63]

The parliamentary system of government is characterized by the superior position of the Parliament in relation to the executive power, therefore, the Parliament, which is the highest representative body, not only forms the government, but also controls it.[64] As for the head of state, whether monarch or president, he /she generally holds no real power, but his/her "role increases during governmental and parliamentary crises".[65] In a parliamentary system, the Parliament is the only source of popular sovereignty.[66] "Parliamentary systems have their name due to their founding principle, which is called the sovereignty of the Parliament"[67]. As Giorgi Kakhiani points out, the transition to the parliamentary model means moving the epicenter of political life to the Parliament, which means the beginning of a new era in Georgian constitutionalism.[68]

Based on the above, it is considered that the parliamentary system is the popular government, because the members of the Parliament, elected by the people, are authorized to observe and control the activities of the government and take appropriate measures.[69] This system is characterized by the fact that the President is distanced from the executive power and his/her authority does not overlap with the authority of the executive power, he/she does not participate in the daily activities of the government and

[62] Thomas O. Sargentich, 'The Presidential and Parliamentary Models of National Government' (1993) 8(2/3) American University International Law Review 579-580 <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1870&context=auilr> [last accessed on 7 July 2023].

[63] Tavits, supra note 58, 2.

[64] Konstantine Kandelaki and others, 'Constitutional systems and the constitutional process in Georgia (1995-2009), development perspective' (Open Society Georgia Foundation 2009) 13 <http://constitution.parliament.ge/uploads/masalebi/bibliography/OSGF-2009-2010-konst-procesi.pdf> (in Georgian) [last accessed on 7 July 2023].

[65] ibid.

[66] ibid, 21.

[67] Giovanni Sartori, Comparative Constitutional Engineering, An Inquiry into Structures, Incentives and Outcomes (2nd Edition, New York University Press 1997) 101.

[68] Giorgi Kakhiani, 'Observations on Some Issues Related to the Draft Constitutional Law' (2012) 1-2(3-4) Davit Batonishvili Law Institute, Law Journal "Sarchevi" 192 <https://dspace.nplg.gov.ge/bitstream/1234/146099/1/Sarchevi_%202012_N1.pdf> (in Georgian) [last accessed on 7 July 2023].

[69] Lana Tsanava, Principles of Government Responsibility: The Practice of Constitutionalism and Georgian Legislation (University Publishing House 2015) 11 <http://press.tsu.ge/data/image_db_innova/disertaciebi_samartali/lana_canava.pdf> (in Georgian) [last accessed on 7 July 2023]; Otar Melkadze and Otar Makharadze, Organization of Political Power in the Countries with Parliamentary System (Regarding Georgian Problems 2001) 27 (in Georgian).

the parliament, and consequently, it can be said that the President is not the addressee of the protest wave, which gives him/her the opportunity to be a neutral arbiter[70] and thus can "bring the country out of the state of a crisis situation in a constitutional way, using the "soft power"".[71]

The President does not enjoy the right of a legislative initiative or veto, and his/her main powers are somewhat symbolic, such as, for example, appointment and pardon, and the President cannot act independently, as he/she basically implements the will of the parliamentary majority, and formally participates in the formation of the government.[72] The role of the President increases when there is a diversity of parties, the Parliament and the Government are unable to act in concert and a parliamentary crisis occurs, which can be overcome by removing the government or dissolving the parliament.[73]

In a parliamentary republic, the President is traditionally elected by the Parliament, although there are different ways of electing a president.[74] It can be said that "the temptation to intrude on the powers of the head of government and the cabinet is greater when parliamentary democracies have a president as the head of state-generally someone who has had a former political career. One method that parliamentary systems use to minimize this risk is not to allow the president the democratic prestige and implicit power of being popularly elected. Instead, the usual procedure is that the parliament elects the president."[75] When analyzing parliamentary regimes, political scientists ignore the role of the head of state: the monarch, the governor-general in the British Commonwealth of Nations, and the president in republics.[76] Monarchs and their "successor" presidents in a parliamentary republic cannot be just a relic of the past.[77] However, it should be noted that in the case of a parliamentary regime, "if the role of the head of state were only decorative, the separation of the roles of the head of state and the head of government would lose its meaning."[78]

[70] Gogiashvili, supra note 50, 156.
[71] ibid.
[72] Tsanava, supra note 72, 158.
[73] ibid, 159.
[74] Ibid, 160.
[75] ibid; Arend Lijphart, Patterns of Democracy, Government Forms and Performance in Thirty-six Countries, second edition, New Haven and London (First edition 1999. Second edition 2012) 128.
[76] Juan J. Linz, 'Presidential or Parliamentary Democracy: Does It Make a Difference? The Failure of Presidential Democracy' in Juan J. Linz and Arturo Valenzuela (eds), Baltimore and London, Vol. 1 (Johns Hopkins University Press 1994) 46.
[77] Tsanava, supra note 72, 160.
[78] ibid, 160-161.

