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CONSTITITIONAL COURT OF GEORGIA

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FOREWORD

A consistent and gradual increase in legal awareness is a prerequisite for strengthening constitutional and legal democracy. Critical understanding of current legal processes, case law, and legal reforms facilitates the search for findings based on rational reasoning, and thus, informed decision-making. An accessible academic platform, open to both young researchers and acclaimed scholars, ensures legal cognizance by encouraging discussion around various areas of the legal profession, which in turn equips interested subjects to make valuable contributions to the development of current legal processes.

"Journal of Constitutional Law" is an internationally-refereed, authoritative academic publication that provides Georgian scholars, legal practitioners, and young researchers with the opportunity to present their work to the wider public and establish a place in the field of research. At the same time, the publication is a valuable source for students and legal professionals to obtain information and deepen their knowledge on current, topical legal issues.

The present issue of the "Journal of Constitutional Law" brings together six academic pieces by Georgian and foreign authors. In particular, the journal contains an academic article by Prof. Claus Kreß on the topic of the prohibition of the use of force in international law on the example of the ongoing war in Ukraine. The author, through a doctrinal analysis, discusses the issue of the prohibition of the use of force from the point of view of the law of international armed conflict and international criminal law. The foregoing subject gains huge relevance, in particular, for Georgia and for the wider region against the backdrop of ongoing global armed conflicts.

The "Journal of Constitutional Law" also combines five academic works by Georgian authors. In particular, the journal brings together pieces by Georgian researchers on the following interesting legal issues: the possibility of improving the Georgian model of respect for the Constitutional Court's judgements (authored by Mr. Giorgi Khazalia and Ms. Nino Chochia), the permissible scope of provocation of crime during covert investigative actions and operative-search measures (authored by Mr. Gia Markoidze), the separation of powers in the case law of the Constitutional Court (authored by Professor Malkhaz Begiashvili), indirect evidence as a constitutional-legal basis for issuing a guilty verdict (authored by Ms. Mariam Chikadze and Mr. Irakli Jojua), aspects of the legal regulation of local self-governments in the international system (authored by Assistant Professor Nino Rukhadze).

In addition, this publication provides an overview of four landmark judgments of the Constitutional Court of Georgia in 2023. In particular, In particular, the journal gives the overview of the following judgments: №1/5/1355,1389 of July 27, 2023 ("Samson Tamariani, Malkhaz Machalikashvili and Merab Mikeladze vs. the Parliament of Georgia"), №1/3/1591,1605 of June 1, 2023 ("Merab Muradashvili and the Public Defender of Georgia vs. the Parliament of Georgia and the Minister of Internal Affairs of Georgia"), №2/3/1421,1448,1451 of April 11, 2023 ("Ikhtios LLC", Zaza Pataridze, Nikoloz Beriashvili, Shalva Oniani, Vakhtang Kobeshavidze and Manana Kharkheli vs. the Parliament of Georgia") and №2/7/1528 of November 10, 2023 ("Ekaterine Pipia vs. the Parliament of Georgia and the Minister of Education and Science of Georgia").

In the case №1/5/1355,1389 ("Samson Tamariani, Malkhaz Machalikashvili and Merab Mikeladze vs. Parliament of Georgia") of July 27, 2023, the Constitutional Court assessed the norms of the Criminal Procedure Code, which established the right of the victim to appeal only once to a superior prosecutor the prosecutor's reasoned decision to refuse to satisfy the request for information on the progress of the investigation, initiation and/or termination of criminal prosecution. In its judgement №1/3/1591,1605 of June 1, 2023 ("Merab Muradashvili and the Public Defender of Georgia vs. the Parliament of Georgia and the Minister of Internal Affairs of Georgia"), the Constitutional Court assessed, in relation to the constitutional right to equality, on the one hand, the constitutionality of the norms regulating the age limit for firefighter-rescuer positions (55 years) and the grounds for dismissal from the position upon reaching the specified age limit, and, on the other hand, the age limit for employees of the Main Department of External Security of the Penitentiary Department (60 years).

In its judgement №2/3/1421,1448,1451 of April 11, 2023, the Constitutional Court considered the constitutionality of the rules established by the norms of the Code of Civil Procedure, according to which, a decision made by a court of first instance in disputes arising from a contract would be subject to immediate enforcement if this was expressly provided for by the contract. At the same time, in the aforementioned case, the plaintiff's request to ensure the reversal of the enforcement of the decision was excluded. In the №2/7/1528 of November 10, 2023 ("Ekaterine Pipia vs. Parliament of Georgia and Minister of Education and Science of Georgia"), the subject of the dispute was the regulation on the basis of which the National Centre for the Development of Educational Quality did not recognise higher education obtained abroad in a fully remote form, except in cases where the remote format of education was due to the purpose of preventing the spread of the pandemic or combating its consequences.

I reckon this edition of the "Journal of Constitutional Law" will contribute to raising legal awareness and conducting research-based discussions among professional circles and the general public.

Professor **Merab Turava**
President of the Constitutional Court of Georgia

CONTENTS

*Claus Kreß**

THE UKRAINE WAR AND THE PROHIBITION OF THE USE OF FORCE IN INTERNATIONAL LAW[1]

ABSTRACT

As from 24 February 2022, Russia has been escalating its unlawful use of force against Ukraine, which had begun as early as in 2014, to a comprehensive war of aggression. As the world has been witnessing since the beginning of this escalation, Russia's course of action constitutes an existential threat to Ukraine and its people. In addition to that, it implies the serious risk that the authority of the prohibition of the use of force may erode. This study, which has grown out of a speech delivered in Karlsruhe, where Germany's Federal Constitutional Court and Federal Court of Justice are seated, sets out the international legal framework for current and possible future reactions by Ukraine, third States and the international community as a whole in response to Russia's fundamental challenge to what the International Court of Justice has called a "cornerstone of the United Nations Charter".

In large parts, the study is of a doctrinal nature. But it also attempts to shed light on the historic dimension of the topic as well as on some aspects of legal principle. In conclusion, the study recalls previous calls for ringing the death knell for the prohibition of the use of force and the encouraging fact that the supposed patient has always survived. In that vein, this paper argues that if the support of Ukraine from within the international community will be sufficiently determined and steadfast, there is no reason to ring the death knell for Ukraine in its internationally recognized borders and for the universal prohibition of the use of force.

* Professor for Criminal Law and International Law at the University of Cologne; Director of the Institute of International Peace and Security Law. The text is based on a lecture delivered on 29 June 2022 at the Karlsruhe Society of Legal Studies established, among others, by the Federal Constitutional Court, the Federal Court of Justice, the Federal Prosecutor's Office and the Lawyers Accredited with the Federal Court of Justice. The oral style has been somewhat reduced and headings and references have been added.

[1] The original English publication is Claus Kreß, "The Ukraine War and the Prohibition of the Use of Force in International Law', Occasional Paper Series No. 13 (2022), TOAEP, Brussels, 2022, ISBN 978-82-8348-211-9 (http://www.toaep.org/ops-pdf/13-kress/). For permissions, please e-mail: info@toaep.org. The Georgian translation of the English original is published with the kind permission of the author and the Torkel Opsahl Academic Epublisher (TOAEP) in the Journal of Constitutional Law, Volume 2 (2023). The translation is prepared by Giorgi Dgebuadze, Associate Professor of Ivane Javakhishvili Tbilisi State University, and Mariam Murvanidze and Rusudan Tsagareli - the Research Assistants of the Institute for Comparative and Transnational Criminal Law of Ivane Javakhishvili Tbilisi State University. The translator is responsible for its accuracy, not TOAEP or Claus Kreß.

*George Khazalia**

*Nino Chochia***

REFINING GEORGIA'S LEGAL FRAMEWORK FOR ENFORCING CONSTITUTIONAL COURT JUDGEMENTS

ABSTRACT

A judgment adopted by the constitutional court reveals its true *res judicata* nature and binding force through enforcement. Certain court judgments are self-executing, while others require an active involvement of various branches of government to ensure their enforcement. The practice of the Constitutional Court of Georgia shows that some judgments were not enforced at all, were enforced with delay, or only partially. For the effective execution of judgments, it is essential to have a necessary component of trust between state institutions but also to ensure the existence of all appropriate mechanisms for their enforcement. The applicable Georgian legislation primarily focuses on the mechanisms for restoring individual rights in response to the Constitutional Court judgments, while broader measures such as the adoption of new legislation are relegated to the political process. This article will assess the effectiveness of the Georgian legal framework of enforcing the Constitutional Court judgements, analyze the best international practices and provide recommendations for elaboration of the instruments that will promote their effective enforcement.

I. INTRODUCTION

The significance of the constitutional court and its role in strengthening the constitutional legal order depends not only on the substantive aspects of the court's judgements but also on the extent to which the standards established by them are transformed into living law, and the will expressed by these judgments is implemented in practice. For the constitutional court to effectively fulfill its constitutional oversight function granted by the constitution and to contribute to strengthening of the constitutional order and legality in the country, it is impermissible to allow existence of either factual or legal possibilities for overruling or disregard of the court judgment and its outcomes.

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Adequate mechanisms at both legislative and operational levels are essential to ensure the enforcement of judgments, thereby establishing the necessary foundations for the effective articulation and application of the constitutional standards embodied in these judicial acts.

This article aims to analyze the effectiveness of the legislative mechanisms and practices related to the enforcement of the judgments made by the Constitutional Court of Georgia, identify problematic issues and search for the best solutions to address the gaps. To achieve this goal, the article examines the mechanisms that promote enforcement of the judgements reached by the European Court of Human Rights, and studies judicial practices of the constitutional courts of foreign countries.

The second chapter of the article is focused on the Georgia's legal framework of enforcement of the Constitutional Court's judgements; the third chapter studies the international judicial practice and those of selected foreign countries, while the fourth chapter provides recommendations for improving the Georgia's legal framework of enforcing Court judgments.

II. GEORGIA'S LEGAL FRAMEWORK OF ENFORCING THE CONSTITUTIONAL COURT'S JUDGEMENTS AND EXISTING CHALLENGES

The judicial acts of the Constitutional Court of Georgia include the judgment, ruling, recording note and conclusion.[1] These acts are final and shall not be subject to appeal or revision.[2] The non-enforcement of a Constitutional Court judgment is punishable by law.[3] Under the term "judgement" referred to by the law, all types of acts should be understood as the Constitution of Georgia does not differentiate between types of judicial acts, collectively referring to them under the single term "court judgment."[4] Hence, the Organic Law of Georgia on the Constitutional Law of Georgia indicates a *res judicata* nature of all types of acts adopted by the court.[5] Like a judgment, a conclusion, recording note, or ruling carries decisive authority on matters of greater

[1] Article 43, paragraph 1, Organic Law of Georgia on the Constitutional Court of Georgia. 31 January 1996. Official Gazette of the Parliament of Georgia, 001, 27.02.1996.

[2] Article 60, paragraph 5, the Constitution of Georgia. 24 August 1995. Official Gazette of the Parliament of Georgia, 31-33, 24.08.1995; Article 43, paragraph 8, Organic Law of Georgia on the Constitutional Court of Georgia. 31 January 1996, Official Gazette of the Parliament of Georgia, 001, 27.02.1996.

[3] Article 25, paragraph 1, Organic Law of Georgia on the Constitutional Court of Georgia. 31 January 1996. Official Gazette of the Parliament of Georgia, 001, 27.02.1996.

[4] Article 60, paragraph 5, the Constitution of Georgia. 24 August 1995. Official Gazette of the Parliament of Georgia, 31-33, 24.08.1995.

[5] Article 43, paragraph 8, Organic Law of Georgia on the Constitutional Court of Georgia. 31 January 1996. Official Gazette of the Parliament of Georgia, 001, 27.02.1996.

significance (such as recognizing an overriding norm as unconstitutional, suspension of a norm, etc.). Respectively, eliminating the legal liability for the non-enforcement of these judicial acts is unreasonable and generally, contradicts the idea of imposing responsibility for noncompliance with court judgements.

Article 381 of the Criminal Code of Georgia classifies the non-enforcement of the court verdict or other judgment, or obstruction of its execution, as a crime. At the same time, provided that the responsibility for enforcing the Constitutional Court judgements is shared by state agencies and their representatives, a reference should be made to the criminal law provision, prohibiting abuse of official authority.[6] The delineation of the scope of application of these articles is a subject for separate discussion. However, referencing them serves to demonstrate that the Criminal Code provides the means to sanction specific instances of noncompliance with the Constitutional Court's judgments. It is important to assess the possibility of imposing legal responsibility in each individual case. For example, reluctence to adopt a new normative regulation by an authorized body due to certain legal nuances (such as in the case of a panel) or due to a political nature of the process may give rise to political accountability only. However, a legal responsibility may apply to an individual who, while working on the specific case, disregards a Constitutional Court record on suspending the legal effect of the norm, and continues to apply the suspended norm in legal proceedings.

According to the Georgian Constitution, "An act or a part thereof that has been recognized as unconstitutional shall cease to have legal effect as soon as the respective judgment of the Constitutional Court is made public, unless the relevant judgment envisages a later time frame for invalidating the act or a part thereof."[7]

The loss of the legal effect of the unconstitutional norm results in two main outcomes: a) restoration of individual rights[8], and b) creation of a new normative order as a general measure to prevent future violations of rights. The following discussion in this chapter, considering existing challenges, will focus on the latter issue.

As a rule, the obligation to create a new normative order falls on the subject, which was presented as a defendant in the legal proceedings. At the same time, as mentioned above, the Constitutional Court may deviate from the general rule of invalidating the legal act (or its part) upon recognizing it unconstitutional, and set a later timeframe for it. This means that the body responsible for implementing the judgement must amend the legislative framework in accordance with the standards outlined in the judgment before

[6] Article 333, Criminal Code of Georgia. 22 July 1999. Official Gazette, 41 (48), 13.08.1999.

[7] Article 60, paragraph 5, the Constitution of Georgia 24 August 1995. Official Gazette of the Parliament of Georgia, 31-33, 24.08.1995.

[8] The restoration of individual rights means suspending the enforcement of Court's verdicts/judgments made previously based on unconstitutional regulation, and in cases prescribed by procedural legislation, their revision. It is noteworthy that the discussions are more focused on expanding the revision framework rather than addressing the challenges related to enforcing the existing mechanism.

the expiration of the period specified therein. After the set deadline, the unconstitutional norm becomes void. The Constitutional Court mostly uses this mechanism in case when recognizing the norm as void from the moment of the publication of the Court judgement could pose a risk of causing harm to significant public interest. In practice, the Court does not define other issues related to the enforcement of judgment.

The practice of enforcing the Constitutional Court judgments (both its reasoning and resolutive parts) varies in accordance with the modification of the legislative normative base. Some judgments do not require legislative amendments for their enforcement. More specifically, the Constitutional Court, based on its practice, introduced the method of recognizing the normative content of a provision as unconstitutional. [9] As a result, the entire norm is not declared unconstitutional; rather, only one of its interpretations is. The information regarding the unconstitutional normative content is immediately published on the website of the Legislative Herald of Georgia (Georgia's official gazette) and is visible to judges and legal practitioners. This method facilitates the enforcement of the Court judgments as it eliminates the need for legislative intervention by the relevant authority. The Constitutional Court notes that based on the analysis of recent practice, judges of the general courts do not apply provisions and normative content that have been declared unconstitutional by the Constitutional Court.[10] However, there are alternative cases, which will be discussed below.

Additionally, there are instances where the Court judgements have not been enforced according to the standards established in its reasoning part. The Judgement N2/1/536 can be brought as an example,[11] involving restriction/prohibition on the blood donation right for men who have sex with men (MSM). Following this judgement, the executive minister amended the regulations on donation rights of MSM twice, but the new norms did not comply with the standards set by the Judgment N2/1/536. Consequently, the Court recognized the adopted norms as overriding the Constitutional Court's judgment twice, and recognized them as unconstitutional.[12]

[9] 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.

[10] The Constitutional Court of Georgia, Information on Constitutional Legality in Georgia (2019) 98 <https://constcourt.ge/files/4/2019_Report.pdf> (in Georgian) [last accessed on 08 May 2023].

[11] Judgement of the Constitutional Court of Georgia on case N2/1/536 "Citizens of Georgia Levan Asatiani, Irakli Vacharadze, Levan Berianidze, Beka Buchashvili and Gocha Gabodze v. the Minister of Labour, Health and Social Affairs of Georgia", 4 February 2014.

[12] Ruling of the Constitutional Court of Georgia N1/13/878 "Citizens of Georgia Gocha Gabodze and Levan Berianidze v. The Minister of Labour, Health and Social Affairs of Georgia", 13 July 2017; Ruling of the Constitutional Court of Georgia N2/16/1346 "Gocha Gabodze and Levan Berianidze v. Minister of Labour, Health and Social Affairs of Georgia", 17 December 2019.

It is evident that there are judgments that have been enforced within the timeframe established by the Court.[13] However, contrasting examples are also striking.[14] Moreover, there are the cases, where the deadline set by the Court expired without legislative amendments being adopted, yet the executive authority did not violate its enforcement obligations. These include the cases when the Court applies the instrument of delaying the enforcement of a decision to eliminate inequalities created by a discriminatory law. In these instances, the rationale for postponement lies not in an avoidance of violations of rights due to a legal vacuum but it rather is a reflection of the nature of the Constitutional Court as "negative legislator".[15] In such cases, the executive authority accepts the legal status quo resulting from the invalidation of the unconstitutional norm, and this state of affairs does not contradict the Constitution. Furthermore, there also are the Court judgments requiring systemic reforms to be taken by the parliament, with no tangible action taken by the latter in response.[16]

In terms of enforcement, the Judgment N1/4/693,857 (2019) related to the publication of the full texts of the Court's legal acts issued following open court hearings presented challenges.[17] The Court granted the Parliament a deadline until May 1, 2020 to adopt the legislative amendments. However, the legislative body adopted those only in June 2023.[18]

The Constitutional Court Judgement N1/8/926 (2022) represents a currently unenforced case. In this judgment, the Court declared the action stipulated by Article 255, paragraph 1 of the Criminal Code of Georgia - "Illegal production, dissemination or advertisement of pornographic material, printed publications, images or similar items, as well as sale or storage of these items for marketing or dissemination purposes", as unconstitutional, due to the substantive vagueness[19]. As a next step, the Court granted the Parliament a deadline until May 1, 2023 to adopt relevant legislative amendments. The Parliament failed to introduce amendments, as a result of which the norm declared unconstitutional lost its legal effect.

[13] The Constitutional Court of Georgia, supra note 10, 97.

[14] ibid, 94-97.

[15] Judgment of the Constitutional Court of Georgia on case N1/2/671 "LEPL 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. Paragraphs II-41-44.

[16] Constitutional Court of Georgia, supra note 10, 90.

[17] Judgement of the Constitutional Court of Georgia on case N1/4/693,857 "NNLE Media Development Foundation (MDF) and NNLE Institute for Development of Freedom of Information (IDFI) v. The Parliament of Georgia", 7 June 2019.

[18] Organic Law of Georgia on Amendments to the Organic Law of Georgia on General Courts. 13 June 2023, N3129-XIms-Xmp.

[19] Judgement of the Constitutional Court of Georgia on case N1/8/926 "Giorgi Logua v. the Parliament of Georgia", 4 November 2022. Paragraphs II-50.

Consequently, at this stage, there is a legal vacuum concerning the criminalization of activities related to adult pornography (production, distribution, advertisement, sale, or storage for sale or distribution).

The negative consequences should be mentioned here as well resulting from the failure to implement legislative changes within the timeframe established by the court, and consequently, by leaving the legal relationships unregulated. The case identified by the Constitutional Court itself is a clear illustration of this: the Court determined that in the absence of new legislation, the Supreme Court of Georgia applied a provision that had already been declared invalidated during legal proceedings.[20]

In the enforcement process, practice has highlighted a challenge involving cases where the designated authority implemented the necessary legislative amendments before the timeframe defined by the court; however, these legislative changes came into force not immediately upon publication but from the period when the court declared the provision unconstitutional. In such circumstances, there remains a period during which the unconstitutional provision continues to operate, even though the legislative changes compliant with the constitution have already been adopted, and the legislator in fact does not require additional time.

An example of such practice is the measures aimed at enforcing the Constitutional Court judgement N2/4/1412.[21] In this case, the Court postponed the invalidation of the disputed provision until June 1, 2021. The Parliament adopted the legislative changes necessary for enforcement on April 29, 2021, but defined the date for enacting the changes on June 1, 2021; hence, the unconstitutional provision remained in effect for more than a month without any objective grounds.[22] Notably, the deadline set by the Constitutional Court is referenced as the argument for determining the effective date of the legislative changes.[23] A legislator is not bound by the timeframe defined by the Constitutional Court in such a way to prohibit the enactment of a norm already adopted prior to the expiration of the period established by the court. Therefore, the reasoning behind the Parliament aligning the effective date of the new provision with the court's deadline remains unclear.