VI. FOREIGN POWERS OF THE PRESIDENT IN THE CONTEXT OF A PARLIAMENTARY MODEL OF GOVERNANCE ON THE EXAMPLE OF DIFFERENT COUNTRIES

1. GERMANY

Germany is a parliamentary federal republic,[79] according to the Constitution[80] of which the federal president is elected by the federal assembly, like the president of Georgia, who is elected by the electoral college at the next elections[81], which corresponds to the role of a neutral arbiter, assigned to the president by the Constitution.[82] Germany represents a classical type of parliamentary republic, where the state government is based on the scheme of division of power into legislative, executive, and judicial authorities.[83] The Federal President of Germany is the head of state, elected for a 5-year term by a majority vote of the Federal Convention. Any German who is entitled to vote in Bundestag elections may be elected as president.[84] The Federal Assembly consists of the Members of the Bundestag and an equal number of members elected by the parliamentary assemblies of the Länder on the basis of proportional representation.[85]

The status of the President in the field of foreign relations: a) The Federal President shall represent the Federation in international law. b) He shall conclude treaties with foreign states on behalf of the Federation. c) He shall accredit and receive envoys. d) Treaties that regulate the political relations of the Federation or relate to subjects of federal legislation shall require the consent or participation, in the form of a federal law, of the bodies responsible in such a case for the enactment.[86]

According to Article 59 of the Constitution of Germany[87], the Federal President shall represent the Federation in international law. He shall conclude treaties with foreign states on behalf of the Federation. He shall accredit and receive envoys, while the treaties that regulate the political relations of the Federation or relate to subjects of

[79] Vasil Gonashvili (ed), Constitutions of Foreign States, Part III (Union "Lawyers for the Rule of Law" 2006) 48 (in Georgian).

[80] Article 54, Basic Law for the Federal Republic of Germany <https://www.btg-bestellservice.de/pdf/80201000.pdf> [last accessed on 7 July 2023].

[81] Article 50, Constitution of Georgia of June 29 of 2020 <https://matsne.gov.ge/ka/document/view/30346?publication=36> [last accessed on 7 July 2023].

[82] European Commission for Protection of Democracy through Law, Opinion on the draft revised Constitution, 53 <https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)013-e> (in Georgian) [last accessed on 15 July 2023].

[83] Constitutions of Foreign States, supra note 92, 58.

[84] Article 54, Basic Law for the Federal Republic of Germany <https://www.btg-bestellservice.de/pdf/80201000.pdf> [last accessed on 7 July 2023].

[85] Constitutions of Foreign States, supra note 92, 59.

[86] Article 59, Basic Law for the Federal Republic of Germany <https://www.btg-bestellservice.de/pdf/80201000.pdf> [last accessed on 7 July 2023].

[87] ibid, Article 59.

federal legislation shall require the consent or participation, in the form of a federal law, and in case of administrative agreements the provisions concerning the federal administration shall apply.

Thus, according to the German constitution, the general power of representation is granted to the president (without reference to consent or agreement), as well as the power of signing a treaty, however, some issues are specified, in regard to which the president has a limited scope of independent action to conclude agreements. Orders and directions of the Federal President shall require for their validity the countersignature of the Federal Chancellor or the competent Federal Minister.[88] It is clear from the above, that the president independently carries out foreign representation and concludes international agreements, and in the field of foreign relations there is almost no free space where the powers of the president and the executive authority overlap. On the example of Georgia, it can be said that, according to the current version of the Constitution, the power to represent the country in foreign relations is still divided between the Prime Minister and the President.

The Constitution of Germany also contains a provision, according to which relations with foreign states shall be conducted by the Federation. Before the conclusion of a treaty affecting the special circumstances of a Land, that Land shall be consulted in a timely fashion. Insofar as the Lands have the power to legislate, they may conclude treaties with foreign states with the consent of the Federal Government.[89]

2. HUNGARY

Hungary is a unitary parliamentary republic in which the parliament has a leading role.[90] Hungary's Head of State is the President of the Republic, who represents the unity of the nation and monitors the democratic operation of the State. The President of the Republic is the Commander in Chief of the armed forces.[91] Any enfranchised citizen who has reached the age of thirty-five prior to the date of election may be elected to the office of President of the Republic for a term of five years. The President of the Republic may be re-elected to such office no more than once. The President is elected by the Parliament.[92]

Status of the President in the field of foreign relations: The President of the Republic shall a) represent the State of Hungary; b) conclude international treaties on behalf

[88] ibid, Article 58.
[89] ibid, Article 32.
[90] Constitutions of Foreign States, supra note 92, 690.
[91] Article 29, Constitution of the Republic of Hungary <https://www2.ohchr.org/english/bodies/cescr/docs/E.C.12.HUN.3-Annex2.pdf> [last accessed on 7 July 2023].
[92] ibid, Article 29/A.

of the Republic of Hungary; c) if the subject of the treaty falls within its legislative competence, prior ratification by the Parliament is necessary for conclusion of the treaty; d) accredit and receive ambassadors and envoys.[93]

Accordingly, the President of Hungary represents the Republic of Hungary (and not the government) [94] and has the authority to sign international agreements on behalf of the Republic. Also, if the subject of the agreement is a matter within the competence of the Parliament, prior consent/ratification of the Parliament is required before concluding of such an agreement. Ambassadors Extraordinary and Plenipotentiary are appointed by the President. Therefore, unlike Georgia, in this case, we do not have a conflict with the executive power in terms of the President's foreign powers, since according to the Hungarian constitution, only the President enjoys the power of representation in foreign relations, which does not require the countersignature of the Prime Minister or the relevant minister.[95] As to the issue of concluding international agreements, as stipulated by the Constitution, the government concludes international agreements on behalf of the government of the Republic, and the President on behalf of the Republic, and moreover, the co-signing mechanism applies to concluding of international agreements.[96] Consequently, the categories of agreements to be concluded by the President and by the Prime Minister are clearly separated into those to be concluded on behalf of the Government, and on behalf of the Republic. Appointment/recalling of ambassadors by the President of the Republic and conclusion of international agreements require the countersignature of the Prime Minister or the responsible minister.

3. BULGARIA

Bulgaria is a parliamentary republic. According to the Constitution,[97] the President is the head of state, who is directly elected by the voters for a term of 5 years. The President shall embody the unity of the nation and shall represent the State in its international relations.[98]

Status of the President in the field of foreign relations: The President shall a) represent the State in its international relations; b) conclude international treaties in the

[93] ibid, Article 30/A.

[94] The government can enter into international agreements on behalf of the government of the Republic, see Article 35.1(j), Constitution of the Republic of Hungary <file:///C:/Users/User/Downloads/The%20Constitution.pdf> [07.07.2023].

[95] ibid, Article 30/A.

[96] Article 35, Constitution of the Republic of Hungary <https://www2.ohchr.org/english/bodies/cescr/docs/E.C.12.HUN.3-Annex2.pdf> [last accessed on 7 July 2023].

[97] Articles 92, 93.1, Constitution of Bulgaria <http://www.parliament.bg/en/const> [last accessed on 7 July 2023].

[98] ibid, Articles 92-93.

circumstances established by the law; c) on a motion from the Council of Ministers, appoint and remove the heads of the Republic of Bulgaria's diplomatic and permanent missions at international organizations.[99]

Therefore, differently from Georgia, only the President of the country has the power of representation in the field of foreign relations, and the country's executive power, which, according to the Bulgarian Constitution,[100] determines the country's domestic and foreign policy, does not interfere in the authority of the President to exercise this power. Also, the powers of the President of the Republic include conclusion of international agreements in cases defined by law, and on a motion from the Council of Ministers, appoint and remove the heads of the Republic of Bulgaria's diplomatic and permanent representatives at international organizations, and receive the credentials and the letters of recall of the foreign diplomatic representatives to this country.[101] The Council of Ministers concludes, confirms or denounces international treaties when authorized to do so by law.[102] As for the right of representation in international relations, the Constitution grants the President the right to exercise this power independently. The President's decrees shall be countersigned by the Prime Minister or the minister concerned.[103] As we can see, even when concluding an international agreement, the Bulgarian Constitution does not stipulate for the need of approval by the Council of Ministers, but requires countersignature of the Prime Minister or the minister concerned only in regard to decrees issued in the field of foreign relations.