At the same time, in some cases, the alignment of the enactment of a new provision with the timeframe defined by the Constitutional Court has a justified rationale. For example, in the Judgment N1/6/1320 of the Constitutional Court the invalidation of

[20] Constitutional Court of Georgia, supra note 10, 100.

[21] Judgement of the Constitutional Court of Georgia on case N2/4/1412 "Irakli Jugheli v. the Parliament of Georgia", 29 December 2020.

[22] Law of Georgia on Amendments to the Code of Administrative Offenses of Georgia. 29 April 2021, N482-IVms-Xmp.

[23] Explanatory Note to the Draft Law of Georgia on Amendments to the Code of Administrative Offenses of Georgia, 07-3/44/10, 21.04.2021.

the contested provisions was postponed until July 1, 2022.[24] The Parliament adopted the necessary legislative amendments on June 9, 2022; however, Article 1 of the law, which established a constitutional provision, came into effect on July 1, 2022.[25] In this case, the rationale for postponing the enactment of the norm was that the issuance of the necessary bylaws by the competent authorities was required to ensure the implementation of new regulation.[26]

It is essential as well to review the effectiveness of the mechanisms for enforcing court judgements within the existing judicial framework.

According to Article 14, paragraph 2 d of the Organic Law of Georgia on the Constitutional Court of Georgia, the secretary of the Constitutional Court takes measures to enforce the Court judgements and reports to the Plenum on the progress of their enforcement on a monthly basis. Although the law remains silent on the nature of "specific measures". In practice, the "taking measures" involves a court personnel collecting information on the enforcement of judgement and presenting this information monthly to the Plenum. The court secretary has no other leverage.

According to the recent practice, the Constitutional Court provides the information on the enforcement of its judgments in the annual report on constitutional legality in Georgia. This practice is established by the 2019-2020 reports. In addition, according to information obtained from the Court, its Secretary submitted written reports on the enforcement of judgments made by the Constitutional Court to the Plenum twice - on August 5, 2022 (regarding the judgments reached in 2020-2021), and on January 31, 2024 (regarding the judgments reached in 2023). Apart from this, as Giorgi Tevdorashvili, the Secretary of the Constitutional Court[27] stated in the interview, he updates the Plenum on the progress of enforcing the court judgments during each meeting in the working format.

It is noteworthy that the abovementioned written reports mostly describe the progress of enforcing those judgments, where the court employed the mechanism of postponing the invalidation of the contested provision. Consequently, the information on the monitoring of the enforcement of judgments, in which case a said mechanism was not applied (despite the need for legislative amendments), is harder to obtain. The civil society actors also highlight the challenges in enforcing such judgments. Specifically, they point out that the cases in which the Constitutional Court does not postpone enforcement are either enforced within an unreasonable timeframe or not enforced at all.[28]

[24] Judgement of the Constitutional Court of Georgia on case N1/6/1320 "Elga Maisuradze, Irma Ginturi, and Leri Todadze v. the Parliament of Georgia", 28 December 2021.

[25] Law of Georgia on Amendments to the Civil Code of Georgia. 9 June 2022, N1651-VIIIms-Xmp.

[26] ibid, Article 2.

[27] Member of the Constitutional Court of Georgia, the Court's Secretary from December 1, 2021.

[28] Georgian Young Lawyers' Association, Strategic Litigation of the Georgian Young Lawyers' Association in the Constitutional Court (2020) 8 (in Georgian).

The effectiveness of the existing enforcement mechanism is questioned by Manana Kobakhidze, a Court Member. Her primary argument is that the Court Members do not have a real mechanism to force the executive authority to adopt new regulations within the established timeframe.[29] Moreover, the judge notes that there is no any forum for a dialogue, where the court, enforcement agencies, plaintiffs and civil society actors could jointly discuss challenges that hinder the timely enforcement of the Court judgments.[30] It should be noted that there have been fragmented instances of organizing such forums. For instance, the complexity of the aforementioned judgement of the Constitutional Court, regarding the publishing of judicial materials (the judgements) by general courts, as well as the challenges of its enforcement necessitated a dialogue between the Parliament and the Court, in order to initiate necessary legislative amendments.

From the perspective of the agencies responsible for enforcement the Court judgments, the factors hindering this process include: (a) the vagueness of the Constitutional Court judgment or its part, necessitating further interpretation; (b) the failure to reach consensus among political actors, which is particularly relevant in the case of Parliament; (c) the fact that the agencies responsible for enforcing the Court's judgments are usually political bodies means that they constantly reflect on political events, resulting in their activities being consistently politically charged. This political engagement reduces the time available for carrying out the necessary work to enforce the Court judgment; (d) in some cases, considering the complexity of the case, the timeframe set by the Constitutional Court is insufficient.[31]

[29] Manana Kobakhidze, a member of the Constitutional Court, and the Court's secretary in 2018-2021, notes: "The relevant provision [Article 14 (2d)] may well exist in the law… but the question is, how effective is it? What actual leverage does the Court's Secretary, who is an ordinary member of the Court, have? We understand that the law obliges him/her to collect information and find out whether the changes have been made, what is the progress, whether the Parliament or any other body violated the deadline, and report this to the Plenum; but beyond that, to put it bluntly, there are no any enforcement mechanisms whatsoever. What can the Court Secretary do to push the Parliament or a minister […] to adopt the necessary changes?" From an online discussion held by the Georgian Young Lawyers' Association in 2020, "The Practice and Challenges of Enforcing Constitutional Court Judgments/Rulings" <https://he-il.facebook.com/GYLA.ge/videos/2473752172922496/> [last accessed on 08 May 2023].

[30] Manana Kobakhidze, a member of the Constitutional Court, and the Court's secretary in 2018-2021. An online discussion held by the Georgian Young Lawyers' Association in 2020, "The Practice and Challenges of Enforcing Constitutional Court Judgments/Rulings" <https://he-il.facebook.com/GYLA.ge/videos/2473752172922496/> [last accessed on 08 May 2023].

[31] ibid. Anri Okhanashvili, Chairman of the Legal Issues Committee of the Parliament of Georgia. See an online discussion held by the Georgian Young Lawyers' Association in 2020, "The Practice and Challenges of Enforcing Constitutional Court Judgments/Rulings" <https://he-il.facebook.com/GYLA.ge/videos/2473752172922496/> [last accessed on 08 May 2023].

III. INTERNATIONAL AND OTHER COUNTRIES' PRACTICE IN ENFORCING COURT JUDGMENTS

1. ENFORCEMENT OF JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS

The authors of the article believe that since the enforcement of a judgment of the Constitutional Court, similar to the enforcement of a judgment of the European Court of Human Rights (ECtHR), particularly in terms of general measures, involves both legal and political aspects, it is relevant to review the regulatory framework and practice governing the enforcement of ECtHR judgments in light of the best international practices.

Articles 39 and 46 of the Convention for the Protection of Human Rights and Fundamental Freedoms (The European Convention on Human Rights/Convention) stipulate that the Court's final judgment/ruling on settlement is submitted to the Committee of Ministers, which oversees its execution. The Committee of Ministers serves as a representative body of the Council of Europe,[32] comprising the foreign ministers of the member states or their representatives.[33] The political nature of the activities of the Committee makes it capable of employing political leverage in relation to unenforced cases.[34]

The Department for the Execution of Judgments, operating under the Directorate General of Human Rights and Rule of Law plays a significant role in the architecture of judgment enforcement.[35] The department is mandated to advise and assist the Committee of Ministers in performing its supervisory function over the enforcement of ECtHR judgments as well as to support member states in fully, effectively, and promptly enforcing decisions issued against them.[36]

The Committee of Ministers receives information from various sources for the purpose of executing judgments - the respondent state, the victim, civil society organizations, national human rights institution, international intergovernmental organizations, and their official bodies.[37] Key instruments of dialogue between the Committee of Ministers

[32] Article 13, Statute of the Council of Europe, 5.5.1949 <https://rm.coe.int/1680306052> [last accessed on 08 May 2023].

[33] ibid, Article 14.

[34] Szymon Janczarek and Nikita Kolomiets, 'Solid and Effective: Supervision of Execution of Judgments of the European Court of Human Rights by The Committee of Ministers' (2021) Constitutional Justice in Asia "Current Problems in Execution of Judgments: Constitutional Justice" 20.

[35] Website of the Council of Europe <https://www.coe.int/en/web/execution/presentation-of-the-department> [last accessed on 08 May 2023].

[36] ibid.

[37] Rule 9, Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements. 10 May 2006 <https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016806dd2a5> [last accessed on 08 May 2023].

and member states during the enforcement process are the action plan and the action report.[38] The respondent state is obligated to submit an action plan to the Committee of Ministers no later than six months after the final ruling is rendered. The action plan reflects the measures that the state has to implement to enforce the ECtHR judgment, specifying the timelines for their implementation.[39] The action plan is a living document, meaning that it is updated by the state throughout the entire enforcement process.[40]

The measures determined by the state are of two types: individual and general. Individual measures (paying compensation, revision of judgments at the national level, release from detention, etc.) are aimed at restoring the rights of the victim, while general measures (amending legislation, changing judicial practices, etc.) serve to prevent similar violations of rights in the future.[41]

The action report is a document submitted by the state describing measures taken to enforce the court judgment. The final update of the action plan becomes an activity report.[42]

A significant stage in the enforcement process is the Committee of Ministers' meetings dedicated to the execution of judgments (CM-DH meetings).[43] The progress of enforcement regarding specific cases is assessed at these meetings, and to facilitate the process, the committee adopts the decisions expressing encouragement, concern, or recommendations regarding enforcement.[44] Given the heavy workload, the CM-DH meetings' agenda include only selected and important cases requiring special actions (priority cases). For the most problematic cases, debates are held before the committee adopts a decision, while less problematic cases are reviewed without debate.[45]

For the purposes of this article, it is particularly relevant to review the instruments available to the Committee of Ministers and the ECtHR to influence the enforcement process, especially when the respondent state shows little or no willingness to comply with the obligations arising from the court judgment.

To assist states in fulfilling their obligations under Article 46 of the Convention, the ECtHR issues guidelines in respect of certain judgments. These guidelines include

[38] Department for the execution of judgments of the European Court of Human Rights, Guide for the drafting of action plans and reports for the execution of judgments of the European Court of Human Rights (Series "Vade-mecum" N1, 2015) 1 <https://www.coe.int/en/web/execution/vademecum> [last accessed on 08 May 2023].

[39] ibid, 3.

[40] ibid.

[41] ibid, 7-8.

[42] ibid, 3.

[43] The Committee of Ministers' Human Rights meetings. "DH" is a French acronym for "Droit de l'Homme" (Human Rights).

[44] Szymon Janczarek and Nikita Kolomiets, supra note 27, 35.

[45] ibid, 35-36.

defining the individual or general measures that the state must implement to rectify the identified violation,[46] particularly when the implementation of a specific measure is essential to eliminate the violation.[47] It is crucial to maintain balance in this process, ensuring that explicit instructions from the court do not undermine the flexibility of the enforcement process led by the Committee of Ministers. At the same time, the principle should be respected, which underlines that selection of the measures for the execution of court judgment (to be carried out under the supervision of the Committee of Ministers) falls within the competence of the state.[48]

The second format for issuing guidelines involves the adoption of pilot judgments by the court. A pilot judgment is rendered when a complaint reveals the existence of a structural or systemic problem, or another form of dysfunction, which has resulted in or may lead to similar complaints.[49] In the pilot judgment, the court identifies the nature of the structural or systemic problem and specifies the measures that the respondent state must implement to address it. The court may also specify the timeframe to implement the measure.

According to Article 46, paragraph 3 of the Convention, if the Committee of Ministers considers that execution of the final judgment is delayed due to issues related to interpretation of the judgment, it can apply to the Court with the request to provide required interpretation.

Additionally, the Court is empowered to initiate infringement proceedings under Article 46, paragraph 4 of the Convention, as an exceptional mechanism. Specifically, if the Committee of Ministers believes that a contracting party refuses to comply with the court's final judgment, the committee may, after issuing a formal notice to the party, apply to the Court to determine whether the contracting party has violated its obligation to abide by the judgment. The purpose of this procedure is not to reopen the case or penalize the state but to increase political pressure to ensure the enforcement of the court's original judgment.[50]

The instruments in possession of the Committee of Ministers are also noteworthy. Identifying the reason for inaction of the legislator enables the Committee to determine an appropriate response, whether it will be a political instrument, involvement in the programs aimed at fostering cooperation with state (roundtables, seminars, bilateral

[46] Council of Europe/European Court of Human Rights, Guide on Article 46 of the Convention - Binding force and execution of judgments (2022) 7 <https://www.echr.coe.int/Documents/Guide_Art_46_ENG.pdf> [last accessed on 08 May 2023].

[47] Judgment of the European Court of Human Rights on case N71503/01 "Assanidze v. Georgia", 8 April 2004. Paragraphs 202-203.

[48] Council of Europe/European Court of Human Rights, supra note 39, 9.

[49] Article 61, Rules of Court, 20 March 2023 <https://www.echr.coe.int/documents/rules_court_eng.pdf> [last accessed on 08 May 2023].

[50] Judgment of the European Court of Human Rights N15172/13 "Ilgar Mammadov v. Azerbaijan", 29 May 2019. Paragraphs 59-160.

meetings with the Department for the Execution of Judgments), or assistance with technical difficulties.[51]

Through its instruments, the Committee is authorized to:

- Change the mode of oversighting a case from the standard procedure to enhanced supervision;[52]
- Immediately present a case under enhanced supervision at a CM-DH meeting;
- Adopt decisions criticizing delays in enforcement progress;
- Set deadlines and issue recommendations or other instructions;
- Issue interim resolutions when concerns reach a certain level of seriousness;
- Take additional measures, such as convening a high-level meeting, sending a letter to the respondent state, or raising the issue during a Committee of Ministers' session with ministers in attendance.[53]

Furthermore, to address ongoing resistance by a state to the enforcement of a court judgment, the Committee of Ministers may:

- Issue a warning if the state disregards its obligations and clear evidence of this inaction exists;
- Invoke the powers provided under Article 46, paragraph 4 of the Convention;
- In cases of established inaction, ensure the issue is placed on the agenda for communication with other bodies of the Council of Europe, and call on member states to take appropriate measures, including diplomatic efforts, to ensure enforcement;
- Publicly declare that the situation warrants assessment under Article 8 of the Statute of the Council of Europe, which provides for the possibility of expelling a state from the Council of Europe. [54]

[51] Szymon Janczarek and Nikita Kolomiets, supra note 27, 40.

[52] As a rule, judgment/ruling is a subject to standard supervision procedure; and in exceptional cases, to the enhanced procedure. Enhanced supervision applies to cases that the committee has prioritized. The distinction between standard and enhanced supervision lies in the Committee of Ministers' active involvement in monitoring enforcement under enhanced supervision, with cases being regularly reviewed during CM-DH meetings. For more information, see Ministers' Deputies, Information Documents CM/Inf/DH (2010) 45 Final, 7 December 2010 <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804a3e07> [last accessed on 08 May 2023].

[53] Szymon Janczarek and Nikita Kolomiets, supra note 27, 40.

[54] ibid, 41.

2. ENFORCEMENT OF CONSTITUTIONAL COURT JUDGEMENTS IN THE FEDERAL REPUBLIC OF GERMANY

2.1. GENERAL OVERVIEW

According to Paragraph 35 of the Federal Constitutional Court Act of Germany (Bundesverfassungsgerichtsgesetz), "In its rulings, the Federal Constitutional Court may specify the entity responsible for implementing the decision. The Court may also determine the form and means of enforcement in a particular case." In one of its judgments, the Federal Constitutional Court explicitly stated that this provision grants the Court, as the guardian and credible interpreter of the Constitution, the power to secure the effective implementation of its judgments. Hence, the Federal Act grants the Court all the powers necessary to enforce its judgments, underscoring the status of the Constitutional Court as the paramount constitutional authority.[55]

According to Paragraph 78 of the Federal Act, if the Federal Constitutional Court concludes that a provision of federal law is incompatible with the basic law (Grundgesetz), or that a provision of the state law is incompatible with the basic law or other federal legal norms, it declares the relevant provision void. If other provisions of the same law are also incompatible with the basic law or other federal legal norms for the same reason, the Federal Constitutional Court may also declare them void.[56] In its turn, when a provision is declared void, it is assumed that the provision was invalid from the very outset (*ex tunc*).[57] Such decisions are self-executing and do not require special enforcement measures. Provisions that have been declared void must not be applied in practice, particularly by the courts.[58]

However, in certain cases, the Federal Constitutional Court refrains from declaring a law void and merely establishes its incompatibility with specific provisions of the basic law, in which case the provision continues to have legal effect for a certain period.[59] In parallel, the competent authority must adopt specific regulations to restore the constitutional order as quickly as possible. This is the reason why the Federal Constitutional Court links a temporary legal effect of an unconstitutional provision with the legislator's obligation to take measures to restore constitutional order. The legislator, accordingly, is granted a reasonable period within which it must adopt new

[55] BverfG, Beschluss vom 21.03.1957. 1 BvB 2/51. Paragraphs 8-9.
[56] Paragraph 78, "Act on the Federal Constitutional Court", 11 August 1993.
[57] Christofer Lenz und Ronald Hansel, Bundesverfassungsgerichtsgesetz Kommentar (2 Auflage, Nomos 2015) 44.
[58] Reinhard Gaier, 'Die Durchsetzung verfassungsgerichtlicher Entscheidungen' (2011) 11 Juristische Schulung 962.
[59] Klaus Schleich und Stefan Korioth, Das Bundesverfassungsgericht (10 Auflage, C.H. Back 2015) 424.

constitutional regulation.[60] It is noteworthy that the court considers itself authorized to refrain from maintaining an unconstitutional legal situation temporarily, and so it may create a normative framework that will operate during the transitional period.[61]

The judgments of the Federal Constitutional Court that declare a legal provision incompatible with the Constitution, can be categorized into two types.[62] The first category includes the cases where the immediate invalidation of a provision would further burden the constitutional order. The aim of allowing an unconstitutional provision to temporarily remain in force is to avoid creating a legal vacuum[63] and a situation of legal uncertainty.[64] The second category includes the cases where invalidating the contested provision is not "intolerable" from the perspective of the rule of law. However, the court refrains from declaring the provision void, taking into account the legislator's wide margin of discretion/appreciation to restore the constitutional legal order. By adopting this approach, the court expresses a form of institutional deference towards the legislative body, as the latter has a variety of means to eliminate the unconstitutional situation - in contrast to the Constitutional Court, which by its nature is a "negative legislator." This scenario is particularly relevant when the court finds a provision that grants the privilege to inequality to be incompatible with the right to equality.[65]

2.2. THE FEDERAL CONSTITUTIONAL COURT'S LEVERAGE IN CASES OF LEGISLATIVE INACTION ON OBLIGATIONS IMPOSED BY THE COURT

The Federal Constitutional Court has various options for responding to the legislator's inaction on the obligations imposed by the Court.[66] As stated above, the legal basis for this lies in Paragraph 35 of the Federal Constitutional Court Act, granting the Court the authority to take measures necessary to enforce its judgments.

(A) SPECIFICATION OF RESPECTIVE MEASURES IN THE JUDGMENT TEXT

The Federal Constitutional Court can specify the possible measures that could follow legislative inaction on the imposed obligation in the text of its judgment. For example,

[60] BVerfG, Beschluß vom 24.06.1992. 1 BvR 459/87, 1 BvR 467/87, 2-3.
[61] BverfG, Urteil vom 18. 07. 2012. 1 BvL 10/10, 2/11–II, 2.
[62] Klaus Schleich und Stefan Korioth, supra, note 50, 395.
[63] BVerfG, Beschluß vom 21.03.1974. 1 BvL 22/71, 21/72–VII, 1-3.
[64] BVerfG, Urteil vom 14.07.1986. 2 BvE 2/84, 2 BvR 442/84–E, 1-2.
[65] BVerfG, Beschluß vom 6.07.2010. 2 BvL 13/09-DI, 1-3.
[66] Hoppe Tilman, 'Verfassungswidriges Recht: Was folgt aus einem Unterlassen des Gesetzgebers' (2009) 22 Deutsches Verwaltungsblatt 628.

if the legislator fails to introduce necessary regulations in a timely manner, the court, in order to ensure the enforcement of the judgment, can rule that upon expiring the established deadline, the provision that has been deemed unconstitutional (and which remains in force during the transitional period) will be declared void.[67]

If the legislative body does not implement the required changes within the timeframe specified in the judgment, the Federal Constitutional Court can also identify (in the judgment) a new regulation, compatible with the Constitution that will automatically take effect upon expiring the deadline, without any further action. In such cases, the new regulation will have a self-executing mode. The case-law of the Federal Constitutional Court illustrates this point: The Court ruled twice that public servants with two or more children would be entitled to increased child care benefits. However, the legislator failed to implement this in practice.[68] In its third judgment, the Court ruled that if the legislator did not take the necessary steps to implement the judgment, the public servants with two or more children would have the right to demand a higher social benefit in the amount indicated in the judgment; and the state agencies responsible for granting these benefits would be obliged to act based on this court judgment. Ultimately, the practical value of the judgment was that the legislator enacted regulation to ensure the provision of increased social benefits.