4. CZECH REPUBLIC

The Czech Republic is a parliamentary republic. According to the Czech constitution, unlike classical parliamentary republics, the president is elected directly. The President of the Czech Republic is the head of state, elected not by the Parliament,[104] but directly by popular elections for a term of five years.[105] He/she is the head of state and represents the country.[106]

Status of the President in the field of foreign relations: the President of the Republic shall a) represent the State with respect to other countries; b) negotiate and ratify

[99] ibid, Articles 92, 98.
[100] ibid, Article 105.
[101] Article 98, Constitution of Bulgaria <http://www.parliament.bg/en/const> [last accessed on 7 July 2023].
[102] ibid, Article 106.
[103] ibid, Article 102.
[104] *Miloš* Zeman became the first directly elected president in 2013, before that, according to Article 54, paragraph 2 of the Constitution, the President was elected by the Parliament at a joint session of the Chambers.
[105] Articles 54-55, Constitution of the Czech Republic <https://adsdatabase.ohchr.org/IssueLibrary/CZECH%20REPUBLIC_Constitutional%20law.pdf> [last accessed on 7 July 2023].
[106] Vasil Gonashvili and others, Constitutions of Foreign Countries, Part I (Second Revised Edition, Union "Lawyers for the Rule of Law" 2008) 632 (in Georgian).

international treaties; c) has the right to delegate the negotiation of international treaties to the government or, with its consent, to individual members thereof; d) receive the heads of diplomatic missions; e) appoint and recall heads of diplomatic missions.[107]

In accordance with the Constitution of the Czech Republic, representation in the field of foreign relations is carried out by the President of the country. In addition, the President conducts negotiations and is authorized to conclude international agreements and also ratifies them. An important authority is delegation negotiation of international treaties to the Government or, subject to the Government's consent, to its individual members. Decisions made by the President of the Republic pursuant to the field of foreign relations shall be valid only if countersigned by the Prime Minister or by an authorized member of the Government. Consequently, responsibility for a decision made by the President of the Republic, which must be countersigned by the Prime Minister or a member of the Government authorized by him, shall be borne by the Government.[108] Accordingly, it can be said that the so-called "bipolarity" is not observed in the field of foreign relations according to the Constitution of the Czech Republic.

VII. AN "INVISIBLE" OR "NEUTRAL" PRESIDENT IN THE PARLIAMENTARY REPUBLIC ON THE EXAMPLE OF GEORGIA

The parliamentary model of governance can be said to contain some challenges for the institution of the President, since, at first glance, the institution of the President does not possess effective authority in the sphere of execution, and the President stands far from the executive power, but at the same time, if necessary, he/she becomes the main figure on the political chessboard, who is able to defuse a political crisis and at the same time be equipped with the function of a "neutral arbiter".

On the example of Georgia, it should be noted that the head of the state is the President, whose degree of legitimacy, ensuing from direct elections, is quite high, even compared to the degree of legitimacy of the executive power. The importance of the status of the President and his/her role in parliamentary democracies does not lose its relevance, and in turn, the degree of legitimacy of the President is a subject of constant debates, in particular, whether it is important for the functioning of the regime, whether the president is elected directly by citizens, or indirectly by a representative body.[109] Today, Georgia has a directly elected president, however, from 2024, the head of state will be elected indirectly.[110] It is necessary to analyze whether it is possible for a directly

[107] Article 63, Constitution of the Czech Republic <https://adsdatabase.ohchr.org/IssueLibrary/CZECH%20REPUBLIC_Constitutional%20law.pdf> [last accessed on 7 July 2023].

[108] ibid, Article 63.

[109] Tavits, supra note 58, 1.

[110] Article 50, edition of the Constitution of Georgia of June 29 of 2020 <https://matsne.gov.ge/ka/document/view/30346?publication=36> [last accessed on 7 July 2023].

elected President to be a nominal figure in a parliamentary republic, and an indirectly elected President to be more active in terms of involvement in foreign policy and its implementation,[111] and whether the degree of legitimacy of the President depends on the way he/she was elected.[112] On the basis of consideration of this issue, it should be determined, what makes the institution of the President powerful and influential in a parliamentary republic. Thus, the real power of the President of Georgia on the way to parliamentary democracy can be determined clearly by analyzing the powers of the President.

The foreign powers of the president are the subject of constant discussion and controversy, and against this background, the question of who has the right to represent the country in foreign relations is relevant – as the guarantor of the country's unity and national independence, "only the President has the right to speak or be heard as a representative of the nation,"[113] or is it possible, that this right can be shared with the executive power. Effective power in the field of foreign relations facilitates expansion of Presidential power in other areas, of course, to varying degrees in different countries.[114] Coexistence of the President and the Prime Minister on the background of the ceremonial powers of the President is characteristic of the parliamentary regime, however, viewing the President's powers only as ceremonial does not correspond to reality, since all the presidents of the parliamentary regime are vested with additional clearly defined powers in the field of governance process, which can be divided into legislative and non-legislative powers. In particular, the legislative powers are the right to veto, legislative initiative, the power to issue a decree, and non-legislative powers can be considered the power to form and/or dismiss the government, and besides, most constitutions grant presidents the role of commander-in-chief of the armed forces and certain prerogatives in the field of foreign relations.[115]