The other enforcement measure involves the Federal Constitutional Court delegating, in case of legislator's inaction, the practical implementation and operationalization of its judgments to the general courts, instead of establishing (new) regulations, compatible with the Constitution. Specifically, the Constitutional Court instructs general courts (by the judgment) to resolve individual cases based on constitutional norms in case the legislator fails to bring the normative framework in line with the Constitution; meaning that the constitutional norm exerts its derogatory effect on ordinary legislation.[69]

(B) SUBSEQUENT ACTION

Pursuant to Paragraph 35 of the Federal Constitutional Court Act, the Court is empowered to issue an enforcement order following its judgment. This authority is often exercised when enforcement needs arise at a subsequent stage. Through such an order, the Constitutional Court ensures the establishment of the necessary factual prerequisites for the effective implementation of its judgment. However, an enforcement order cannot alter, supplement, or extend the substantive judgment it is intended to enforce.

[67] BVerfG, Beschluß vom 7.02.2012. 1 BvL 14/07–IV, 1.

[68] Reinhard Gaier, supra note 49, 965.

[69] BVerfG, Beschluß vom 29.01.1969. 1 BvR 26/66-B–I, 2. A constitutional norm has derogatory power over ordinary law, meaning that issues must be resolved based on the constitutional norm rather than ordinary legislation. In other words, the adjudicating authority must deviate from the statutory provision and act in accordance with the constitutional norm.

2.3. THE LEGAL PROCEDURE FOR ADOPTING AN ENFORCEMENT ORDER

The Federal Constitutional Court explicitly stated in one of its judgments that Paragraph 35 of the Federal Constitutional Court Act clearly reflects the legislator's intent not to establish a specific formal procedure, granting the Court greater flexibility to find the most appropriate, swift, expedient, simple and effective means to ensure the enforcement of its judgment.[70] This serves a principal task to ensure that procedure enables reaching the state of affairs required by the substantive judgment of the court.

The Federal Constitutional Court issues an enforcement order based on its own initiative and for it purpose it does not require a formal application from the parties involved in the process. Nevertheless, the German constitutional legal doctrine suggests that initiating an enforcement process independently by the Constitutional Court does not *a priori* exclude the right of the parties to apply to the Court to request enforcement.[71]

An enforcement order under Paragraph 35 is typically issued without an oral hearing. The Constitutional Court, at its discretion, determines what information to request and from which body to seek clarifications.[72]

Since enforcement must influence the outcome of a judgment, every enforcement order includes a certain degree of foresight. The Constitutional Court takes the latter into consideration and draws relevant conclusion. The above-mentioned Paragraph 35 empowers the court to carry out enforcement measures on its own or delegate them to other bodies, which include an individual, administrative body or other entity subordinate to the federal authority. At the same time, the legislation does not explicitly require that the body responsible for enforcing the court judgment be vested with official state authority.[73]

The determination of the entity responsible for enforcement is not entirely within the court's discretion. It is constrained by the nature of the matter and the constitutional principle prohibiting arbitrariness. Additionally, the court may utilize the Federal State Apparatus (Länder) to enforce its judgments. A notable example is the obligation imposed on the Ministers of the Interior of the Federal States to enforce the court's judgment, by deploying police forces, to dissolve the Communist Party of Germany, which had been declared unconstitutional and disbanded by the judgment.[74]

In case the Federal Constitutional Court delegates the enforcement of a judgment to another entity, the following two scenarios of action can be activated:

[70] BverfG, Beschluss vom 21.03.1957. 1 BvB 2/51, 8-9.
[71] Christofer Lenz und Ronald Hansel, supra note 48, 35 (4).
[72] BverfG, Beschluss vom 21.03.1957. 1 BvB 2/51, 8-9.
[73] Roman Herzog, Die Vollstreckung von Entscheidungen des BverfGG (1965) 4 (1) 46.
[74] BVerfG, Urteil vom 17.08.1956. 1 BvB 2/51–II, 1.

(a) It is possible for the court, in general, to assign the enforcement of a judgment to a specific body without specifying the exact manner of enforcement. In such cases, the executive body, within its own discretion, determines the most effective means of enforcement;

(b) If the Constitutional Court, in addition to designating the entity responsible for enforcement, explicitly specifies the form or means of enforcement of the judgment in the enforcement order, the discretion of the executing body is significantly limited. The body must act strictly within the scope of the court's instructions.

In the first scenario, the designated body acts instead of the Federal Constitutional Court, while in the second scenario, the court acts through the other body, which serves as an "instrument" for enforcement. The criterion for distinguishing these two cases is the general and abstract nature of the enforcement order. Constitutional bodies can be considered as "instruments" only when the court instructs them to use the means proportional to physical coercion. The application of physical force requires exceptional justification and must be a necessary measure to uphold the rule of law in response to unlawful conduct.[75] In such cases, the decision to authorize the use of physical force is made by the court, while its implementation is carried out by a specialized body. This is why these bodies are regarded as "instruments" for the practical execution of court judgments.

It is important to highlight that legislation does not mandate a specific form for enforcement orders issued by the Federal Constitutional Court to implement its judgments. Furthermore, the possibility of filing a complaint against specific enforcement actions under such an order depends on the entity responsible for enforcement. The following scenarios can be identified in this context:

(a) If the Federal Constitutional Court itself enforces the judgment (for example, by declaring an unconstitutional provision void after the legislator's inaction once the set deadline expires), no complaint can be filed against it; regardless of whether it is established directly by the same judgment or a subsequent enforcement order;

(b) When a specific body, delegated by the Federal Constitutional Court, enforces the judgment while acting within its own discretion, a complaint may be filed against that body's actions in the general court and, following the principle of subsidiarity, in the Constitutional Court. This aligns with the right to effective legal protection guaranteed by Article 19, paragraph 4 of the Basic Law;

(c) If a body acts as the Federal Constitutional Court's "instrument" - meaning that it enforces the Court's judgment strictly within the framework defined by the Constitutional Court, rather than acting at its own discretion – then the enforcement

[75] Niklas Luhmann, Die Politik der Geselschaft (6 Auflage, Surkhamp Verlag 2000) 55.

> action is attributed to the Court, issuing the assignment. Since the Constitutional Court judgments cannot be appealed, the same principle applies in this case as well. Namely, the enforcement actions carried out by delegated bodies cannot be contested. This standard was established by the Federal Constitutional Court as early as in 1953, when based on the enforcement order the Ministry of Internal Affairs of Lower Saxony was entrusted with taking appropriate measures to execute the Court judgment to dissolve political parties - successors to the Reich Socialist Party. Acting within his discretion, the Lower Saxony Interior Minister directed police authorities to prevent the parties (recognized as unconstitutional) from conducting election campaigns and to prohibit any election-related meetings. Since these enforcement measures were not specifically defined by the Constitutional Court, the minister acted within his discretion; therefore, the court judged that any enforcement-related complaint should first be filed in the general court, and then, according to the principle of subsidiarity, to the Federal Constitutional Court.[76]

The analysis of German legislation, practice, and doctrine reveals that a key challenge in enforcing Constitutional Court judgments arises from the complex interplay between politics and law. In a well-functioning society, political communication and the struggle for power must occur strictly within the framework of the law. One of the Constitutional Court's most essential functions, rooted in the principle of the rule of law, is to safeguard the constitutional and legal legitimacy of political processes. This principle distinguishes the Constitutional Court from other courts that administer justice, and it is this unique feature that should clarify the scope of the interpretation of the norms defining the Court's authority to enforce its judgments.

3. BRIEF OVERVIEW OF THE JUDICIAL PRACTICE OF OTHER COUNTRIES

This section provides a brief overview of the specific mechanisms employed in various countries to promote the enforcement of Constitutional Court judgments. The observed trends are as follows:

- The failure to enforce a Constitutional Court judgment is classified as a criminal offense (e.g., Republic of North Macedonia, Bosnia and Herzegovina); [77]
- The legislative framework explicitly designates the parliament or the executive branch, or both as the entities responsible for enforcing Constitutional Court

[76] BVerfG, Beschluß vom 04.03.1953. 1 BvR 766/52.

[77] Article 377, Section 3, Criminal Code of the Republic of North Macedonia; Article 239, Criminal Code of Bosnia and Herzegovina, Official Gazette of Bosnia and Herzegovina, 3/03.

judgments (e.g., Republic of Montenegro, Romania).[78] Austria presents an interesting example in this regard; namely, the Austrian constitution designates the President as the entity responsible for enforcing Constitutional Court judgment. Accordingly, the judgment is executed by the federal or state authorities, including the federal armed forces, according to the President's instructions. The Constitutional Court must submit a request to the President to initiate enforcement;[79]

- The Constitutional Court is empowered to determine the time of invalidation of an unconstitutional norm, the method of enforcement, and the executive body responsible for enforcement (e.g., Republic of Montenegro, Republic of Serbia, Republic of Latvia);[80]
- Upon expiration of the timeframe defined by the court, the body responsible for enforcement officially notifies the Constitutional Court on the measures taken to execute the judgment (e.g., Republic of Montenegro, Bosnia and Herzegovina); [81]
- In case of non-enforcement or delay either in enforcing the judgement or providing information on applying appropriate measures, the Constitutional Court issues a judgment that confirms non-enforcement, where the Court can also specify the rule of enforcing the judgment in-question. This judgment is finally sent to the body responsible for enforcement (e.g., Bosnia and Herzegovina).[82]

IV. RECOMMENDATIONS FOR IMPROVING GEORGIA'S LEGAL FRAMEWORK FOR ENFORCING CONSTITUTIONAL COURT JUDGMENTS

Observation of the practice of enforcing Constitutional Court judgments suggests that the enforcement process lacks consistency, planning, and coordination. The implementation of general measures necessary for the enforcement of court judgments depends entirely on the initiative, resources, and political will of respective agencies.

Based on the analysis of national challenges and best international practices, the authors of this article believe that there is significant potential for improving the process of enforcing Court judgments. Below are recommendations to address deficiencies in the

[78] Article 151, Constitution of Montenegro (2007); Article 147, The Constitution of Romania.
[79] Artikel 146, Abs 2, Bundesverfassung.
[80] Article 52, Law on the Constitutional Court. Constitutional Justice in Asia "Current Problems in Execution of Judgments: Constitutional Justice" (2021) 267; Article 46, paragraph 6, Law on the Constitutional Court (2007); Article 31, paragraph 11, Constitutional Court Law.
[81] Article 52, Law on the Constitutional Court. Constitutional Justice in Asia "Current Problems in Execution of Judgments: Constitutional Justice" (2021) 267; Article 72, paragraph 5; Rules of the Constitutional Court of Bosnia and Herzegovina.
[82] Article 72, paragraph 6, Rules of the Constitutional Court of Bosnia and Herzegovina.

enforcement process: some require legislative changes, while others can be implemented without them. The proposed measures are as follows:

1. The legislative provision granting the Secretary of the Constitutional Court the authority to take measures for enforcement is largely illusory. The law does not specify any concrete measures. It is recommended that the Constitutional Court be empowered to exert political influence in response to the executive branch's failure to act on a court judgment. Specifically, the court should adopt an enforcement decision that formally acknowledges inaction and instructs the executive body on specific instruments to expedite enforcement;
2. Upon the expiration of the timeframe defined in the judgement, the responsible body should be legally obliged to notify the Court in written form on the measures taken to enforce the decision;
3. As the practice shows, the enforcement process may be hindered by the vagueness of Court judgment; hence, the executive body should have the right to petition the Constitutional Court to provide an interpretation of the judgment or its specific part;
4. The court should not leave the judgements without set deadlines for enactment, unmonitored. These are the judgments, which remain unenforced once a reasonable period has passed;
5. For the judgments that were unenforced within the established deadline or for those without a set timeframe that remain unenforced after a reasonable period has passed, the Court should request updates on the progress of enforcement from the responsible enforcement body at regular intervals, as prescribed by the respective judicial practice or legislation. This process should continue until the judgment is fully enforced;
6. To enhance the court's overall awareness, it is advisable to allow plaintiffs, the Public Defender, and representatives of civil society organizations to submit information to the court on the progress of enforcement reflecting their own perspectives;
7. The enforcement process could be improved by establishing a forum for dialogue between executive bodies and the court. This forum could facilitate working meetings to address cases with complex enforcement issues and actively apply this practice to unresolved court judgments, as needed, at the request of either the court or the executive body;
8. Before setting deadlines when postponing the invalidation of unconstitutional norms, the Constitutional Court should consult with the relevant executive bodies to determine a reasonable timeframe for enforcement;

9. Currently, the court's annual reports on the enforcement of Constitutional Court judgments serve as one of the primary sources of information. However, the accuracy and transparency of their publication require improvement. It is recommended that the lists of unenforced judgments, progress reports submitted by executive bodies and other stakeholders, and court rulings related to enforcement be made publicly accessible. Public scrutiny fosters greater accountability among state institutions, particularly when the enforcement process has a political dimension;
10. It is recommended to establish dedicated staff positions within the court structure (either by creating a new unit or integrating the role into the existing framework) to oversee and monitor the enforcement of court judgments.

V. CONCLUSION

In conclusion, it should be stated that the Constitutional Court of Georgia lacks effective legislative and practical instruments to ensure the enforcement of its judgments. The current normative framework does not adequately promote the implementation of the standards established by the judgment or the will of the Court expressed within it, particularly in cases of legislative inaction.

The research revealed that Georgia's legal framework for enforcing Constitutional Court judgments requires significant improvement. The challenges associated with the enforcement of these judgments are not merely theoretical or legalistic but have substantial practical implications. In practice, there are precedents of unenforced judgments, which combined with the Constitutional Court's ineffective enforcement mechanisms, hinder the practical implementation of the court's will and the realization of the "living constitution" as interpreted by the court.

It is essential that, through appropriate legislative and/or practical reforms, the court's enforcement measures extend beyond merely reporting to the Plenum and documenting cases of inaction in annual reports. These measures must be translated into effective enforcement tools. Specifically, improvements to the current framework should focus on the following areas:

(a) Establishing mechanisms to exert political pressure on the executive branch to promote enforcement;

(b) Enhancing the accountability of executive bodies to the court;

(c) Ensuring transparency in monitoring the enforcement process;

(d) Creating a forum for dialogue between the court and executive bodies and promoting its active use;

(e) Strengthening the court's logistical and operational capabilities for monitoring the enforcement process.

For evident reasons, this article does not attempt to exhaustively address all issues related to the enforcement of Constitutional Court judgments. However, the authors hope that the key systemic findings presented here will inspire further academic discourse on the topic and offer valuable insights to both legislators and the Constitutional Court in devising effective solutions to the current challenges.

*Gia Markoidze**

PERMISSIBLE LIMITS OF ENTRAPMENT IN COVERT INVESTIGATIONS AND OPERATIVE-INVESTIGATIVE MEASURES

ABSTRACT

A parallel can be drawn between the idea of entrapment and the biblical story of Adam and Eve. In the Garden of Eden, Eve was tempted by the serpent, leading her to partake in the forbidden fruit at the urging of another.[1]

Temptation is a social phenomenon and an inseparable part of human interaction as societies evolve. The Law, in its turn, which permeates all spheres of social life,[2] encompasses the aspect of temptation as well, bringing about the development of a separate legal doctrine. Criminal law encompasses the idea of temptation through the concept of entrapment, which applies to situations where a law enforcement officer provokes someone to commit a crime, leading to prosecution.

Criminal proceedings function as an effective tool for the state to combat crime while ensuring the protection of individuals' fundamental rights through procedural safeguards. Among these guarantees, the right to a fair trial holds significant importance, with the entrapment defense serving as one of its key components. In legal doctrine, establishing an acceptable equilibrium in the use of provocative measures during covert investigative activities is of critical importance. This article examines that balance, offering the author's perspective on the interpretation of relevant legislation and the incorporation of best practices.

I. INTRODUCTION

Criminal proceedings serve as an important tool against unlawful actions, yet safeguarding human rights remains the highest priority, forming a fundamental pillar

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[1] Cf. Anthony M. Dillof, 'Unraveling Unlawful Entrapment' (2004) 94 (4) Journal of Criminal Law & Criminology 827.

[2] Giorgi Khubua, Theory of Law (2nd edition, Meridiani Publishing House 2015) 74-132 (in Georgian).

of any rule-of-law-based state. It is a general assumption that law enforcement officers serve the important public good by preventing and responding to crime. The obligations to society motivate law enforcement bodies to identify criminals using various tools including covert investigation activities and operative-investigative measures for this purpose. Resorting to these tools, on the other hand, significantly increases the risk of entrapment, which, at first glance, might seem justified as the person did commit a criminal offense. However, as emphasized at the outset, the human being is the highest value and should not merely become a passive object in the fight against crime.

Let us take the example of an undercover police officer who, intending to identify and detain a pickpocket, impersonates a so-called vulnerable victim in the subway station at night. Resembling an elderly woman being under the influence of alcohol, the officer visibly carries a large sum of money in the open pocket. As a result, she is robbed by a person who takes money from her pocket[3]. Or let us imagine a case of a person who desperately needs money for tuition he/she does not have. The person is approached by an undercover officer offering him/her drugs to sell. The person succumbs to the offer and is apprehended during the sale.[4]

In both cases mentioned above, the persons could resist the temptation meaning they are no less dangerous to society than other offenders are. However, according to the Criminal Procedure Code of Georgia, conducting illegal searches, seizures, or other actions, even against a well-known criminal, cannot serve as a basis for a guilty verdict since this approach might create an unjustifiable risk of punishing innocent persons. That said, the question is: what legal risks exist for individuals who are the targets of entrapment? Isn't the conduct of those who have been entrapped morally justifiable?[5]

This article aims to reconsider the issues related to entrapment and provide a systematic analysis of the problematic areas revealed in practice from a comparative legal perspective. It is written using a comparative legal approach, combining analysis and synthesis of practice and doctrine. The majority of the article examines court decisions and doctrinal materials using historical, socio-legal, analytical, and systematic methods. These methods enhance the understanding of the problems surrounding the subject matter and the means of addressing them.

Notably, a lawsuit involving the entrapment defense, as analyzed in this article, has been submitted to the Constitutional Court of Georgia and is currently pending.[6] The author hopes that the arguments developed herein will contribute meaningfully to both legal practice and doctrinal development.

[3] Cf. Judgment of the New Jersey Superior Court, Appellate Division, State v. Long, 523 A.2d 672, 678 (N.J. Super. App. Div. 1987).
[4] Cf. Judgment of the Court of Appeals of Indiana, Kats v. Indiana, 559 N.E.2d 348 (Ind. Ct. Apps. 1990).
[5] Dillof, supra note 1, 830.
[6] Constitutional Claim of Georgia's Public Defender N1630, 22 July 2021.

II. GENERAL DEFINITION OF ENTRAPMENT

The principle prohibiting entrapment bars the state from inducing individuals to commit a crime solely to initiate criminal prosecution.[7] In the criminal law textbooks, the persons who carried out such actions are commonly referred to as agent-provocateurs.[8]

The concept of defense against entrapment emerged in the legal system of the United States in the 19th century[9] and, until recent times, has been absent in other countries practicing common and continental law.[10] From 1870 to 1932, some American courts considered the issues of inadmissibility of entrapment,[11] although the United States Supreme Court did not officially recognize the concept until 1932[12].[13]

The case *Sorrells v. United States*[14] laid the basis for prohibiting the practice of entrapment in the United States. During the National Prohibition Act, a federal agent visited Sorrells under the guise of a tourist and claimed to be a World War I veteran serving in the same military division as Sorrells. After about an hour of conversation, the agent asked Sorrels five times to get him a gallon of liquor. Despite Sorrell's initial refusal, the agent persisted until Sorrells eventually succumbed to pressure and procured him a half-gallon of whiskey. The US Supreme Court ruled that law enforcement officers could use covert techniques only against individuals who had criminal intent[15], but such methods were deemed unacceptable against law-abiding citizens.[16]

For the next 25 years, the US Supreme Court did not hear any similar case until the case *Sherman v. United States.*[17] Sherman was receiving treatment for drug addiction when he met an agent at the pharmacy who was pretending to be a person undergoing the same treatment. After several encounters, when the two discussed the details of addiction treatment, the agent started asking Sherman to get him drugs. In the beginning, Sherman refused but later agreed, got some, and shared with the agent. As

[7] See definitions, Daniel J. Hill, Stephen K. McLeod and Attila Tanyi, 'The Concept of Entrapment' (2018) 12 (4) Criminal Law and Philosophy 546-554.