Article 49 of the Constitution of Georgia defines the status of the President states, in particular, the President of Georgia shall represent the country in foreign relations. At first glance, the mentioned authority is presented as exclusive, because it is stipulated in the article, that establishes the status of the President, in particular, this provision states that the President of the country is 1) The President of Georgia is the Head of state of Georgia; 2) is the guarantor of the country's unity and national independence; 3) the President of Georgia is the Supreme Commander-in-Chief of the Defense Forces

[111] ibid, 233.
[112] ibid, 239.
[113] Louis Fisher, 'The "Sole Organ" Doctrine, Studies on Presidential Power in Foreign Relations' (2006) 1 Law Library of Congress 1 <https://sgp.fas.org/eprint/fisher.pdf> [last accessed on 7 July 2023].
[114] Juliet Edeson, 'Powers of Presidents in Republics, Papers on Parliament' No. 31 (Published and Printed by the Department of the Senate Parliament House, Canberra 1998) 110 <https://www.aph.gov.au/binaries/senate/pubs/pops/pop31/pop31.pdf> [last accessed on 7 July 2023].
[115] Tavits, supra note 58, 29.

of Georgia; d) the President of Georgia shall represent Georgia in foreign relations. The existence of the said authority in the norm, defining the status of the President, indicates the importance, that the legislator assigns to a representation of the country in the field of foreign relations and the fact that the said authority is characteristic of the institution of the President. However, we should not forget the status of the President as the head of state, therefore, whether the Constitution contains or does not contain a provision, that the President is the representative of the state in foreign relations, the fact is that the country has the head of state and this status gives him/her a certain privilege of representation in the field of foreign relations, as well as defense.

Article 52 of the Constitution, which defines the powers of the President, states that the President with the consent of the Government, shall exercise representative powers in foreign relations, negotiate with other states and international organizations. Hence, it is already clear, that the President cannot represent the country in foreign relations without the approval of the government, therefore, negotiations with other states and international organizations also require such approval. Article 55, paragraph 3 of the Constitution stipulates that the Prime Minister shall represent Georgia in foreign relations and conclude international treaties on behalf of Georgia. The Constitution of Georgia duplicates the right of representation in foreign relations and grants this authority to both the Prime Minister and the President, with the reservation, that the latter will need approval of the government. It is important to establish the goal of the legislator, when he stipulated in the Constitution of Georgia, that the right of representation in the field of foreign relations is assigned to the two highest political figures - the President and the Prime Minister of Georgia. The article establishes the authority of the President to "exercising" foreign powers, which means "implementation in practice",[116] and the mentioned term indicates to a somewhat extended authority of the President. According to the supreme law of the country, foreign policy is implemented by the government,[117] therefore, to some extent, according to the given provision the government delegates to the President the representative powers.

It is important to define what is meant by foreign representation in general, and whether it is possible to divide this authority between two persons. This implies working visits to different countries and meetings with their leaders, working meetings at summits, meetings with international organizations, expressing support to a specific country by visiting it, cooperation in any field, be it political, trade, economic, energy, or cultural, strengthening of bilateral contacts, friendship or partnership between countries, and etc. In some cases, the mentioned visits may even be related to the signing of an international agreement.

[116] Explanatory dictionary of the Georgian language, Language Modeling Association <http://www.ena.ge/explanatory-online> [last accessed on 7 July 2023].

[117] Article 54, Constitution of Georgia of June 29 of 2020 edition <https://matsne.gov.ge/ka/document/view/30346?publication=36> [last accessed on 7 July 2023].

According to the principle of separation of powers, as well as taking into consideration current model of government and the institution of the President, if the provision of the Constitution of Georgia on the right of representation of the country in the field of foreign relations to be understood in such manner that any step and issue must be agreed with the government of Georgia, and only in case of approval by the government the President shall be able to go on a working visit abroad, this will be a certain "derogation" of the institution of the President, as according to the Constitution, the President is not a figure subordinate to the Prime minister and/or the government as a collegial body, and he/she is not accountable to the government of Georgia. Therefore, the provision, which states that the President needs the consent of the government to exercise representation in the field of foreign relations should not be interpreted in this manner, as this will create political and legal "awkwardness" both, within the country and abroad. Also, as mentioned above, according to the Law of Georgia on "Structure, Authority and Rules of Operation of the Government of Georgia" the Prime Minister and ministers represent Georgia in foreign relations within the scope of their authority. Which means that the circle of persons, to whom the legislation grants the right of representation in the field of foreign relations is quite large, although according to the current edition of the Constitution, the country does not have the highest representative in foreign relations.

On the backdrop of the symbolic status of the President in the context of the parliamentary governance model, it is important to distinguish between the role of the President as a symbol of the state, and the power of the President to influence and define foreign policy,[118] since "the mere presence or absence of the President in itself changes the dynamics of the parliamentary regime".[119] "Recent and far-reaching changes ongoing globally represent a challenge both for the leaders, who implement foreign policy, as well as for those who study foreign policy."[120]

According to Article 52 of the Constitution of Georgia, one of the authorities of the President of Georgia in the field of foreign relations is to accept the accreditation of ambassadors and other diplomatic representatives of other states and international organizations with the consent of the Government; also, upon nomination by the Government, appoint and dismiss ambassadors and other heads of diplomatic missions of Georgia. According to the Law of Georgia on "Structure, Authority and Rules of

[118] Sujit Choudhry and others, Semi-Presidentialism as Power Sharing: Constitutional reform after the Arab Spring (Center for Constitutional Transitions and International IDEA 2014) 91 <https://www.idea.int/sites/default/files/publications/semi-presidentialism-as-power-sharing-constitutional-reform-after-the-arab-spring.pdf> [last accessed on 7 July 2023].

[119] Tavits, supra note 58, 236.

[120] Juliet Kaarbo and others, The Analysis of Foreign Policy in Comparative Perspective, Domestic and International Influences on State Behavior (CQ press 2013) 4 <https://hostnezt.com/cssfiles/internationalrelations/The%20Analysis%20of%20Foreign%20Policy%20in%20Comparative%20Perspective.pdf> [last accessed on 7 July 2023].

Operation of the Government of Georgia",[121] the government, within the limits of its competencies defined by the Constitution and the law, refers submission to the President of Georgia on appointment and recall of ambassadors and heads of diplomatic missions of Georgia; also, approves of accreditation of ambassadors and other diplomatic representatives of other states and international organizations.[122] The recent past shows that the field of foreign relations is a field, that has become the subject of conflict between persons with higher authority on numerous occasions, therefore, when determining the separation of powers in this field, each word has a special meaning at the legislative level. For example, let's consider the word "submission" of the government. According to the explanatory dictionary of the Georgian language, submission means "an official statement containing some desire".[123] Also, "submission" is defined as an "official written appeal, statement".[124] Submission of the government regarding the appointment of ambassadors and heads of diplomatic missions implies the desire to appoint an ambassador and the head of a diplomatic mission to some specific country, but what is the role of the President in the exercise of said authority? Does the President have the right to either appoint persons to these positions, or to reject their appointment, and does such submission mean a priori that the President shall appoint the mentioned persons to the position unconditionally? It is also important to determine, whether it is the constitutional obligation of the President to appoint ambassadors and heads of diplomatic missions, or it is his/her authority, and the President arrives at a decision at own will. Does it follow from the specificity of the parliamentary republic that the President is only a signatory of documents in the field of foreign relations, and his real will is not expressed in actions. According to Article 53 of the Constitution, a legal act of the President of Georgia shall require the countersignature of the Prime Minister, and political responsibility for countersigned legal acts lies with the Government. Does this provision mean that the selection of ambassadors or the heads of diplomatic missions is only within the competence of the government, and the President must only formally sign their appointment? In addition, what legal regime applies to such cases, when the President refuses to appoint a candidate nominated by the government to the mentioned position due to a whole range of reasons or justifications.

[121] Article 5, paragraph "w", Law of Georgia on Structure, Powers and Rules of Operation of the Government of Georgia <https://matsne.gov.ge/ka/document/view/2062?publication=41> [last accessed on 7 July 2023].

[122] Article 5, paragraph "x", Law of Georgia on Structure, Powers and Rules of Operation of the Government of Georgia <https://matsne.gov.ge/ka/document/view/2062?publication=41> [last accessed on 7 July 2023].

[123] Orthographic Dictionary of the Georgian language <http://ena.ge/explanatory-online> [last accessed on 7 July 2023].

[124] National Library of the Parliament of Georgia <http://www.nplg.gov.ge/gwdict/index.php?a=term&d=14&t=34418> [last accessed on 7 July 2023].