[8] Levan Kharanauli, Panishability of Unfinished Crime according to Georgian and German Criminal Law (comparative analysis) (Dissertation, Tbilisi State University Press 2013) 365 (in Georgian).

[9] See the brief history: Dru Stevenson, 'Entrapment and Terrorism' (2008) 49 (1) Boston College Law Review 148-152.

[10] Jessica A. Roth, 'The Anomaly of Entrapment' (2014) 91 (4) Washington University Law Review 990.

[11] Gregory J. Deis, 'Economics, Causation, and the Entrapment Defense' (2001) 5 University of Illinois Law Review 1211-1216.

[12] In the judgement of US Supreme Court judgment in 1928 Casey v. United States 276 U.S. 413 (1928) the judge Louis Brandeis expressed his dissenting opinion defending the entrapment prohibition, but the majority of judges did not support him.

[13] Roth, supra note 10, 990.

[14] Judgement of the US Supreme Court, Sorrells v. United States, 287 U.S. 435 (1932).

[15] Cf. Hock L. Ho, 'State Entrapment' (2011) 31 (1) Legal Studies 86.

[16] Sorrells v. United States, supra note 14, 440-453.

[17] Judgement of the US Supreme Court, Sherman v. United States, 356 U.S. 369 (1958).

a result, Sherman again started using narcotics. After several such transactions, the agent informed the law enforcement agency, which required additional transactions as evidence of a crime. So, the agent made Sherman engage in more transactions, based on which the law enforcers initiated a covert police operation.[18] The court qualified the agent's actions as entrapment.[19]

Regarding European law practice, Article 6 of the European Convention on Human Rights provides for the right to a fair trial that implies the protection of defendants from entrapment.[20] The European Court of Human Rights (hereinafter - the ECtHR) defines that investigation - or, in some cases, administrative proceedings - should aim to prosecute those who committed a crime or other administrative violations but not by instigating them to commit a crime. The state's end goal should not be to indict individuals by entrapping them.[21] By using the means of entrapment, a state is engaged in/facilitates a criminal activity in order to prosecute a person.[22] More specifically, the entrapment means an active engagement of a state representative or other private person acting under the former's guidance in the special police operations, aiming at inducing a person who would not have committed a crime otherwise.[23]

The ECtHR recognizes the need for covert investigative methods and operative-investigative measures for combating organized crime, corruption, and other complex offenses[24]. However, it underscores that while applying such covert techniques, the appropriate procedural safeguards must be ensured to prevent abuse of authority.[25] Public interest in investigating crime cannot justify obtaining evidence or prosecuting individuals through entrapment, as this violates the right to a fair trial.[26]

As to the Georgian context, Article 31, paragraph 1 of the Georgian Constitution provides for the right to a fair and timely trial. Despite the Constitution does not

[18] ibid, 371-372.
[19] ibid, 376.
[20] Judgment of the European Court of Human Rights N18002/02 "Gorgievski v. the former Yugoslav Republic of Macedonia", 16 July 2009. Paragraph 38.
[21] Judgment of the European Court of Human Rights N6228/09, 6228/09, 19678/07, 52340/08, 7451/09 "Lagutin and others v. Russia", 29 April 2014. Paragraph 94.
[22] Judgment of the European Court of Human Rights N18757/06 "Bannikova v. Russia", 04 November 2010. Paragraphs 37, 51.
[23] Judgment of the European Court of Human Rights N74420/01 "Ramanauskas v. Lithuania", [GC] 05 February 2008. Paragraph 55.
[24] Judgment of the European Court of Human Rights N2689/65 "Delcourt v. Belgium", 17 January 1970. Paragraph 25.
[25] Ramanauskas v. Lithuania, supra note 23, 51.
[26] Judgment of the European Court of Human Rights N44/1997/828/1034 "Teixeira de Castro v. Portugal", 09 June 1998. Paragraphs 35-36, 39. Judgment of the European Court of Human Rights N59696/00 "Khudobin v. Russia", 26 October 2006. Paragraph 135. Judgment of the European Court of Human Rights N53203/99 "Vanyan v. Russia", 15 December 2005. Paragraphs 46-47. "Ramanauskas v. Lithuania", supra note 23, 54.

explicitly prohibit entrapment, it is nevertheless implied under the above provision.[27]

Entrapment is criminalized under Article 145 of the Criminal Code of Georgia and is defined as inducing another person to commit a crime for the purpose of criminal prosecution. While the Criminal Procedure Code does not explicitly prohibit entrapment, it does, at the level of principles, prohibit influencing a person's free will through torture, […] deception […]. (Article 4, paragraph 2). Deception is a central element of entrapment,[28] respectively, that norm can be interpreted as prohibiting it.

According to Article 2, paragraph 5c of the Law of Georgia on Operative-Investigative Activities, operative-investigative measures that involve deceit, blackmail, coercion, or the commission of a crime or other unlawful acts are prohibited.

As shown above, neither the Criminal Code nor the Law on Operative-Investigative Activities defines the concept of entrapment; however, in the latter case, the prohibition of deception and coercion can be interpreted as a prerequisite for prohibiting entrapment. Nonetheless, this provision should be interpreted narrowly, as operative measures are generally based on deception, and excluding it would make the entire operative system ineffective. For example, when acquiring a prohibited item during a controlled transaction, a person purchases it without knowing the agent's identity.[29]

Moreover, deception has its degree, and its proper assessment is no less important for addressing the above-mentioned challenge in legal proceedings.

III. COMPLIANCE OF GEORGIAN LEGISLATION AND PRACTICE WITH EUROPEAN STANDARDS OF HUMAN RIGHTS

According to the ECtHR practice, for determining whether a crime was committed as a result of state-incited actions, the following two tests are applied:[30]

a) Substantive test - evaluates whether the law enforcement agents were acting in "essentially passive manner" and whether the crime would have taken place without state intervention; [31]

b) Procedural test – evaluates whether overall, the legal process was conducted in a fair manner.[32]

[27] Similar approach is shared by the European Court of Human Rights; See also the Constitutional Claim of Georgia's Public Defender N1630, 22 July 2021.

[28] For example, Stefan Trechsel, Human Rights in Criminal Proceedings (Oxford University Press 2009) 135-137 (in Georgian).

[29] Irakli Dvalidze, Impact of Motive and Purpose on the Qualification of Actions and Criminal Liability (Dissertation, Tbilisi University Press 2008) 121 (in Georgian).

[30] Cf. Hill, McLeod and Tanyi, supra note 7, 546-549.

[31] Ramanauskas v. Lithuania, supra note 23, 55.

[32] Judgment of the European Court of Human Rights N39647/98, 40461/98 "Edwards and Lewis v. the

Before studying the ECtHR's standards, it is important to note that the Supreme Court of Georgia agrees and shares this practice, and refers to the citations derived from the ECtHR judgments. For example, in exchange for helping a person secure a job in a government office, the defendant demanded a bribe. The transaction of handing over the money was covertly recorded by the police. Both the trial court and appellate court found the defendant guilty, and the judgment was appealed to the Supreme Court. The Supreme Court, based on the ECtHR test, concluded that since the investigative body became involved in the process only after the defendant demanded the bribe, there was no room/need for entrapment.[33]

1. SUBSTANTIVE TEST

The ECtHR applies different criteria to assess whether the state's actions equated to entrapment. By a broad definition, it should be assessed whether a state initiated a crime or merely joined it. This latter falls within the permissible limits defined by Article 6 of the Convention, while "joining the crime" itself means that the role of the state in the process was "essentially passive', which in turn is determined by assessing whether the:

a) entrapment was carried out by law enforcement agent;
b) law enforcement body initiated contact with the defendant;
c) offer has been repeated despite refusals;
d) proposed price increased;[34]
e) investigative body acted insistently;[35]
f) provoking mechanisms were used to influence the defendant[36] (E.g., obtaining empathy by helping him/her in relieving drug withdrawal syndrome);[37]
g) prior evidence is available of the defendant's involvement in criminal activity;
h) law enforcement agent offered/received legal or illegal service;
i) the process was effectively supervised.[38]

United Kingdom", [GC] 27 October 2004. Paragraph 46. Judgment of the European Court of Human Rights N40412/98 "V. v. Finland", 24 April 2007. Paragraph 72. Judgment of the European Court of Human Rights N23782/06, 46629/06 "Constantin and Stoian v. Romania", 29 September 2009. Paragraphs 56-57.

[33] Judgement of Supreme Court of Georgia on case N497ap-16, 25 January 2017.

[34] Ronald J. Allen, Melissa Luttrell and Anne Kreeger, 'Clarifying Entrapment' (1999) 89 (2) Journal of Criminal Law and Criminology 414-415.

[35] Judgment of the European Court of Human Rights N74355/01 "Milinienė v. Lithuania", 24 June 2008. Paragraph 37.

[36] Dan Squires, 'The Problem with Entrapment' (2006) 26 (2) Oxford Journal of Legal Studies 363.

[37] Vanyan v. Russia, supra note 26.

[38] Cf. Hochan Kim, 'Entrapment, Culpability, and Legitimacy' (2020) 39 (1) Law and Philosophy 80-87.

1.1. ENTRAPMENT CARRIED OUT BY LAW ENFORCEMENT AGENT

The prohibition of entrapment is primarily the obligation of the state, and therefore, it applies to its representatives.[39] If the agent-provocateur does not represent the state either directly or indirectly, it means that Article 6 of the Convention is not violated. Direct representation refers to the cases where a law enforcement agency employs a person, whereas indirect representation involves individuals who are not formally employed by the agency but cooperate with it officially or unofficially, receive instructions, etc.[40]

The state representation should be effectively determinable, and the state should not be able to evade responsibility with artificial arguments. In the case of *Ramanauskas*,[41] the prosecutor-in-charge was contacted by a person who offered him a USD 3,000 bribe in exchange for dropping criminal charges. In the beginning, the prosecutor refused the offer but later, after repeated persistent requests, accepted it. The initiator of the bribe turned out to be an officer of the anti-corruption bureau.[42] The prosecutor was found guilty, with the primary evidence being wiretaps of exchange between the two. The state argued that the anti-corruption officer acted out of personal interest and did not represent the state, but the European Court disagreed, pointing out that the state had been involved in the criminal activity not from the official start of the investigative operation but from its very inception. Judging otherwise would allow the law enforcement body to abuse its powers.[43]

In the Georgian context, a challenge exists since the legislation regulating procedural and operative-investigative measures does not provide for either the definition of entrapment or the regulations related to its prohibition. By the definition given in Article 145 of the Criminal Code of Georgia, any person can be the subject of entrapment; albeit this definition cannot be considered as a comprehensive norm defining the term/concept since it pertains to substantive law, i.e., it identifies what exactly is criminalized. Consequently, the definition cannot be deemed relevant for state representatives.

It is recommended that the regulation governing both the procedural and operative-investigative measures formulates a comprehensive definition of entrapment that would include both the direct and indirect engagement of the state.[44]

[39] Allen, Luttrell and Kreeger, supra note 34, 421.
[40] For example, Ho, supra note 15, 74.
[41] Ramanauskas v. Lithuania, note 23, 67.
[42] ibid, 10-14.
[43] ibid, 62-64.
[44] In the USA, the Attorney General's guidelines set restrictions and defines other aspects. Additionally, there are state-level directives and constitutional provisions in the context of rights protection. See critical analysis, Stevenson, supra note 9, 162-166.

1.2. INITIATING CONTACT

The ECtHR emphasizes the aspect of initiating contact with the defendant. Once the law enforcement authority initiates the contact, it points to the presumption of entrapment, necessitating a thorough examination of the matter.

Entrapment extends to the cases when an agent, i.e., a state representative, causes the commission of a crime. Specifically, this refers to the situations, where a person did not do anything unlawful prior to the agent's involvement. If a person had already been engaged in criminal activity and the agent got involved afterward, Article 6 of the Convention is not violated. In the case of *Sequeira*,[45] it was found that persons A and C began cooperating with law enforcement agents after the applicant had already been involved in organizing an illegal transportation of cocaine (being in possession of one of them) to Portugal. Thus, A and C cannot be regarded as agent provocateurs. [46]

The above criterion is often applied in cases where investigative authorities receive information about potential crime not from covert but identifiable sources, such as, for instance, a private person.[47] In the case of *Shannon*,[48] the source of information on the possible commission of the crime was a journalist who was not a state agent and so did not act under police instructions/control. After receiving the information, the police got involved, which points rather to the "joining" than "instigating" the process.[49] The ECtHR upheld this approach in subsequent cases such as, for instance, the case of *Milinienė*.[50] A person contacted the police after being asked for a bribe to achieve the desired result. The police equipped the person with a wire, and the information about committing a crime was obtained in this manner. Clearly, the law enforcement authority influenced the course of events by equipping and instructing a person on how to participate in the special operation. Yet, it merely joined the criminal activity without initiating it. Therefore, Article 6 of the Convention was not violated.

Conversely, in the case of *Malininas*,[51] the contact with a defendant was initiated by police; the officer asked the latter where the drugs could be purchased. The defendant responded by offering the agent to supply the drugs; however, when offered a large amount of money, he got motivated to produce drugs himself. Considering that the

[45] Judgment of the European Court of Human Rights N18545/06 "Sequeira v. Portugal", 20 October 2009.
[46] Ho, supra note 15, 91-92.
[47] In this respect, the doctrines of private and public entrapment were developed in academic literature. See Daniel J. Hill, Stephen K. McLeod and Attila Tanyi, 'What Is the Incoherence Objection to Legal Entrapment?' 2022 22 (1) Journal of Ethics and Social Philosophy 48-50.
[48] Judgment of the European Court of Human Rights N6563/03 "Shannon v. the United Kingdom", N6563/03, 04 October 2005.
[49] About the British model see Squires, supra note 36, 355-360.
[50] Milinienė v. Lithuania, supra note 35.
[51] Judgment of the European Court of Human Rights N10071/04 "Malininas v. Lithuania", 01 July 2008.

police initiated the contact with the defendant and later instigated him by increasing the monetary offer, the police was qualified as the agent provocateur, pointing to the violation of Article 6.

The above-mentioned criterion is somewhat problematic in Georgian legislation. As it was noted, the risk of entrapment arises in practice with launching the operative-investigative measures. Article 8 of the Law on Operative-Investigative Activities defines the grounds for conducting such measures, stipulating, specifically for the purpose of entrapment, an assignment given by the prosecutor (or on his/her consent, by an investigator) to the operative(s) prior to or during the investigation. The law does not require justification for the assignment or the formulation of preconditions (including related evidence and formal details) in the relevant operative documentation. The absence of such instructions makes it difficult to identify the initiator and ensure that subsequent actions will be conducted in a safe environment, guaranteeing the protection of rights. Provided that operative information has a covert nature, the defendant becomes aware of the measures undertaken only at the stage of court proceedings or does not at all, which impedes elaboration of the defense strategy. Therefore, it is advisable to produce a written document of justification for such assignments, which will be attached to the criminal case materials, and thereby ensure the efficacy of the procedural guarantee stipulated by the ECtHR, as outlined above.

As for specifying the issues related to the initiator in the legislation, no such requirement exists currently in subsequent regulations. Nevertheless, the investigative authorities should strictly uphold all due guarantees, with the view that in the framework of legislative reforms, it will be of utmost importance to include the identification of the initiator as a criterion for commissioning entrapment. [52]

1.3. METHODS OF PERSUASION: REPEATED OFFERS, COERCION, PRICE INCREASE, ETC.

To classify an act as entrapment, the methods of persuasion employed by a law enforcement agent are taken into account. Specifically, it is assessed whether the state representative made the offer once or multiple times, whether coercive methods were used such as increasing price; manipulating a person through drug addiction, exploiting the knowledge of his/her personal problems, etc.[53] In practice, determining the level of influence exerted on an individual is extremely difficult.[54]

[52] Hill, McLeod and Tanyi, supra note 7, 542.

[53] Richard H. McAdams, 'The Political Economy of Entrapment' (2005) 96 (1) Journal of Criminal Law and Criminology 153-158.

[54] Squires, supra note 36, 362.

In the case of *Teixeira de Castro v. Portugal*,[55] two police officers contacted a person, and pretended to be interested in purchasing heroin. The person said he did not have it but suggested another person for the job. Not knowing that person's address, the concerned person asked the second individual. As a result, two police officers and these two individuals went to the suggested contact and expressed interest in buying heroin. It turned out that the contact person also did not have drugs and bought them from a third person who had been apprehended on the way back.

The ECtHR stated that the police officers approached the suspect through two other intermediaries. Furthermore, the defendant did not have heroin in possession; he obtained it from another person due to persistent requests; and when detained, was found to possess no more than the amount he had been requested for by said persons. Accordingly, there was no indication of the defendant's prior criminal intent/activity. Therefore, the police officers did not limit themselves to a "passive role" but, to the contrary, significantly influenced the defendant to commit a crime. The Court found clear evidence of entrapment and ruled that there was a violation of Article 6 of the Convention.[56]

The above-mentioned criteria established by the ECtHR should undoubtedly be incorporated into the legislation regulating procedural and operative-investigative measures since the absence of such is challenging. This issue is less problematic with regard to covert investigative activities since, thanks to the recent legislative amendments each procedure has been formulated in detail. However, when it comes to the operative-investigative measures, the relevant procedures remain minimally regulated. For example, the Criminal Procedure Code does provide detailed regulations on the rules for covert telephone surveillance and recording, procedural documentation and evidentiary standards, technical tools, supervisory bodies, document circulation systems, etc., while the Law on Operative-Investigative Activities lacks such details. According to Article 4, paragraph 2 of the mentioned law, the state bodies authorized to carry out operative-investigative activities are entitled to issue the internal legal normative acts on specific aspects of such activities within their jurisdiction, based on this law, the rule established by the law and the approval given by the Prosecutor General of Georgia. It should be noted, however, that these normative acts belong to the category of state-secret information, meaning that even in the case of detailed formulation of all procedures contained therein, they still cannot meet the criteria established for laws by the ECtHR.[57] Specifically, the law should be accessible to the public, either through proactive publication or upon request from the relevant authority; and secondly, the qualitative law must be clear and understandable.

[55] Teixeira de Castro v. Portugal, supra note 26.

[56] ibid, 37-39.

[57] Judgment of the European Court of Human Rights N45554/08 "Ashlarba v. Georgia", 15 July 2014. Paragraph 33.

Conversely, an opinion might emerge in academic literature suggesting that detailing such procedures could harm the interests of operative-investigative measures. While this argument is certainly noteworthy, it is not convincing. Outlining procedures for operative actions does not bring any jeopardy, while on the other hand, certain aspects such as measures of informants' control, number of meetings, etc., can be regulated through secret legal acts. It is notable as well that certain covert investigative activities, which previously had been considered as operative-investigative measures (E.g., covert telephone surveillance and recording), now have a clear and detailed procedure to follow that did not anyhow compromise the public interest.

Unlike the Criminal Procedure Code, the relevant legislation does not provide for documenting the process and outcomes of operative-investigative measures, resulting in the absence of records outlining the process and results of specific operations. As a result, it's impossible to determine how often the state agent asked the defendant to commit a crime, when these requests occurred, or whether he/she raised the price, among other factors. One could argue that this information might be obtained through interrogation during the investigation stage; however, this approach is ineffective.

If we follow this logic, it can be suggested that the same approach should be applied to covert investigation activity as well. Clearly, drafting a report and documenting the process and outcomes of conducted operative measures is a higher and the most required procedural guarantee for the defendant since it allows reconstructing a full picture without prejudice, by excluding the risk of forgetting any detail/information.

According to Article 7, paragraph 7 of the Law on Operative-Investigative Activities, an official report should be drafted when carrying out operative measures reflecting the conditions under which technical means were used. This report, along with the obtained materials, is kept in compliance with the rules established by law. As it comes out, this requirement makes drafting the report only necessary when the technical means were used during operation(s). Moreover, the law does not specify the mandatory elements to be included in the report, which undoubtedly is a legislative gap.

1.4. PRIOR EVIDENCE ON A PERSON'S INVOLVEMENT IN CRIMINAL ACTIVITY

When planning entrapment, it is important to analyze the evidence available prior to the involvement of state agents in the actual process of committing a crime by a person.[58] In case such evidence exists, the issue of entrapment becomes less relevant, and vice versa.[59]

[58] David M. Tanovich, 'Rethinking the Bona Fides of Entrapment' (2011) 43 (2) U.B.C. Law Review 428-438.

[59] Squires, supra note 36, 364-366.

In the previously discussed case of *Ramanauskas v. Lithuania*,[60] the court noted that there was noother evidence of the defendant's involvement in criminal activity prior to offering him a bribe, which became one of the prerequisites of violating Article 6. Similarly, the lack of evidence of the applicant's involvement in criminal activity resulted in qualifying police action as entrapment in the *Teixeira* case described above. Namely, the defendant did not have a criminal record, nor was it found any evidence in the process of investigation pointing to his linkage with drugs. This factor turned out to be crucial for qualifying the state action as entrapment.[61] The court extended the same reasoning to the cases of *Eurofinacom*,[62] *Vanyan*,[63] *Khudobin*,[64] etc.

Possessing comprehensive information about the crime is not sufficient for proving a person's predisposition to commit one. As seen in the cases mentioned above, the court had often placed emphasis on the criminal history of a person in order to assess whether he/she was involved in criminal activity at the time of the legal proceedings[65]. The ECtHR specifies the approach further by stating that criminal history is the one but not sufficient indicator. In the case of *Constantin and Stoian*, an indication of the defendant's criminal history only when no other facts existed (no drugs were found in possession of the first defendant or in the house of the second defendant) was considered insufficient.[66] Existence of sufficient evidence could have been a person's visible proximity to narcotic drugs, ability to acquire them in a short period of time, etc.[67]

As noted repeatedly, Georgian legislation does not recognize the concept of entrapment, nor does it provide a list of criteria to assess whether the operative actions can be qualified as entrapment. This can be seen as a legislative gap, requiring the formulation of a corresponding definition and a list of criteria to address this gap.[68]

1.5. OTHER CHALLENGES RELATED TO SUBSTANTIVE TEST

One of the key issues related to the substantive test is whether the state offered/received a legal or illegal service since offering/receiving an illegal service creates a presumption of entrapment. E.g., if a state representative offers a city mayor a bribe in exchange for

[60] Ramanauskas v. Lithuania, supra note 23, 67.
[61] Teixeira de Castro v. Portugal, supra note 26, 37-38.
[62] Judgment of the European Court of Human Rights N58753/00 "Eurofinacom v. France", 2004-VII.
[63] Vanyan v. Russia, supra note 26.
[64] Khudobin v. Russia, supra note 26.
[65] Cf. Chris D. Sa, 'Entrapment: Clearly Misunderstood in the Dial-a-Dope Context' (2015) 62 (1-2) Criminal Law Quarterly 200-208.
[66] Constantin and Stoian v. Romania, supra note 32, 55.
[67] Shannon v. the United Kingdom, supra note 48.
[68] Cf. Khudobin v. Russia, supra note 26, 135; Vanyan v. Russia, supra note 26, 46-47; Teixeira de Castro v. Portugal, supra note 26, 38. Ramanauskas v. Lithuania, supra note 23, 64. Judgment of the European Court of Human Rights N7614/09, 30863/10 "Volkov and Adamskiy v. Russia", 26 March 2015. Paragraph 36.

a construction permit, this creates a presumption of entrapment, which must be rebutted by other parameters presented. The opposite scenario arises when a state representative offers or receives legal services from a person.[69] The ECtHR generally views such cases as passive involvement of the state.

The issue of whether the investigation was essentially passive was assessed in the case of *Volkov and Adamskiy*. A police officer called Volkov and asked to update his computer software. While talking, the officer mentioned the low price of the service, to which Volkov responded that he had been getting the software through semi-legal means. A similar situation took place with Adamskiy. Both were arrested for copyright infringement.[70] Unlike the *Teixeira de Castro* case, here, the police officer requested the individual to engage in legal activity. Services for software programming are legal, and the officer's request did not suggest entrapment as he did not initiate the crime but joined it. Thus, there was no violation of Article 6 of the Convention.[71]

A comparable situation occurred in the *Kuzmickaya* case. The law enforcement agent ordered drinks to determine whether customers were deceptively served smaller quantities of alcohol. It was found that customers were indeed being deceived, which resulted in holding the defendant accountable. Hence, the right to a fair trial was not violated in this case as well.[72]

Effective oversight is a separate subject of assessment. Legal guarantees become illusory without strong element of oversight. According to the ECtHR, judicial supervision serves as the most adequate mechanism for covert operations.[73] Absence of procedural safeguards in the court ruling authorizing covert police actions increases the risk of arbitrariness and entrapment.[74] In the Georgian context, covert operations include both the covert investigation activity and the operative-investigative measures.

Covert investigative activity is regulated by procedure law and is subject to effective judicial oversight. As for the operative-investigative measures, they are regulated by Article 21 of the special law and Article 25 of the Organic Law on the Prosecutor's Office. Generally, judicial oversight of the operative-investigative measures is limited. Law enforcement agencies can obtain information regarding a judge's telephone communications (such as time and duration of calls) only through a

[69] Ho, supra note 15, 81.
[70] Volkov and Adamskiy v. Russia, supra note 68, 7-15.
[71] ibid, 40-44.
[72] Judgment of the European Court of Human Rights N27968/03 "Kuzmickaja v. Lithuania", N27968/03, 10 June 2008.
[73] Khudobin v. Russia, supra note 26, 135.
[74] Judgment of the European Court of Human Rights N5753/09, 11789/10 "Nosko and Nefedov", 30 October 2014. Paragraph 64.

ruling by the Chairperson of the Supreme Court of Georgia based on a reasoned motion issued by the Prosecutor General.

Information on the individuals - confidential informants to the operative-investigative body, degree of their cooperation as well as tactics of obtaining operative information, organization of actions, operative files and the confidential part of actions are not subject to the prosecutorial oversight. Access to such information is granted only to higher officials of the Prosecutor's Office, as provided under Article 25, paragraph 2 of the Organic Law.

As outlined above, neither ex ante nor ex post judicial oversight is envisaged for operative-investigative measures that creates challenges in aligning them with European standards. E.g.: controlled deliveries can be carried out without such oversight. In practice, those are conducted through covert investigation activity such as covert audio or video recording, which do require judicial control. However, this control is clearly insufficient for ensuring adequate scope of oversight for operative actions.[75]

Prosecutorial oversight is a very important institution; however, proceeding from the doctrine of separation of powers, such oversight functions should rest not with prosecution but with an independent branch of the government - the judiciary. Procedures and guarantees of prosecutorial oversight are not codified at the legislative level, which makes unclear what specific measures this control should be composed of. Additionally, it is problematic to leave the tactics and methods of operative measures out of control, as those directly determine the degree of interference with human rights. E.g.: how many times an individual was approached with the offer of engaging in criminal activity, which method was used during the conversation, the tone and manner of communication, etc. If it is argued that prosecutorial oversight of tactics and methods used poses a risk to operative-investigative measures (which is unlikely), then it would be advisable for the legislation to incorporate respective guarantees (to mitigate those risks) rather than abandoning the oversight altogether.

2. PROCEDURAL TEST

The procedural test for assessing entrapment exercised by the state body aims to ensure that the overall process is fair. More specifically, the state should provide the defendant with adequate legislation and practices to effectively protect him/her from entrapment. While the ECtHR does not prescribe specific systems, it establishes minimum criteria that a legal system shall comply with and effectively implement in practice. The process shall meet the following standards:[76]

[75] See the similar argumentation on the example of UK, Squires, supra notes 36, 367.

[76] For example, Judgment of the European Court of Human Rights N31536/07 "Tchokhonelidze v. Georgia", 28 June 2018. Paragraph 46.

a) Defendant shall be able to obtain and present evidence against alleged entrapment. The legal proceedings should adhere to the adversarial principle, ensuring a comprehensive and thorough examination of issues;

b) The burden of proof to establish the absence of entrapment lies with prosecution;

c) National courts shall thoroughly examine:

c.a) The reasons for initiating covert investigative activity and operative-investigative measures against defendant;

c.b) Degree of state's involvement in the process;

c.c) Type of pressure/entrapment the defendant was subjected to;[77]

d) Court shall uphold the general standards of the right to a fair trial, including ensuring the cross-interrogation of agents and other individuals involved in the alleged entrapment. At a minimum, there must be objective circumstances[78] justifying the impossibility of such cross-examination that should be balanced by other factors;[79]

e) The court in its judgment shall provide reasoned responses to the defense's claims regarding entrapment.[80]

The ECtHR examines whether human rights were violated, but it is not authorized to review the decisions made by internal courts. It studies materials gathered during the investigation and hearing phases of the process. The court cannot establish factual circumstances independently; and in practice, there have been cases, where the state did not investigate the fact of entrapment, i.e. did not apply the procedural test for this purpose.[81]

Procedural test became challenging in *Tchokhonelidze's* case.[82] Based on the facts, the defendant serving as a deputy governor demanded USD 30,000 from a person in exchange for help with getting him a construction permit. Police recorded the events of handing over the money and subsequent meetings, gave the defendant marked money, and detained him. The ECtHR could not be provided with the evidence obtained internally; so, it was unclear whether the bribe was initially demanded by the agent or offered by the defendant. Consequently, it could not be established whether the

[77] Bannikova v. Russia, supra note 22, 48.

[78] Judgment of the European Court of Human Rights N26766/05, 22228/6 "Al-Khawaja and Tahery v. The United Kingdom", 15 December 2011; Judgment of the European Court of Human Rights N9154/10 "Schatschaschwili v. Germany", 15 December 2015.

[79] Judgment of the European Court of Human Rights N28823/04 "Bulfinsky v. Romania", 01 June 2010. Paragraph 45.

[80] Judgment of the European Court of Human Rights N17711/07 "Sepil v. Turkey", 12 November 2013. Paragraphs 37-40. Constantin and Stoian v. Romania, supra note 32, 64.

[81] Constantin and Stoian v. Romania, supra note 32, 56-57.

[82] Tchokhonelidze v. Georgia, supra note 76.

substantive test was adhered to, which compelled the Court to focus on procedural test instead. The defendant argued that by being engaged in the act of bribery he was subject to entrapment; alleging that the person giving the money was an agent provocateur. The prosecution failed to present any arguments to rebut the claim. At the same time, the operative-investigative measures were not subject to judicial oversight under the applicable legislation: according to Article 7, paragraph 3-7, the infiltration of undercover agents does not require judicial control.[83] Furthermore, in the process of substantive examination, the court did not find the reasons for initiating the operative-investigative measures, nor did it clarify the scope of the agent's involvement or potential entrapment/pressure exercised. In addition, the court did not provide for the possibility of cross-interrogation of the second agent. Hence, this part of the process was not conducted in accordance with the adversarial principle. Thus, the integrity of the procedural test was violated.[84]

It is important to assess compliance of Georgian legislation regulating procedural aspects and operative-investigative activity with the European standards in light of the procedural test.

2.1. CHALLENGES WITH ADMISSIBILITY AND ACCEPTANCE OF THE EVIDENCE OBTAINED THROUGH ENTRAPMENT

Admissibility of evidence is examined at the pre-trial hearing stage, while its acceptance is determined during the substantive hearing. According to Article 82, paragraph 1 of the Criminal Procedure Code of Georgia, evidence shall be assessed based on its relevance, admissibility, and reliability in connection with the criminal case. This provision primarily relates to the evaluation of evidence during the acceptance stage, but these criteria are also applied at the admissibility stage.[85] In legal doctrine, the admissibility stage is referred to as the verification of evidence, while the acceptance stage pertains to its evaluation.

There are various factors that exclude admissibility such as challenges with obtaining, procedural attachment, or the exchange of evidence. However, in the context of entrapment, assessing the admissibility of evidence upon its acquisition is important. According to Article 72, paragraph 1 of the Criminal Procedure Code, the evidence obtained with a substantive violation of the law as well as other evidence lawfully obtained based on such (first) evidence - in case it worsens the legal position of the defendant - is inadmissible and has no legal force.

[83] Cf. Judgment of the European Court of Human Rights N23200/10, 24009/07, 556/10 "Veselov and Others v. Russia", 02 October 2012. Paragraph 111.

[84] Tchokhonelidze v. Georgia, supra note 76, 49-52.

[85] For European Court practice on admissibility in the context of entrapment see Philip Leach, Taking a Case to the European Court of Human Rights (Oxford University Press 2013) 364-367 (in Georgian).

As mentioned above, the legislation regulating covert investigation activity and operative-investigative measures does not explicitly prohibit entrapment; however, both legislative acts prohibit deception that can be interpreted as including entrapment as well. On the other hand, Article 145 of the Criminal Code criminalizes entrapment. In practice and doctrine, the evidence obtained through entrapment, based on these legal grounds, should be considered as obtained with a substantive legal violation and, therefore, inadmissible. In this context, the Constitutional Court's judgement[86] is noteworthy, stating that any violations of the law be it the Criminal Code or the law on operative-investigative actions, shall be the grounds for considering evidence as inadmissible.

Another issue is whether the court can examine admissibility during the pre-trial hearing, as determining whether an individual was a victim of entrapment requires substantive investigation. While it is unlikely that this issue will be thoroughly examined at the pre-trial stage, is it still possible, therefore, the court should not limit itself or "make its work easier" by claiming the issue should only be addressed during substantive hearing?[87] E.g., A covert audio-video recording shows that a state agent offers narcotic drugs to the person who refuses to get it, but finally succumbs to pressure. In case of absence of the criminal record on this person, the mentioned recording with all related evidence shall be deemed inadmissible (similar to the "fruit of the poisonous tree" doctrine), and criminal prosecution shall terminate.

As for the acceptance of evidence, this issue is addressed once the court examines the evidence and draws up a judgment. The acceptance procedure is broader and includes the criteria for admissibility as well. At this stage, the judge has the opportunity to evaluate the version of entrapment. If such a fact is established, the obtained evidence clearly shall not be accepted.

An opinion might emerge in legal doctrine that if an investigation initiated under Article 145 of the Criminal Code fails to establish a fact of entrapment, with no responsibility imposed on anyone, the issue of evidence acceptance cannot be assessed. Such an opinion is inaccurate as the evidence in criminal proceedings is evaluated based on the procedures established by procedural legislation. Judges have procedural tools to examine the issue independently from the outcomes of another investigation, ensuring that the defendant's rights are not violated.

Inadmissibility, refusal on acceptance of the evidence, or automatic acquittal?

This issue causes controversies in legal literature – shall the evidence obtained through entrapment be considered inadmissible, not accepted, or shall the concerned person

[86] Judgement of the Constitutional Court of Georgia on case N 2/2/579, "Maya Robakidze v. Parliament of Georgia", 31 July 2015.

[87] For admissibility of entrapment see Giorgi Tumanishvili, Criminal Procedure, An Overview of the General Part (1st edition, World of Lawyers Publishing 2014) 284–291 (in Georgian).

be automatically acquitted?[88] In the landmark *Sorrells* case, the court left the final judgment on the jury, i.e. the issue was not assessed in the prism of admissibility of the evidence. Over time, this practice has changed, and cases involving entrapment were no longer presented to juries.[89]

In German legal doctrine, the issue of outcomes of entrapment has become the subject of debate following an ECtHR judgment of 2014,[90] which criticized the German approach established in practice.

A so-called *procedural obstacle based approach* prevails in German legal doctrine, meaning that if the state instigated a crime, it loses the right to issue a sentence.[91] Another approach suggests that the evidence obtained through the agent provocateur should not be accepted. [92] This perspective is argued to derive directly from the constitution, associated with the legal principle of excluding improperly obtained evidence from judicial proceedings.[93]

Before the ECtHR's *Furcht* case, Germany's Federal Court was guided by a so-called *sentence-based approach*,[94] whereby the fact of alleged entrapment should be assessed during sentencing instead of deeming it as a substantive factor excluding criminal liability. This means that entrapment was considered as a mitigating factor only, not having any other effect at all. Notably, this approach replaced the earlier dominant "procedural obstacle" approach applied by the German Federal Court.[95]

The compliance of the sentence-based approach with legal principles was verified by the Constitutional Court of Germany as well[96]. However, in the *Furcht* case, the ECtHR sharply criticized this approach[97], arguing that the sentence-based model contradicts the right to a fair trial and that mitigation of sentence cannot compensate for the negative effects of state-led entrapment.[98]

[88] Roth, supra note 10, 1003.
[89] ibid.
[90] Judgment of the European Court of Human Rights N54648/09 "Furcht v. Germany", 23 September 2014.
[91] Bernd Heinrich, 'State Entrapment' (2016) 1 German-Georgian Journal on Criminal Law 25 (in Georgian).
[92] On criticizing the model, See Ho, supra note 15, 88.
[93] Heinrich, supra note 91, 26.
[94] According to the US practice, undercover agents determine themselves the quantity of drugs or type of weapon used in covert operations, which affects the penalty. This was the reason of developing a doctrine of sentence reduction. See Stevenson, supra note 9, 198-206.
[95] Heinrich, supra note 91, 26.
[96] ibid, 28.
[97] For the US context See Kirstin Kerr O'Connor, 'Sentencing Entrapment and the Undue Influence Enhancement' (2011) 86 (2) New York University Law Review 615-618.
[98] Furcht v. Germany, supra note 90, 70.

Following the above-mentioned case, Germany's Federal Court revisited its approach and opted for the procedural obstacle model.[99] However, the new practice cannot be considered finally introduced, as the matter has not been heard by the Grand Chamber, nor has the Federal Court's panel heard differing opinions from other panels.[100]

Professor Heinrich supports the procedural obstacle approach, arguing that the national courts' downplaying of the ECtHR's judgment undermines the idea of European Union integration and should not be supported. He also notes that further research is needed in legal doctrine to determine whether exceptions might exist; where, depending on the degree of entrapment, an approach other than the procedural obstacle model could be applied.[101]

The ECtHR does not provide detailed guidance on how states should implement its requirements, specifically which model they should adopt. The primary standard in this regard is that a sentence shall not be based on the evidence obtained in such a manner. Beyond this, compliance with European standards is a matter to be resolved at the national level.

Regarding the Georgian context, as noted, the legislation leaves room for its interpretation, which in turn allows the court to consider such evidence inadmissible or refuse to accept it. However, the practical aspects of this matter are particularly interesting.

The Supreme Court of Georgia, referring to the *Ramanauskas* case,[102] states the following: "The ECtHR in one of its rulings explicitly notes that the use of undercover agents in investigation processes does not violate the guarantee established under Article 6, paragraph 1 of the European Convention. In general, incitement of individual by an undercover agent does not exclude his/her criminal liability. Entrapment does not exempt the concerned individual from criminal liability from a substantive legal perspective".[103]

The Supreme Court's argument that entrapment does not exempt a person from criminal liability from a substantive legal perspective is not an ECtHR standard. The Court of Cassation quotes an argument presented by the Lithuanian Supreme Court, which had to be reviewed by the ECtHR.[104] Moreover, it does not fall within the ECtHR's prerogative to determine which act constitutes a crime; it should be addressed at the national level.

[99] German Federal Court of Justice (BGH), Judgement of 10 June 2015 N2 StR 97/14, Criminal Law Advocates Forum (StraFo) (2015) 509.
[100] For details on the procedure, see Heinrich, supra note 91, 28.
[101] ibid, 30-31.
[102] Ramanauskas v. Lithuania, supra note 23.
[103] Judgement of Supreme Court of Georgia on case N128ap-16, 28 July 2016.
[104] Ramanauskas v. Lithuania, supra note 23, 27.

Instead, the ECtHR evaluates whether, in the absence of evidence obtained through entrapment, there remains a legal basis for convicting a person.[105]

Given this error, it shall be assumed that Supreme Court's position on the matter does not exist. Furthermore, the sentence-based approach prevalent in German doctrine and legal practice should not be unequivocally replicated since it would allow the state to exploit the system by, for instance, repeatedly imposing minor penalties on the concerned person that would ultimately lead to the same result. Regarding the procedural obstacle-based approach, it can align with acquittal in the Georgian legal context; however, a question arises: should entrapment always lead to acquittal? Let us take the example of a person who had been persistently asked by the agent to produce counterfeit banknotes in exchange for a large sum of money. The individual refused the offer at the beginning but finally agreed. The audio and video surveillance materials were produced as evidence of the crime. The arguments given above make clear that the operative-investigative activities conducted in this manner are unlawful under Georgian legislation. Consequently, the evidence obtained in this way is inadmissible; and specifically it refers to the operative materials and the results of covert investigative measures since, it can be assumed that there are other private individuals - eyewitnesses to the process of making an offer, transferring money, or production of counterfeit banknotes - who can testify against the person in court. Therefore, there might be additional evidence against the person sufficient for conviction.