The President, in the exercise of foreign powers, including in the sphere of appointing ambassadors, submits written proposals to which, according to the Rules of Procedure of the Government of Georgia, the Government declares its consent.[125] Consequently, the government is obliged to consider the proposals of the President, including those, related to appointing ambassadors, and arrive at a decision, which means that the role of the President in the sphere of appointing ambassadors is not limited to facsimile.[126] Also, according to Article 5 of Resolution No. 206 of November 16, 2005 of the Government of Georgia on Approval of the Regulations of the Ministry of Foreign Affairs of Georgia, the duties of the Minister of Foreign Affairs include submission ofproposals to the President of Georgia regarding the appointment or dismissal of extraordinary and plenipotentiary ambassadors of Georgia, permanent representations of Georgia in international organizations and the heads of diplomatic missions.[127] Taking into consideration the above, the term "submission" used in the Constitution should not be understood as an already made decision that should be automatically confirmed by the President, but it refers to a written appeal of the government, expressing its desire to appoint a specific person to the relevant position.

The role of the President lies in the fact that the constitution grants him/her the power to appoint ambassadors, which implies that the President may not appoint a specific person as an ambassador based on such nomination. Accordingly, the legislation provides for communication of the Minister of Foreign Affairs with the President not only for the purpose of informing, but also to a certain extent for reporting purposes, in the form of submission of proposals to the President. In this case, the word "submission" also means taking into account the will of the President, otherwise the term "consent" of the government would have been used.

It is important to mention two circumstances, namely, firstly, the legislation of Georgia does not contain a provision regarding what will happen if the President refuses to appoint a person as an ambassador, and secondly, what will happen if the President for an indefinite period of time does not approve or reject the appointment of a candidate as an ambassador. The Constitution does not provide for a deadline or legal consequences if the President refuses to appoint a candidate as an ambassador. The legislator did not indicate in the basic law of the country, that the ambassador will be considered as appointed in such case, or that he/she will be appointed by the Prime Minister. According to the Constitution of Georgia, the general powers of the President make

[125] Article 52, Decree No. 77 of the Government of Georgia dated February 14, 2018 on Approval of the Rules of Procedure of the Government of Georgia <https://matsne.gov.ge/ka/document/view/4062183?publication=11> [last accessed on 7 July 2023].

[126] Statement of the President <https://fb.watch/fxm4RIH-o8/> [last accessed on 7 July 2023].

[127] Article 5, paragraph 1, subparagraph "m" of the Resolution No. 206 of the Government of Georgia of November 16 of 2005 on Approval of the Regulations of the Ministry of Foreign Affairs of Georgia <https://matsne.gov.ge/ka/document/view/10678?publication=30> [last accessed on 7 July 2023].

it clear that if the President uses his/her discretionary power and refuses to appoint a candidate, the legislator proposes as an alternative, that the candidate shall be considered as appointed. For example, "If the President of Georgia does not appoint the Prime Minister within the specified period, he will be considered appointed". Hence, it follows from the Constitution of Georgia, that if the President refuses to appoint a person as an ambassador, the appointment procedure will not continue, and such a person will not be considered as officially appointed ambassador without being appointed by the President.

The word "submission" should be interpreted as presenting a proposal of an institution, in this case, the government, to the President, regarding the appointment of a specific person to a relevant position, and in case of a positive answer decision in the given regard is reached through the government's submission and requires the co-signature of the Prime Minister. After the co-signing, the government is responsible for the final decision on the appointment of the person as ambassador.

According to the examples of countries with parliamentary governance, considered above, the issue of appointing ambassadors, as well as the field of foreign relations, is considered as the sphere, in which the President is engaged actively, as this authority is inherent to the institution of the President, who exercises certain powers independently, or requires the co-signature of the government/Prime Minister.

Regarding signing of international agreements by both - the Prime Minister and the President with the consent of the government, it should be taken into consideration as to why the legislator tries to link the authority to conclude an inter-state international agreement to the President of Georgia, instead of assigning it exclusively to the Prime Minister; Why the right of representation is assigned both to the President and the Prime Minister; Why there is an attempt to ensure domination of the President in this field again, even nominally. The answer may be that, in general, this is viewed as belonging to the list of "authorities of the President", regardless of the model and form of government in the country, because the sphere of foreign relations is the sphere of engagement of the President as the head of state. That is why the opinion of the President, as a state institution, should be taken into account in regard to appointing of ambassadors as well. Otherwise, the government, as the executive branch, would itself have carried out any action in the field of foreign relations as the "sole body".[128] Consequently, the fact that the government "implements" the country's foreign policy does not deprive the President, as an institution, of the right to engage in the field of foreign relations and make decisions.