With regard to the above example, the ECtHR's standard requires that the court should not rely on the information obtained through special investigation measures. On the other hand, the question arises as to what approach should be taken regarding other evidence. One position might be that the state "created" only the evidence obtained through operative and covert investigative measures, while the testimonies of private persons exist independently and should not, therefore, be deemed inadmissible. Others argue that without the state's (covert) actions, the testimonies of private individuals would not have existed either, making their statements inadmissible as well.

From the outset, it should be clarified that this article addresses procedural issues and does not evaluate whether such actions constitute a crime in a substantive legal sense. With this in mind, the second position is more compelling, since accepting the first position would strip the defendant of the procedural guarantees against entrapment.[106] For example, state agents could attempt various methods to convey information to private individuals regarding the offer or possession of narcotic drugs, thereby rendering the prohibition of entrapment illusory.[107]

[105] Nana Mchedlidze, Standards for the Application of the European Convention on Human Rights by Georgian Common Courts (Study prepared within the framework of the EU and Council of Europe project 2017) 118-119 (in Georgian).

[106] For the similar practice of Canada, UK and other countries see Stevenson, supra note 9, 155-157.

[107] Ho, supra note 15, 88.

The above discussions may seem straightforward, not requiring further depth. Yet we can consider another example: a state agent has convinced a person to kill a government official. The person agreed, acquired a gun, and started preparing for the crime. For some reason, the law enforcement officers failed to stop the person who eventually committed a murder.[108] What happens to the evidence in such a case - the evidence proving the preparation and attempt and the evidence proving the completed crime?

2.2. RIGHT OF THE DEFENSE TO ACCESS EVIDENCE

According to ECtHR standards, the defense should be authorized to have access to the evidence.[109]

Article 83, paragraph 1 of the Criminal Procedure Code of Georgia provides for the procedure of transferring the evidence by the prosecution to the defense, upon relevant request. The same norm stipulates that the prosecution should make available to the defense the exculpatory evidence as well. This right may be restricted when it comes to covert investigation activity and operative-investigative measures before the pre-trial session upon the prosecution's motion. At least five days before the pre-trial hearing, both parties must disclose to each other and to the court all evidence they intend to present during the trial.

As seen above, the obligation to provide exculpatory evidence arises only under Article 83, paragraph 1, in case the defense requests the latter. On the other hand, this right may be restricted with regard to the materials related to alleged entrapment (covert investigation activity and operative-investigative measures) before the pre-trial session. The procedure of transferring evidence before the second pre-trial session does not mention exculpatory evidence but rather requires the disclosure of the evidence, which the prosecution is going to present in court. Hence, it may result in the prosecution withholding, for example, the evidence of an agent provocateur's initiation of the defendant's involvement in criminal activity. Besides operative-investigation measures, the prosecution might also refrain from transferring to the defense the covert audio-video recordings showing attempts of inducement.

This literal, word-for-word interpretation of the law is incorrect. Otherwise, if the defense requests evidence five days before the pre-trial session, it will be provided with the exculpatory evidence as well; but if the evidence is provided to the defense mandatorily, it may not include exculpatory evidence. Hence, it means that the defense should receive exculpatory evidence in all cases.

[108] For the issue of entrapment within the prism of so-called victimless crimes see Stevenson, supra note 9, 128-129.

[109] Judgment of the European Court of Human Rights N11170/84, 12876/87, 13468/87 "Brandstetter v. Austria", 1991. Paragraph 67.

Even with a correct interpretation of the law, it is still possible that the defense might not receive the evidence confirming entrapment. For example, if an agent provocateur contacts the victim via mobile phone and the conversation is covertly recorded, the prosecution might withhold the initial communication and provide only the subsequent recordings, where the actions of the state as the initiating agent are not visible. The defense would have no means to obtain these recordings as there aren't/can't be effective procedural safeguards in place to address this issue. The ECtHR emphasizes that the burden of proof to demonstrate the absence of entrapment lies with the prosecution.[110] Moreover, under Article 72, paragraph 3 of the Criminal Procedure Code of Georgia, the burden of proving the admissibility of evidence of the prosecution and of the inadmissibility of the evidence of the defense lies with the prosecutor. This logic applies to sharing evidence during the substantive examination of the case. The court must effectively apply this norm once the defense indicates that initial contact or other significant fact, the evidence of which is exclusively in the prosecution's possession, occurred. If the prosecution fails to provide detailed and credible information, the court should consider that suspicions of entrapment remain unresolved and should not accept the evidence.

2.3. OBLIGATION TO PROVIDE REASONING ON THE FACT OF ENTRAPMENT IN JUDGMENT

The ECtHR states that the procedural test requires proper reasoning regarding entrapment raised by the party, in final judgment.[111] In general, the reasoning of judgment is a crucial component of a fair trial. According to Article 259, paragraph 1 of the Criminal Procedure Code of Georgia, the judgment would be legitimate, reasoned, and fair. Moreover, Article 260 provides a detailed list of the issues to be addressed in judgment. Hence, Georgian legislation complies with European standards on the matter.

However, the application of this very criterion may be challenging in practice. In judicial practice, the most frequently cited judgments of the ECtHR are those emphasizing that a court is not obligated to address each and every argument raised by the parties but should focus on the principal issues. Notably, in many of these cases, violations were found precisely because the judgment lacked sufficient reasoning. Although it should be noted, that national courts use judgments for other reasons.

The above-described practice is rather common; however, applying reasoning towards entrapment would violate the integrity of the procedural test, and consequently – the right to a fair trial. Hence, courts should thoroughly examine arguments presented by the parties' arguments concerning entrapment.[112]

[110] Ramanauskas v. Lithuania, supra note 23, 70-71.
[111] Tchokhonelidze v. Georgia, supra note 76, 53.
[112] For example, the ruling of the Supreme Court of Georgia on case N799ap-22, 26 September 2022; the

IV. WAYS OF TRANSPOSING THE U.S. PRACTICE AND DOCTRINE TO THE GEORGIAN LEGAL FRAMEWORK

1. SUBJECTIVE THEORY (DOCTRINE)

In the U.S., the subjective doctrine is applied at the federal level and in the majority of states .[113] It was established through the doctrine and does not have a legislative basis.[114]

The subjective test for prohibiting entrapment considers so-called inducement measures legitimate if they target the individual predisposed to committing a crime.[115] If predisposition cannot be established, then these procedural actions shall be deemed as entrapping.[116]

Specifically, the subjective test for prohibiting crime provocation has two dimensions: a) the individual should present the evidence showing that state agents encouraged or induced him/her to commit a crime[117]; if such evidence does not exist, the entrapment prohibition doctrine cannot be invoked; b) if such evidence is provided, the burden of proof will be shifted towards the state. Namely, the state will have to prove, beyond a reasonable doubt, that the individual was predisposed to commit a crime.[118] If the state fails to do so, the individual shall be acquitted.

In the U.S. practice, the first part of the test is relatively easy to prove. Inducement is interpreted broadly and includes "requesting, offering, initiating, or indicating the commission of a crime."[119] It is clear that inducement aims more than merely creating an opportunity to commit a crime.[120] E.g., offering a person to buy narcotic drugs at the market price does not qualify as an inducement.[121] Yet, the act of inducement does not require that the agent's actions inevitably or categorically lead to the crime being committed; it is sufficient to create the opportunity.[122] As noted in the case of *Sorrells v.*

ruling of the Supreme Court of Georgia on case N397ap-20, 13 October 2020; the ruling of the Supreme Court of Georgia on case N145ap-22, 8 June 2022; the ruling of the Supreme Court of Georgia on case N903ap-21, 26 November 2021.

[113] For example, Judgement of the US Supreme Court, Jacobson v. United States, U.S. 540, 548-49 (1992).

[114] Allen, Luttrell and Kreeger, supra note 34, 407-410.

[115] Vincent Chiao, 'Policing Entrapment' (2021) 44 (1) Manitoba Law Journal 305.

[116] Ho, supra note 15, 82.

[117] For different definitions of instigation see Kevin A. Smith, 'Psychology, Factfinding, and Entrapment' (2005) 103 (4) Michigan Law Review 767-774.

[118] Dillof, supra note 1, 831-832.

[119] For example, Judgment of the United States Court of Appeals, Second Circuit, United States v. Dunn, 779 F.2d 157, 158 (2d Cir. 1985).

[120] Judgment of the United States Court of Appeals, Eight Circuit, United States v. Randolph, 738 F.2d 244 (8th Cir. 1984).

[121] Judgement of Alabama Court of Appeals, Ruggs v. State, 601 So.2d 508, 511 (Ala. Crim. App. 1992).

[122] Judgment of the United States Court of Appeals, District Columbia Circuit, United States v. Kelly, 748 F.2d 691, 691 (D.C. Cir. 1984).

United States, repeated requests to buy alcohol, combined with the shared background of both the agent and Sorrells as war veterans, were considered as an inducement.[123] Similarly, appealing to the withdrawal symptoms and evoking pity is enough to meet the required level for entrapment.[124] In reality, there is no established formal level the effort should meet (the degree of coercion, persuasion, or pressure) in order to be qualified as entrapment.[125] The essential factor, of course, is the instigator's connection to law enforcement agencies.[126]

Assessing to whether a person is predisposed to commit a crime depends on the period before the contact with investigation authorities.[127] The question to be answered is whether the individual "was ready and willing to commit the crime" when "he/she had been given the opportunity."[128] Clearly, this cannot be determined by simply asking the defendant.[129] Investigative authorities use other methods to obtain this information.[130]

In judicial practice, several factors have been identified as relevant when assessing a predisposition to commit a crime: [131]

a) A person's character, reputation, and criminal record; [132]

b) Whether investigative authorities had previously offered a person to be engaged in criminal activity;

c) Whether a person participated in the crime for personal gain;

d) The nature and intensity of inducement;

e) and the most importantly, whether a person resisted the law enforcement agent, that required the next series of inducement attempts.

True, the factors "b", "d", and "e" refer to the conduct of law enforcement authorities but are crucial in determining predisposition. If the inducement had not been extensive and the individual committed a crime, that indicates a high degree of predisposition.[133] Consequently, if an obvious fact of formal inducement did not occur, the entrapment

[123] Sorrells v. United States, supra note 14, 435, 439-440.
[124] Sherman v. United States, supra note 17, 369, 370-71.
[125] Dillof, supra note 1, 832.
[126] ibid, 833.
[127] Jacobson v. United States, supra note 113, 540, 549.
[128] ibid.
[129] Dillof, supra note 1, 833.
[130] ibid.
[131] Judgment of the United States Court of Appeals, Ninth Circuit, United States v. Smith, 802 F.2d 1119, 1125 (9th Cir. 1986); Judgment of the United States Court of Appeals, Seventh Circuit, United States v. Fusko, 869 F.2d 1048, 1052 (7th Cir. 1989).
[132] See the UK practice, Squires, supra note 36, 369-371.
[133] Jacobson v. United States, supra note 113, 540, 550.

prohibition doctrine will not apply.[134] Conversely, if the level of inducement is high, the doctrine will come into play, and balancing factors will need to be assessed.[135] Investigation authorities rely on the individual's factual actions following the inducement to determine the predisposition to the crime while being induced.[136]

Other aspects of the limits of prohibited entrapment require further examination. For instance, if an individual had a strong desire to commit a crime but could not physically accomplish it without the intervention of state agents, does this qualify as entrapment? E.g., person A wanted to counterfeit money but could not do so without equipment provided by the official body.[137] Similarly, should an individual be considered predisposed to crime if he/she had a wish to engage in criminal activity, but the behavior of state agents actually discouraged his/her involvement? And finally, how aligned must the committed crime be with a person's original intent? For instance, if a person intended to sell a specific type and quantity of drugs to the representatives of a specific group, but was induced to sell a different type and quantity of drugs to another group, does this constitute predisposition? These issues require separate analysis and research.[138]

2. OBJECTIVE THEORY (DOCTRINE)

In contrast to subjective doctrine, the objective doctrine is structurally simpler. The sole principal issue is determining whether the state agent's behavior created a significant risk that such a crime would be committed "by a person not predisposed to commit the crime" or, in other words, "by a law-abiding citizen."[139] This formulation of protection against entrapment is not shared at the federal level and in most states in the USA.[140]

According to the objective test, proving entrapment automatically leads to the acquittal of the defendant. The law enforcement is prohibited from "creating" a crime, as its primary obligation is its prevention.[141] Supporters of the test argue that the main purpose of the doctrine is to exclude the inappropriate behavior of law enforcement officers from the realm of criminal justice, [142] ensuring that the integrity of justice is protected from unethical actions of police officers.

Unlike the subjective test, an individual's characteristics, including the predisposition to crime, are irrelevant for the objective test. The objective test focuses more on the

[134] Gideon Yaffe, 'The Government Beguiled Me: The Entrapment Defense and the Problem of Private Entrapment' (2005) 1 (1) Journal of Ethics & Social Philosophy 7-15.
[135] Dillof, supra note 1, 834.
[136] ibid, 833.
[137] ibid, 835.
[138] ibid.
[139] Yaffe, supra note 134, 15-23.
[140] Dillof, supra note 1, 835.
[141] Ho, supra note 15, 84-84.
[142] Sorrells v. United States, supra note 14, 459.

actions of law enforcement agents,[143] trying to reveal what influence such behavior might have on society in broad terms rather than specifically on the defendant. Surely, the defendant must demonstrate that he/she was the target of law enforcement actions. According to the objective standards, entering into a close personal,[144] sexual relationship[145] or offering an excessively large sum of money[146] shall be deemed as inappropriate behavior.

A common challenge with implementing the objective test arises when considering the characteristics of a hypothetical law-abiding person not predisposed to commit a crime. For example, if a defendant, being a drug consumer, points to the fact of entrapment, should the court assess the case from the perspective of a person who does not consume drugs or of a person in recovery when neither of whom is predisposed to commit a crime? These alternatives may affect how the test's substance is interpreted, as capturing drug users may require less intense efforts compared to non-users.[147]

3. APPLICATION OF LEGAL THEORIES AT FEDERAL AND STATE LEVELS

3.1. FEDERAL LEVEL

At the federal level, the subjective doctrine of entrapment prohibition dominates. Over the years, it has been a common practice to resort to undercover operations such as sending minors into stores to purchase tobacco or alcohol to identify the facts of selling one to those.[148] Other examples are the state agents dressed provocatively and hanging out in special locations in order to get offers or acting as vulnerable victims to provoke a crime against them, disguising as taxi drivers in districts with high incidences of crime or conducting control purchases or supply of narcotics and other prohibited items. Operating pawnshops, where law enforcement agents would "buy" an unlawfully obtained property, used to be a widespread practice in the US as well.[149]

One notable example of the application of subjective doctrine at federal level is a so-called Operation Looking Glass. This precedent is noteworthy because, on the one

[143] Chiao, supra note 115, 305.
[144] Judgement of the Florida Court of Appeals, Dial v. Florida, 799 So. 2d 407, 409-10 (Fla. Dist. Ct. App. 2001).
[145] Judgement of Michigan Court of Appeals, People v. Wisneski, 292 N.W.2d 196, 199 (Mich. Ct. App. 1980).
[146] Judgement of Alaska Supreme Court, Grossman v. State, 457 P.2d 226, 230 (Alaska 1969).
[147] Dillof, supra note 1, 2004, 837.
[148] Dru Stevenson, 'Entrapment by Numbers' (2005) 16 (1) University of Florida Journal of Law and Public Policy 7-9.
[149] Joseph A. Colquitt, 'Rethinking Entrapment' (2004) 41 American Criminal Law Review 1398.

hand, it represents the U.S. Supreme Court's most recent judgment in this field, while, on the other hand, it contributed to making certain modifications to the entrapment prohibition doctrine.[150] Despite the operation resulting in multiple arrests, it could still be considered unsuccessful for law enforcement since, in fact, it came up with a new model of establishing the subjective test element of "predisposition to commit a crime."[151]

Jacobson's case is an illustrative one in this regard. Keith Jacobson was arrested in 1987 for violating the Child Protection Act of 1984, prohibiting possession, purchase, or any other activities involving sexual images of children.[152] Before the Act took effect, Jacobson had legally purchased two magazines displaying such images. After the Act was enforced, the federal authorities identified Jacobson's name in the post service's address list. Obviously, he could not be charged for the pre-enactment deeds; however, law enforcement spent two and a half years attempting to induce Jacobson, through five different fictitious organizations, to purchase the same materials.[153] Eventually, Jacobson accepted one offer and was detained. He had been convicted in the first instance court but acquitted by the US Court of Appeals for the Eighth Circuit.[154]

The Supreme Court imposed the burden of defining the risk of predisposition to crime on law enforcement officers before the initial contact. [155] According to the case materials, various organizations were not only offering Jacobson the printed products but also were criticizing the state policy, which facilitated censorship and violated the right of free expression. One organization created the legend of being a lobby group financed by sales of such materials. Ultimately, Jacobson purchased a magazine from a "Canadian Company" which assessed the ban as a historical absurdity. He was detained during magazine delivery, and the police found only those two magazines (acquired before the ban) in his apartment.

To establish a predisposition to crime (as an element of a subjective test), law enforcement referred to the fact of purchase by the defendant of the two magazines before the 1984 Act took effect. The Court did not agree to this reasoning, explaining that his previous purchases indicated an interest in such materials but not a predisposition to violate the law. [156] There was no evidence to prove that Jacobson would have been inclined to break the law under the ban; so the court separated the interest in pornography from a

[150] Allen, Luttrell and Kreeger, supra note 34, 427.
[151] Colquitt, supra note 148, 1411.
[152] Jacobson v. United States, supra note 113, 540.
[153] ibid 543.
[154] Judgement of the US Court of Appeals, Eighth Circuit, United States v. Jacobson, 916 F2d 467, 470 (8th Cir. 1990).
[155] Jacobson v. United States, supra note 113, 540, 553-54.
[156] Matthew W. Kinskey, 'American Hustle: Reflections on Abscam and the Entrapment Defense' (2014) 41 (3) American Journal of Criminal Law 258.

predisposition to commit a crime[157], and concluded that Jacobson's violation of the law was a result of law enforcement's two-and-a-half-year efforts and not his own wish.[158]

3.2. STATE LEVEL

At the state level, some courts are more inclined to apply the objective theory, although this is not the case in the majority of states. For instance, Florida adhered to the subjective test until 1985, when the Florida Supreme Court's judgment on the case *Cruz v. State* altered the given state of matters.[159] Based on the case materials, an undercover officer pretended to be intoxicated, was drinking alcohol directly from the bottle, and had a specific smell. In this condition, he went out into a public space and leaned against a wall, having USD 150 in cash in his pocket. Cruz, accompanied by a girl, passed by the officer, exchanged a few words without stopping by, and continued walking. Fifteen minutes later, he returned and took the money from the "drunk person's" pocket and was detained.

The Florida Supreme Court rejected the prevailing subjective test and developed a two-element test: "Entrapment does not take place unless (1) police does not create/ initiate criminal activity, and (2) police employs the reasonably tailored methods or mechanisms in this process."[160] The first component of the test emphasizes that the police must not "create" a crime, while the second element focuses on the methods used. The court stated that both aspects of the undercover operation had gaps: First, there is no prior information available, suggesting that stealing money from a "drunk person" was a common practice in that neighborhood.[161] Second, even if such evidence had become available, the second component of the test - conducting the operation with proper methods - would remain problematic. That is because police officers used a substantial sum of money (at the time, USD 150 had much higher purchasing power at the time of the case) and placed it in the pocket in a way that created a serious risk of inducing a person (who had no predisposition to commit a crime), to commit one.[162]

In the latter case *State v. Long*,[163] an undercover officer walked around a parking lot with money in his pocket, intending to become a victim of a robbery (other police officers were stationed nearby). Two individuals approached the "potential victim," stopped him, and started to talk with him, eventually attempting to push him to a more secluded

[157] Critical review of the case see Stevenson, supra note 148, 28-30.
[158] Jacobson v. United States, supra note 113, 550.
[159] Judgement of the Florida Supreme Court, Cruz v. State, 465 So. 2d 516 (Fla. 1985).
[160] ibid, 516, 522.
[161] Cf. Squires, supra note 36, 364-372.
[162] Cruz v. State, supra note 159, 516-522.
[163] State v. Long, supra note 3, 672, 678.

area physically. When the officer resisted, the two individuals threatened him with a stone and another hard object, prompting other officers to intervene and arrest those two.[164]

The defendant requested the jury to classify the act of "inducement by pretending an easy prey" as entrapment. The New Jersey Court of Appeals rejected this argument, stating that it would be "a sad commentary" on the (American) society if the mere presence of a vulnerable individual were to be held capable of inducing an ordinary person to succumb to a crime". The rule of law cannot excuse a person such behavior when an honest citizen expects effective protection from the justice system.[165] The court concluded that "inducement through an easy prey" could not incite an ordinary person to commit a crime. [166] As it is seen from the outcomes of the case, the evaluation of the elements of the doctrine changed; but not the doctrine itself.

New Jersey also supported a subjective test from the beginning but changed its approach following the *State v. Talbot* case.[167] The court argued that defendant's predisposition to crime could not compensate for the police actions. The court emphasized the objective test, which included the elements of the subjective test.[168]

The facts of the Talbot case were not exceptional. A person who was arrested for a drug-related crime was offered to be reduced a sentence in case of cooperation with the police. As a confidant, he contacted Talbot and asked for the heroin, which he bought himself and then organized "buying the drug by a police officer." As was judged by the Court, Talbot's every criminal act was a result of police activity.[169]

4. COMPARING THE UNITED STATES APPROACHES WITH ECTHR STANDARDS AND THE POSSIBILITIES OF INTRODUCING THEM INTO THE GEORGIAN LEGAL FRAMEWORK

The legal doctrine and practice regarding the prohibition of entrapment are highly developed in the United States. This is not surprising as the roots of the prohibition of entrapment lie in American law. As noted above, the subjective doctrine is more dominant, supported both at the federal level by the Supreme Court and by legal doctrine. Applying objective doctrine is challenging, since it is difficult to evaluate the permissible conduct of police, i.e., where is a "ceiling" of permissible police power beyond which an action

[164] ibid, 674-75.
[165] Cf. Alisdair A. Gillespie, 'Entrapment on the Net' (2002) 7 (3) Journal of Civil Liberties 143-146.
[166] State v. Long, supra note 3, 674-75.
[167] Judgement of New Jersey Supreme Court, State v. Talbot, 364 A.2d 9 (N.J. 1976).
[168] For relatively different doctrine and practice in Canada see Paul M. Hughes, 'Temptation and Culpability in the Law of Duress and Entrapment' (2006) 51 (3) Criminal Law Quarterly 342-359.
[169] State v. Talbot, supra note 167, 9-13.

is considered entrapment? Considering this and other complexities, the present article gives preference to the subjective approach; underlining at the same time that once the elements of objective doctrine have been correctly interpreted, the ultimate purpose is achieved anyway, so objective doctrine can surely also be used. The issue refers more to legal reasoning and logic than to human rights standards – this latter is achieved in all cases. Besides, specific approaches would become unnecessary since the proper interpretation of the elements of subjective doctrine would address the challenges that initially led to the creation of specific doctrines.

Due to these and other complexities, this article supports the subjective approach. However, with the correct interpretation of elements of the objective doctrine, its goals can also be achieved, making its application feasible. This issue is more about legal reasoning and logic than about human rights standards - both approaches ensure human rights protection. Additionally, unified approaches are not strictly necessary, as the challenges that led to the creation of unified doctrines can be addressed through the interpretation of elements of the subjective doctrine.

The ECtHR defines entrapment and, through its judgments, identifies what constitutes an "essentially passive" role of the state representative in the process. As discussed in Chapter 2, the Court uses the following indicators to assess this:[170]

a) Entrapment carried out by state representative;

b) Initiative to offer a "service" (including property);

c) Intensity of the offer;

d) Substance of the offer;

e) Previous criminal history of the person;

f) Oversight of the process.

The ECtHR focuses on the conduct of state agents, meaning that it should be essentially passive. Hence, the European Court tends to focus more on the objective approach, aiming at regulating the behavior of law enforcement officers. On the other hand, when defining an "essentially passive" role of the state agent, the ECtHR also considers a person's criminal record. So, it can be suggested that European practice assesses both the state's passiveness and a person's predisposition for a crime. However, if this is the case, why does the ECtHR use the general term "essentially passive"?

If we consider the issue from a broader perspective, the criteria for evaluating predisposition for a crime, characteristic of the subjective approach, will look similar.[171]

[170] See Chapter 2 (1) for details.

[171] See Chapter 3, Subsection 1.1; see also Andrew Carlon, 'Entrapment, Punishment, and the Sadistic State' (2007) 93 (4) Virginia Law Review 1088.

Thus, there are not any significant differences between the subjective theory and the ECtHR's approach - differences may appear in the interpretation of separate elements. For instance, the ECtHR might consider a certain circumstance as evidence of a criminal record, while the American practice and doctrine may not. It is clear that this difference stems from the dynamic nature of law and the methods of its interpretation, although it does not alter the general picture that the approaches are comparable.

The question arises: which framework is more relevant to apply - the subjective approach, which focuses on a person's predisposition to crime, or the ECtHR's standard emphasizing an essentially passive role of the state? Regarding the latter, it was noted that the standard does not fully encompass the criteria established by the Court's practice. Alternatively, one could argue that neither the predisposition to crime can fully address certain criteria, such as for instance, the number of offers made by state agents before the alleged entrapment, or the nature and intensity of inducement.

While these criteria directly relate to the conduct of state agents, they also indirectly refer to an individual's predisposition to crime. If a person agrees easily, without multiple efforts, it suggests he/she is predisposed to crime; similarly, if a person agrees to a relatively low price, this, too, indicates predisposition. Consequently, a predisposition to crime should be defined as a more precise term.[172]

Conversely, it could be argued that a person predisposed to crime in the classical sense might remain unsafe. E.g., a person who was convicted of counterfeiting is offered a similar opportunity again. While serving a sentence in the penitentiary, the person has been fully re-socialized and no longer has any desire to return to the criminal world but "cannot resist" and succumbs to the repeated offers of the state agent. In this case, assessment of all criteria, which the American practice and doctrine define as relevant for the predisposition to crime (including the numbers, intensity, and nature of these offers, etc.)[173] is crucial. Moreover, each element can be further examined in detail.[174] For example, in the Jacobson case given above, the person's criminal record was thoroughly studied, and a conclusion was made that without examining concrete details of similar behavior in the past, a person cannot be automatically labeled as predisposed to crime. Hence, the doctrine does not create problems from a human rights perspective.[175]

As for the Georgian context, it is advisable for the Georgian procedural doctrine to adopt the subjective theory as an assessment framework. Each element should be interpreted in the light of the ECtHR standards and the best legal practices of the United States. Notably, the discussion in this subsection pertains to the issue of evaluation of actions

[172] On each person's price for predisposition to crime, see Allen, Luttrell and Kreeger, supra note 34, 413-415.

[173] On clarifying the predisposition to crime, see Smith, supra note 117, 779-803.

[174] Stevenson, supra note 9, 138-139.

[175] Ho, supra note 15, 78.

as entrapment rather than addressing the procedural component of the ECtHR's second test. This procedural aspect should be implemented in accordance with the standards discussed in Chapter 2.

To better identify the scope and parameters of evaluation, let us consider the example of a so-called vulnerable victim described in the introduction. An undercover officer impersonates such in the subway during nighttime – aiming at detecting and detaining a pickpocket, the law enforcement agent pretends to be a drunk elderly woman, visibly carrying money in her pocket for all to see. So, some people do take money from their pockets.[176] As noted earlier, the United States courts approached similar cases differently at the state level.

In the Georgian context, the first step is to assess the first part of the subjective theory: did the state agent induce/instigate a person to commit a crime? Playing the role of a vulnerable victim is sufficient to create motivation for committing the crime. The subjective theory does not require a high degree of inducement/instigation to confirm the first part of the test; since creating an opportunity to commit a crime is already considered fulfillment of this first part, which automatically triggers the second part of the test – by shifting a burden of proof to the prosecution, which must show that person was predisposed to commit the crime.[177]

Regarding the second part of the test, it is notable that the agent did not make any offer, instead she merely passed by, playing a role of a vulnerable victim. The inducement, by its nature, was neither strong nor intense; and the person was not specifically targeted by using this method of vulnerable victims before repeatedly. Therefore, the fact that the person himself took the initiative to commit a crime gives the grounds to argue that he was predisposed to crime. Otherwise, such a little push would not have led to the commission of crime.[178]

However, this does not mean that all cases involving vulnerable victims are permissible. Each case requires a thorough and individual approach. For example, if the police is aware of a person's worsening drug withdrawal symptoms and repeatedly use the "vulnerable victim" method, each time making the pockets more visible/accessible or approaching closer, the issue of entrapment might be assessed differently. It is also important to consider that such a model requires an appropriate legal basis at legislative level. The measures listed in Article 7 of the Georgian Law on Operative-Investigative Activities do not include such scenarios as independent actions, without providing an extensive justification of other related action.[179]

[176] State v. Long, supra note 3, 672, 678.
[177] Dillof, supra note 1, 831-832.
[178] For example, Treschel, supra note 28, 136-137.
[179] Multiple other measures related to the law enforcement agents' activity are not specified in the law, confirming the need for further legislative reform.

V. CONCLUSION

As it was stated at the beginning, according to the Bible, the concept of entrapment can be traced back to the story of Adam and Eve. The article shows that covert investigation activities and operative-investigative measures are accompanied by a serious risk of entrapment, necessitating a deep and comprehensive knowledge of the issue in concern to ensure a fair and proper legal process.

The entrapment prohibition doctrine prevents the state from inducing a person to commit a crime for instituting criminal prosecution. Such actions are typically carried out by the individuals known in criminal law literature as agent-provocateurs. As to the issue of entrapment, the European and US practices differ: the European Court of Human Rights assesses entrapment within the framework of the substantive and procedural tests, while the US courts apply its subjective and objective theories.

The basis for prohibiting entrapment was laid down by the decision of the United States Supreme Court back in 1932. It's noteworthy that despite significant advancements in legal doctrine worldwide, the Georgian legislation does not explicitly prohibit entrapment; therefore, the direct prohibition is rather implied in the constitutional provision for a fair trial and in the legal norms regulating covert investigation activities and operative-investigative measures banning deception. In order to advance the Georgian legal practice further, it is crucial to formulate/introduce an explicit definition of the concept, as Article 145 of the Georgian Criminal Code (which serves as the basis for criminalization) does not address this gap.

Substantive and procedural tests developed by the European Court of Human Rights are important sources for Georgian legal practice. For the substantive test, it should be examined whether the entrapment did take place by a state agent, who initiated the first move, which persuasive methods were used, whether there was prior evidence of the person's past criminal activity, whether he/she offered/received a legal/illegal service, and whether effective oversight was in place. In this context, Georgian legislation requires substantial revision to close the gaps, such as the absence of a requirement for formulating a documented assignment for operative-investigative measures, draft protocols (this requirement is either absent or is prescribed only partially) as well as the absence of detailed legislative definition or detailed standard written procedure for covert investigation activities, etc.

With regard to the procedural test, while Georgian procedural law is relatively less problematic, certain challenges remain that require attention from Georgian scholars and practitioners. It is particularly important for Georgian legislation not to adopt a so-called sentence-based approach but rather apply the norms, which view the evidence obtained through entrapment as inadmissible and, therefore, refuse to accept it.

Additionally, courts must effectively shift the burden of proof onto the prosecution, provided the gaps in procedural guarantees for accessing the evidence by the defense. Finally, the courts should be discouraged from applying the established practice of referring to the ECtHR standard, which is not relevant, exempting it from the obligation to answer every argument presented at the hearing.

The objective and subjective theories developed in the United States legal doctrine are very important. The subjective theory is aligned with the standards of the European Court of Human Rights and provides a better model for entrapment prohibition, thus making the subjective theory desirable to be adopted in the Georgian legal practice and doctrine. Additionally, there is no need to unify the two theories, as the challenges raised in the legal literature can be fully addressed through the correct interpretation of all elements of subjective theory.

*Nino Rukhadze**

LOCAL SELF-GOVERNMENTS IN THE INTERNATIONAL SYSTEM: IS THERE A NEED FOR NEW INTERNATIONAL AND CONSTITUTIONAL REGULATION?

ABSTRACT

Local self-governments are increasingly striving to assert themselves in the international system, showing their active participation in international relations. Every indication point to the growing tendency of their active presence in the global arena. Against this backdrop, the questions arise as to what status do local self-governments hold in international law, and whether their increasing role necessitates reconsidering the legal/constitutional framework concerning their status.

This article highlights the recent trends of growing participation of local self-government bodies in global processes, and examines the need for revisiting a legal/constitutional dimension of municipalities' involvement in international relations.

I. INTRODUCTION

Advancement of local self-government entities in the international system is a growing trend. Against this development, the questions arise as to what status do local self-governments hold in international law, and whether their increasing role necessitates reconsidering the legal/constitutional framework concerning this status.

The article aims at reviewing recent trends of the advanced role of local self-government bodies in international relations as well as exploring the need for revisiting a legal/constitutional dimension of municipalities' involvement in international relations.

II. INTERNATIONAL LEGAL FRAMEWORK CONCERNING THE SUBJECTS OF INTERNATIONAL LAW

From the perspective of international law, local self-governments are not recognized as its independent subjects. According to common understanding, a subject of international law is entitled to: "1. establish norms of international law, 2. have rights

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and obligations stemming from these norms, 3. modify, transfer, or terminate these rights and obligations, 4. ensure their balanced application." [1]

Local self-government bodies do not have the signs peculiar to the subjects of international law, starting from a very basic one - the authority to uphold the rights and obligations under international law independently, in their own name.[2]

At the same time, it is important to note that when analyzing the recent advancements of local self-government bodies in the international system, some academic researchers argue that municipalities are increasingly becoming holders of international rights, obligations, and authority. Likewise, they are more frequently seen as objects of international regulation, and their contribution to implementation/enforcement of international obligations becomes increasingly notable.[3]

Local self-government in international relations is as a state-associated structure. Thus, any international activity undertaken by self-governing units is attributed to the states, the part of which they represent. This is explicitly mentioned in the "Draft Articles on Responsibility of States for Internationally Wrongful Acts"; namely, as the Article 4, paragraph 1 of the Resolution states: "The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State." [4]

The given reality is a direct consequence of the Peace of Westphalia. The Westphalian settlement established sovereign states as monolith, unified structures, laying foundation of state-centric system of international relations.

The Westphalian interstate system is strongly backed by present-day international law and its fundamental principles. Consequently, any attempt to undermine the integrity of

[1] David Pataraia, International Public Law, Book one (Ivane Javakhishvili Tbilisi State University Press 2023) 201 (in Georgian).

[2] It should be noted that the activities of local self-governing bodies are brought into the focus of international regulation (UN Sustainable Development Goals, in particular11th goal and the New Urban Agenda can be cited are examples), however, due to their non-binding character, the regulations do not entail any obligations for municipalities. Helmut Aust, 'Cities As International Legal Authorities – Remarks on Recent Developments and Possible Future Trends of Research' (2020) 4 (1) Journal of Comparative Urban Law and Policy, Festschrift II in Honor of Julian Conrad Juergensmeyer on the Occasion of His Retirement: International Perspectives on Urban Law & Policy 85.

[3] Yishai Blank, 'Localism in the New Global Legal Order' (2006) 47 (1) Harvard International Law Journal 263; Yishai Blank, 'The City and the World' (2006) 44 Columbia Journal of Transnational Law 875; Barbara Oomen and Moritz Baumgartel, 'Frontier Cities: The Rise of Local Authorities as an Opportunity for International Human Rights Law' (2018) 29 (2) European Journal of International Law 611.

[4] Article 4, paragraph 1, Draft Articles on Responsibility of States for Internationally Wrongful Acts developed by the UN International Law Commission (General Assembly Resolution 56/83 of 12 December 2001).

the state as a subject of international law shall be seen as an effort to alter the foundations of the Westphalian system and the principles of international law that uphold the latter. Such tectonic shifts would require consensus of the entire international community. Now, the question arises: how strong is the tendency towards changing the foundations of applicable international law and shaping local self-government as independent legal entity separate from the state?

III. LOCAL SELF-GOVERNMENT BODIES IN INTERNATIONAL RELATIONS

The last decades show the advancement of local self-government units in global arena; and while participating in international relations, the replicate many forms and practices of interaction traditionally used by states. Specifically, the local self-government bodies: (1) create international networks; (2) cooperate with international organizations, primarily the United Nations; (3) form international coalitions and organize international sessions; (4) use international law as the basis for advocating their own agendas and interests as well as for decision-making in their daily operations; (5) adopt non-binding international resolutions, enter into agreements, and establish mechanisms for political accountability.[5]

International activities of local self-government bodies are particularly intense in the fields of environmental protection and international human rights law. In these areas, local governments increasingly play the role of indispensable actors and according to the growing shared opinion, are more effective in addressing contemporary challenges than national governments.

Discussions on rising significance of local government bodies are not limited to academic sources only; their pivotal role is also recognized in international political and legal instruments. Considering a growing contribution of local governments to promoting environmental protection and human rights, it is not surprising that international instruments adopted in these fields highlight the prominent role of local self-governing bodies and emphasize that the global governance and policymaking should be conducted in close collaboration with, and participation of local governments.[6]

[5] Chrystie Swiney, 'The Urbanization of International Law and International Relations: The Rising Soft Power of Cities in Global Governance' (2020) 41 (2) Michigan Journal of International Law 243.

[6] The significant role of local governments has been recognized in major international legal instruments in the field of environmental protection, such as the Paris Agreement on Global Warming, the Sendai Framework for Disaster Risk Reduction, and the UN Sustainable Development Goals (SDGs). Anel Du Plessis, "Climate Change and Sustainable Development" in Helmut Philipp Aust and Janne E. Nijman (eds), Research Handbook on International Law and Cities (Edward Elgar Publishing Limited 2021) 189. Similarly, the critical role of local governments in the protection of human rights has also been acknowledged in international instruments such as the New Urban Agenda (NUA), adopted under the aegis

Moreover, the municipalities themselves are increasingly aware of their importance in the fields of environmental protection and human rights, which is not surprising given that cities are major sources of environmental pollution and key drivers of climate change. In addition, cities are usually the front lines for addressing critical human rights issues, especially those related to migration and associated crises.

As a result, it can be concluded that the cities hold the key to solving problems related to environmental protection and migration. This gives municipalities a strong basis for asserting their ambition to play an active role by engaging in discussions held both at national and global level and aiming at concrete measures to be implemented in order to address the challenges.

Moreover, cities are striving to position themselves on the international stage as equally important actors alongside national governments, and in some cases, as vocal and progressive accelerators of the decisions made in the fields of environmental protection and human rights. [7] For example, when the United States under the President Trump withdrew from the Paris Agreement, ten US states and several hundred cities and communities announced that they would independently adhere to the Agreement's obligations in order to achieve the goal to halve the US emissions by 2030 and net-zero emissions by 2050.[8]

Similar behavior is observed in the field of international human rights law. For instance, several US cities voluntarily undertook the obligations prescribed by the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), provided that the United States did not ratify the Convention.[9] The European cities showed the similar commitment by declaring the Convention on the Rights of Persons with Disabilities as binding.[10] Another example is the European Coalition of Cities against Racism (ECCAR), which adheres to and is guided by the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).[11] It is notable that the concept of *Human Rights Cities* has emerged in intenational discourse - a term coined by

of the United Nations, explicitly assigning responsibility for protection of human rights to local authorities. For detailed analysis of the role and responsibilities assigned to local governments by the New Urban Agenda, see Karina Gomes da Silva, 'The New Urban Agenda and Human Rights Cities: Interconnections between the Global and the Local' (2018) 36 (4) Netherlands Quarterly of Human Rights. The impact of local governments on the international policy documents such as UN Global Compact for Migration and the UN Global Compact on Refugees is also noteworthy. For more details, see Colleen Thouez, 'Cities as Emergent International Actors in the Field of Migration: Evidence from the Lead-up and Adoption of the UN Global Compacts on Migration and Refugees' (2020) 26 (4) The Global Governance.

[7] Du Plessis, supra note 6.

[8] "We Are Still In" <https://www.wearestillin.com/> [last accessed on 10 October 2023].

[9] Oomen, supra note 3.

[10] ibid, 617.