It is important to note that the implementation of foreign policy by the government does not mean, that the only body in the field of foreign relations is the government, since

[128] Fisher, supra note 21, 1.

the field of foreign relations, even under a formal presidency, is the field of regulation characteristic of the institution of the President under any form of government, whether parliamentary or a mixed government model. The said authority is exercised by the President, regardless of whether he/she is a part of the executive branch or not. A "non-executive president" is found in almost all countries with parliamentary governments,[129] like Georgia. A non-executive President often has the discretionary power to effectively "intervene" and confront the elected government, and thus, lead to a power struggle.[130]

The field of foreign relations and the problem of separation of competences did not arise only in the political-legal field of Georgia, but it has been and is a subject of discussion for centuries, regardless of the form of government. The constitutional fathers were convinced of Montesquieu's dogma of the separation of powers. They distributed the powers of government among independent legislative, executive, and judicial departments.[131] And yet, where should they place the foreign relations power? Some wanted to give it to the President,[132] some to Congress.[133]

The 26th President of the United States of America, Theodore (Teddy) Roosevelt, described the President as "the ruler of the people" whose "duty" was to do whatever the needs of the nation required unless such action was prohibited by the Constitution or laws.[134] Article 78 of the Constitution of Georgia stipulates for integration into the European and Euro-Atlantic structures, in particular, "the constitutional bodies shall take all measures within the scope of their competences to ensure full integration of Georgia into the European Union and the North Atlantic Treaty Organization". The mentioned article imposes the obligation to do everything to promote the European future of the country, as well as in the organization of the North Atlantic Treaty for the integration of Georgia to the President of Georgia as a constitutional body, who is the head of state, the guarantor of the country's unity and national independence, the Supreme Commander of the Defense Forces of Georgia and the representative of Georgia in foreign relations. As part of the fulfillment of this obligation, the President, as the head of the state, is obliged to take all measures within the scope of his/her authority to ensure full integration of Georgia into the European Union and the North Atlantic Treaty Organization. In the mentioned context, the political space and the concept of multi-party parliament should be emphasized, since "parliamentary democracies governed by multi-party cabinets arrive to foreign policy decisions in a politically difficult context".[135]

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[129] Bulmer, supra note 113, 1.

[130] ibid.

[131] Quincy Wright, 'The American Political Science Review' (1921) 1(15) The Control of Foreign Relations, American Political Science Association, 4 <https://www.jstor.org/stable/pdf/1944023.pdf> [last accessed on 7 July 2023].

[132] ibid.

[133] ibid.

[134] Theodore Roosevelt, An Autobiography by Theodore Roosevelt (Project Gutenberg eBook 2006) <https://www.gutenberg.org/cache/epub/3335/pg3335-images.html#link2H_APPE7> [last accessed on 7 July 2023].

[135] Ryan K. Beasley and Juliet Kaarbo, 'Extremity in the Foreign Policies of Parliamentary Democracies'

VIII. CONCLUSION

As mentioned before, the coexistence of subjects equipped with the authority to represent the country in the field of foreign relations in the constitutional legal space defined by the Constitution is very problematic, especially since the issue of representation of the country in the field of foreign relations is of state importance and is directly related to the image of the country and its foreign policy course. This is especially important in countries with such a governance model, where the President also performs the functions of a neutral arbitrator. During the political crisis or "fluctuations" of the foreign-political course, it is the President, who has the main function of neutralizing and balancing various spheres of the country's governance, including foreign relations. Moreover, representation does not mean only the statement made by the head of state, expressed position, visits or relations with the international community, it also means the expression of the country's position and its representation in the international arena, which affects the current and future life of each citizen. The head of state, who represents the country, is the face of the country in the international arena.

Based on the best constitutional experience of the countries discussed above and the corresponding governance model, the authority to represent the country in the field of foreign relations has been assigned to the President of the country. Hence, based on the experience of our country and countries with similar governance and for the purpose of establishing the best model in the field of foreign relations and ensuring the effective distribution of powers, we consider it expedient to grant the right of representation to the President, who, at the same time, would have the obligation to cooperate with the executive power. As to the issue of international treaties and agreements, in this case too, it would be desirable not to grant the President the right to conclude any type of international agreement, but to vest him/her with the authority to conclude interstate international agreements on behalf of Georgia, which, on the one hand, narrows the powers of the President, but, on the other hand, the mentioned change is correct and suitable for the institution of the presidency and appropriate to the status of the President as the head of state.

We consider it important to note that the exact scope of authority of the executive power and the President in the field of foreign relations cannot be determined by the legislation, as this often depends on the relationship between state institutions based on the Constitution of Georgia, which in many cases implies an agreement between the institution of the President and the executive power, and most importantly, requires the will for constructive mutual cooperation based on the interests of the country and for the purpose of common welfare.

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