[11] ibid.

the cities to reflect their self-perception as champions and protectors of human rights.[12]

In addition to striving to support the implementation of international intergovernmental treaties, local self-government bodies do also contribute to further strengthening the international legal order by drafting and adopting the instruments similar to international treaties.[13] Some authors argue that such practices represent a unique form of international norm-making that, while diverging from the traditional form of law-making, still create a certain international legal order. [14] This indicates that local government bodies have both the interest and the ambition to participate in international norm-creating processes.

As a result, the practice of local governments' international relations shows a growing number of international agreements concluded, which do not nesesarily have a legally binding nature and, consequently, a legal effect, but nevertheless serve as a basis for undertaking certain formal commitments by local governments to fulfill. The Green and Healthy Streets Declaration adopted by the global network of cities "C40" is one of the examples of the afore-mentioned, requiring from signatories to fully shift to purchasing zero-emission buses by 2025 and ensure the major portion of their cities be emission-free 2030.[15] Similarly, the C40's Zero Waste Declaration requires cities and regions to reduce the per capita waste generated by 15% by 2030.[16] Numerous other agreements of the same nature can be found, concluded in the framework of the international inter-city relations.[17]

Other agreements can be listed as well, through which the local governments aim to replicate, at local level, the norm-making activities typically carried out at the international intergovernmental level. The Chicago Climate Charter is one example of those, described by one author as "the most inclusive and formal "contractual" document signed by mayors, aimed at […] expanding cities' responsibilities in the field

[12] For the brief history of developing the concept of human rights cities see Martha F. Davis, 'Finding International Law, 'Close to Home': the Case of Human Rights Cities' in Helmut Philipp Aust and Janne E. Nijman (eds), Research Handbook on International Law and Cities (Edward Elgar Publishing Limited 2021). A Declaration was adopted in 2011 at the World Human Rights Cities Forum held in Gwangju (Republic of Corea), which defined a human right city as "both a local community and a socio-political process in a local context where human rights play a key role as fundamental values and guiding principles". <https://www.uclg-cisdp.org/sites/default/files/Gwangju_Declaration on_HR_City_final_edited_version_110524.pdf> [last accessed on 10 October 2023].https://www.uclg-cisdp.org/sites/default/files/Gwangju_Declaration_on_HR_City_final_edited_version_110524.pdf [last accessed on 10 October 2023].

[13] Katherine Schroeder, 'Cities in International Law: the New Landscape of Global Governance' (2020) 61 Virginia Journal of International Law 397.

[14] Jolene Lin, Governing Climate Change: Global Cities and Transnational Law Making (Cambridge University Press 2018).

[15] Swiney, supra note 5, 265-266.

[16] ibid, 265-266.

[17] For other specific examples see Swiney, supra note 5, 265-269.

of environmental protection."[18] With the adoption of this Charter, local governments sought to initiate the process at the municipal level parallel to the Paris Agreement since, as stated the ex-mayor of the New York City Michael Bloomberg "The efforts carried out by cities to reduce emissions is critically important […] for fulfilling the obligations set by the Paris Agreement."[19] This explicitly demonstrates the efforts of local governments to replicate intergovernmental relations.

A similar aspiration can be observed in the growing phenomenon of transnational municipal networks, which are formed in order to be engaged in global environmental governance. [20] Local governments have begun actively uniting and coordinating their efforts to gain bigger value at the global level and make their own contribution in the process of shaping international policies.

In this context, it is worth noting the above-mentioned C40 network, which strives to participate in global governance of environmental issues. United Cities and Local Governments (UCLG), ICLEI - Local Governments for Sustainability, Eurocities as well as the EU-supported Covenant of Mayors are another examples of international intercity alliances. In addition to striving for access to processes that shape global environmental policies, international associations of local governments aim to develop their own accountability mechanisms to help implement policies and commitments undertaken internationally at local level. For instance, C40, ICLEI, and Eurocities signed the UN Cities Mayors Compact, in the framework of which a mechanism was developed to ensure that the city networks and members of these networks maintain greenhouse gas emissions at set levels, by providing a respective annual reporting.[21]

The Covenant of Mayors for Climate and Energy is worth mentioning as well - an alliance of cities and local governments that ensures that the cities and local self-governments determine the level of greenhouse gas emissions within their territorial boundaries. For this purpose, the local governments committed to draft comprehensive environmental action plans and formulate concrete measures to be implemented, with producing regular monitoring reports on the progress achieved.[22]

It is noteworthy that, to formalize the aforementioned mechanism, the alliance member local governments were required to submit official documents, declaring these

[18] Schroeder, supra note 13, 398.
[19] ibid.
[20] Jennifer S. Bansard, Philipp Pattberg and Oscar Widerberg, 'Cities to the Rescue? Assessing the Performance of Transnational Municipal Networks in Global Climate Governance' (2017) 17 (2) International Environmental Agreements: Politics, Law and Economics 231.
[21] Helmut Philipp Aust, 'Shining Cities on the Hill? The Global City, Climate Change and International Law' (2015) 26 (1) European Journal of International Law 263.
[22] Swiney, supra note 5, 265-266.

commitments, generated in compliance with established procedures and signed by an authorized representative. [23]

The international activities of local governments have not gone unnoticed by the actors of the international intergovernmental system. As stated, "Urbanization has become an integral part of strategic discussions on the sustainability of our planet. Agenda 2030 for Sustainable Development - the UN's roadmap for achieving sustainability - has recognized urbanization as a driving force for development and prosperity. The New Urban Agenda (NUA) adopted at the Third United Nations's Conference *Habitat III* in Quito, outlined a clear action plan for advancing development through urbanization." [24]

As a result, local governments are actively involved in the work of international intergovernmental institutions. As early as 1992, at the UN Conference on Environment and Development (UNCED), local authorities were recognized as key partners. Similarly, local governments were invited as stakeholders and valuable allies in addressing environmental challenges at the very first Conference on Climate Change.[25] The UCLG's engagement in various UN platforms and its collaboration with numerous international intergovernmental organizations also noteworthy.[26] Moreover, C40 participates in the activities carried out by the intergovernmental conferences held under the United Nations Framework Convention on Climate Change (UNFCCC) and collaborates with the World Bank for elaborating international standards in the field of environmental protection, which the Bank is guided by, when making decisions on funding of local governments.[27]

Furthermore, local governments actively approach international intergovernmental organizations to advocate their interests. For example, in 2018, local governments used the UN High-Level Political Forum to advocate the declaration on housing.[28]

All these developments clearly demonstrate that local governments do take steps to establish their stance within international intergovernmental processes. They aim to present themselves as global actors by mirroring the foreign policy, international relations, and law-making efforts made by the states and international organizations within the international system.

[23] ibid.

[24] Aisa Kacyira, 'Urbanization: Emerging Challenges and New Global Urban Agenda' (2017) 23 (2) Brown Journal of World Affairs 87.

[25] ibid.

[26] Swiney, supra note 5, 246-249.

[27] Aust, supra note 21, 263.

[28] Janne E. Nijman, 'The Urban Pushback: International Law as an Instrument of Cities. Proceedings of the Annual Meeting' (2019) 113 American Society of International Law 123.

IV. WHAT IMPLICATIONS THE ADVANCEMENT OF LOCAL GOVERNMENTS CAN HAVE FOR INTERNATIONAL AND CONSTITUTIONAL LAW?

As the examples provided above illustrate, local self-governments unfolded an extensive network of connections and developed a big range of diverse activities within the international system. Local self-governments are involved in the international processes traditionally monopolized by states; and as a result, in such cases states no longer appear in international relations as unified, monolith entities, presenting one unified national position on the matter.

As a result of these developments, a question arises: does a rapid advancement of local self-governments in the global arena dictate the changes in existing international and constitutional legal frameworks? More specifically, do local self-governments acquire a certain status under international law? and consequently, does their legal stance require rethinking within the frame of constitutional law?

Professor Helmut Philipp Aust states that for those who adhere to the traditional understanding of international law, the international activities of local self-governments fully align with the existing international legal constructs. [29] As he points out, from the perspective of traditional approach, all activities carried out by local self-governments are attributed to the state, the part of which they are. Therefore, local self-governments should be regarded simply as state bodies, and any of their actions should be qualified as actions of the state, for the purposes of international law.[30] In other words, municipalities' international activities do not *per se* require reconsidering the status of the subjects of international law or adapting to the new reality of international law do face.

However, the aforementioned traditional approach does not answer a question: how should the international action of a local self-government entity be qualified when these actions are not aligned with the policies and actions of the central government?

As illustrate the cases discussed above, a local self-government entity acts under the aegis of its own interests, aspirations, and positions in today's international system, and while doing so, it may compete with central government, and even openly contradict the policies and positions of central authorities on certain issues. Usually, the local self-governments explicitly express such divergence, striving to lead their own course both in international relations and at the local level. For example, there have been the cases in international relations, when the central government of a certain state refused

[29] Helmut Philipp Aust, 'Cities in International Law from Outsiders to Insiders? Proceedings of the Annual Meeting' (2020) 114 American Society of International Law 269.
[30] ibid.

to ratify an international treaty, while the local authority of the same state has, on its own initiative, implemented the standards and obligations provided for by the treaty, at the local level.

Acknowledging these trends, Philipp Aust argues that that the role of cities in international law (as a minimum, in informal processes) cannot be neglected[31] and concludes that local self-government entities already "have stepped one foot in the door of international law." [32]

Elif Durmuş's opinion also differs from those belonging to the conservative school of international law. Specifically, she argues that participation of local self-governing bodies in international relations is unquestionably reflected on the substance and practice of international law.[33] Irrespective of whether the local self-governing bodies have gained formal recognition, they take firm steps to secure their own niche in global processes that in turn has its impact on international law.[34]

In any case, the fact of local self-government bodies enaging actively in international relations is a present day reality. Consequently, "the principle of efficiency, which is based on the idea of normative power of factual reality"[35] requires giving due consideration to the given reality and reflecting the latter, with some substance and form, in international law.

The truth is that municipalilties cannot "make" an international law of their own as they cannot conclude international agreements or contribute to creating international customs by their actions. Yet they are capable, while acting in the framework of international system, to make an impact on the subjects of international law (states, international orgainsaionts) and with this, play significant role in the process of international law-making. This is important since the international actors produce new global or regional regulations often as a response to the requirements of local self-governing bodies for the first place.[36] Hence, it can be concluded that municipalities have gained a "soft power" in international relations; likewise, the legal acts concluded among local self-governing can be attributed to the "soft law".[37]

It is well-known fact that in modern world the subjects of international law increasingly apply the above-said mechanisms of "soft power" and "soft law" in their practice in

[31] ibid.
[32] ibid, 270.
[33] Elif Durmus, Cities and International Law: Legally Invisible or Rising Soft Power Actors? (2021) 46 <https://www.cidob.org/en/articulos/monografias/global_governance/cities_and_international_law_legally_invisible_or_rising_soft_power_actors> [last accessed on 10 October 2023].
[34] ibid, 51.
[35] Pataraia, supra note 1, 90.
[36] Swiney, supra note 5, 269.
[37] ibid, 269-273.

order to advance their internantational agenda. Accordingly, the power and potential that municipalities hold today should not be underestimated, since their less visibility on the radars of international law does not mean that the local self-governing bodies are inactive. To the contrary, the processes with active involvement of local self-governing bodies are underway within the international system that in the near future will require a reassessment of their status under international law.

The activities that municipalities carry out internationally are versatile; and while operating, they replicate nearly all the actions conducted within the framework of intergovernmental international relations. [38] At the same time, it should be noted that municipalities act in their own name, trying to distance themselves from the states, the part of which they represent.

Against this backdrop, some academic authors argue that it would not be unreasonable or unexpected that at some point in near future the local self-government entities will be recognized as the subjects of international law. [39] They contend that historically, cities have always been the subjects of international law, including since establishment of the Westphalian system, and based on the principles of international customary law, they retain this status till today.[40]

As Durmuş states, if modern trends do not yet confirm the local self-government entities' operation in the international system as of the subjects of international law as an accomplished fact, those trends at least indicate that the local governments do follow the trajectory, which will ultimately lead them to the acquisition of a certain status within the system of international law. [41]

The given situation leads us to the next set of questions: in which form the local self-government bodies might get the status within international law; how autonomous this status might be, and what impact it could have on the status of the state in international law? For instance, some academic scholars argue that local self-government entity has the sings of both - the state and non-state body.[42] In case this concept is accepted, could it lead to disintegration[43] of state as a unified and indivisible subject of international law?

[38] Swiney, supra note 5.

[39] Andrew Bodiford, 'Cities in International Law: Reclaiming Rights as Global Custom' (2020) 23 (1) City University of New York Law Review <https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1489&context=clr> [last accessed on 10 October 2023].

[40] ibid.

[41] Durmus, supra note 33, 51-52.

[42] Janne Nijman, 'Renaissance of the City as Global Actor: The Role of Foreign Policy and International Law Practices in the Construction of Cities as Global Actors' in Andreas Fahrmeir, Gunther Hellmann and Miloš Vec (eds), The Transformation of Foreign Policy: Drawing and Managing Boundaries from Antiquity to the Present (Oxford University Press 2007); Durmus, supra note 33, 46-47.

[43] Graf Vitzthum, 'Aulgenpolitik der Gemeinden' in Albrecht Randelzhofer and Werner Süß (eds), Konsens und Konflikt - 35 Jahre Grundgesetz (1986) 75; Aust, supra note 21, 268.

What potential outcomes and risks might such developments entail?

Although these questions belong to the domain of international law, they are equally important from the perspective of constitutional law; since the unfolding processes involving local self-government entities' operation in international system will inevitably have implications for the constitutional law as well.

Therefore, the above-mentioned issues should be duly acknowledged and professionally discussed not only within academic circles but also among practicing specialists of the constitutional and international law. Such engagement is necessary to ensure that these processes do not evolve chaotically to the detriment of the established global legal order.

V. CONCLUSION

Local self-government entities are increasingly making their presence visible and vocal within the international system.

However, their status under international law is ambiguous. On the one hand, local self-government bodies do not represent subjects of private law, and on the other hand, while being affiliated with the state for the purposes of international law[44], they do not participate in international relations on behalf of the state. Over the last three decades, a trend emerged showing "the cities acting in parallel to national governments in the fields in which they hold competencies". [45]

The fields such as environmental protection and climate change, migration, human rights, gender equality, etc. are the fields, in which local self-governments are recognized as valuable, and arguably indispensable, partners for development of international policies and normative regulations.

The current international law does not recognize local self-governments as subjects of international law. However, the increasing activity of local self-governments in international relations is so profound that it creates an impression that contemporary international law either fails to keep pace of the latest international developments and adequately reflect the existing reality, or is evolving irreversibly towards the situation, where the global actors will have to face the self-governing entities' gaining the certain status within the international legal system.

The given state of affairs requires a proper legal analysis conducted from the perspective of both the international and the constitutional law. There is already a need of putting in place the legal frameworks that could enable, on the one hand, the active involvement

[44] See note 4 supra.
[45] See note 39 supra; Bodiford, supra note 39, 6.

of local self-governing entities in international relations and maintaining all positive outcomes associated with this, while, on the other hand, examine all concerns and risks associated with this advancement and take measures for their prevention.

*Malkhaz Begiashvili**

SEPARATION OF POWERS IN THE CONSTITUTIONAL COURT'S CASE-LAW

ABSTRACT

Separation of powers is an "elastic concept". Many authors recognize an unwavering interest of legal experts towards the principle of separation of powers, acknowledging at the same time, the complexity of the concept. In recent years, the Constitutional Court of Georgia has increasingly been applying the principle of separation of powers when examining the constitutionality of the presented cases.

This study approaches the principle of separation of powers from a different perspective. It does not aim to analyze the theory of separation of powers but to consider its application in the context of positive law. Specifically, it examines how the Constitutional Court of Georgia, in its case law employs this principle as a standard, as defined in Article 4, paragraph 3 of the Georgian Constitution, which states: "The state authority is exercised based on the principle of separation of powers." As a result, the inclusion of this provision in the Constitution transforms the principle of the separation of powers to a positive constitutional norm.

Whereas the principle of the separation of powers has been enshrined as a constitutional norm, the Constitutional Court is obligated to pursue the compliance of the normative provisions it judges upon, with this norm. To accomplish this, the court should develop its own concept of the separation of powers, which will be gradually reinforced through its judicial practice.

A review of the Constitutional Court's case-law shows that when confronted with a legislative provision potentially affecting the functional separation of powers, the Court tends toward supporting a "separatist doctrine" (also known as a "separation doctrine" or "non-delegation doctrine'). At the same time, it ensures that none of the government branches encroaches on the functions assigned to the others. However, in some cases the Constitutional Court refrains from applying the separatist doctrine given that the Constitution explicitly provides for permeability of the principle of the separation of powers that Court cannot override.

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I. INTRODUCTION

In the legal doctrine, the classical theory of the separation of powers is often being criticized for having lost its original meaning and not reflecting the modern system of arrangement of state power, as a result.[1] The separation of powers is referred to an "an elastic concept" with a "purely rhetorical nature",[2] and, as some note, "a mythical concept long detached from reality," [3] which should be removed from legal science.

Nevertheless, as P. Jan notes: "Montesquieu's theory of the separation of powers has never ceased to be in the center of attention of constitutionalists, politicians, and judges […] The issue is as fundamental to the study of constitutional systems as it is difficult to resolve it completely." [4] Many authors recognize an unwavering interest of legal experts to the principle of separation of powers, acknowledging at the same time, the complexity of the concept.

Since 2010, the Constitutional Court of Georgia has increasingly been referring to the principle of the separation of powers when examining the constitutionality of the legal normative acts/provisions (bylaws) appealed.[5] However, the functions of the Court itself is difficult to differentiate from the perspective of the separation of powers, and also given its duty of guarantor of human rights.[6] Studying the issue of separation of powers from any angle and scope, therefore is not devoid of academic interest.

This research offers to apply a different - complementary approach when studying the topic. It does not focus on analyzing the theory behind it but rather discusses the application of the separation of powers in the context of positive law. More specifically, the article explores the standard of applying the said principle by the Constitutional Court of Georgia in its judicial practice based on Article 4, paragraph 3 of the Georgian Constitution of 1995, which states that "The state authority is exercised based on the principle of separation of powers." Advancement of the constitutional case law has undoubtedly strengthened the principle of the separation of powers as a legal norm.

As stated above, the purpose of this study is to analyze the application of the principle of the separation of powers in the Constitutional Court of Georgia's judicial practice.

[1] Pierre Pakte, F. Mellen-Sukramanian, Constitutional Law (First Georgian edition, Tbilisi University Press) 166 (in Georgian).

[2] Pierre Avril, La séparation des pouvoirs est-elle un concept opératoire? <http://www.droitconstitutionnel.org/congresParis/comC6/Avril.html.> [last accessed on 29 April 2024].

[3] Chloé Mathieu, La séparation des pouvoirs dans la jurisprudence du Conseil constitutionnel (Droit. Université Montpellier 2015) 21.

[4] Pascal Jan, Les séparations du Pouvoir, in Mélanges Gicquel-Constitution et pouvoirs (Montchrestien 2008) 255.

[5] Judgment of the Constitutional Court of Georgia on case N1/466 "Public Defender of Georgia v Parliament of Georgia", 18 June 2010. Paragraph II-18.

[6] Jean-Michel Blanquer, La distance parcourue: de l'ordre institutionnel à l'ordre constitutionnel, in Le Conseil constitutionnel a 40 ans (LGDJ 1998) 26.

This principle is defined as restriction of powers by dividing responsibilities, and allocation of various state functions. However, the article does not explore the principle from the general perspective but rather studies its definition and further application by the Constitutional Court as a constitutional norm, i.e. focuses on the analysis of the positive law. This is because the principle of the separation of powers is no longer purely theoretical, but rather solidified by the Constitution of Georgia, which states in Article 4, paragraph 3 that "The state authority is exercised based on the principle of separation of powers." Consequently, this constitutional article transforms the principle of the separation of powers into the constitutional norm.

The increasing references to this principle by the Constitutional Court consolidated its position within the positive law, opening new horizons for research. Now when the separation of powers has been transformed into the constitutional norm, the Constitutional Court must ensure a compliance of bylaws with it, and for this purpose, develop its own concept of the separation of powers, which will gradually be revealed upon analyzing its judicial practice.

Such research is essential for deepening knowledge of positive law and examining some doctrinal prerequisites. Those include the opinion that the principle of the separation of powers has become weak and ineffective along with strengthening the principle of majority and parliamentary system; or the argument that it serves merely as a tool for ensuring rights.[7] Therefore, studying the Constitutional Court's case law is necessary in order to define what exact concept of the separation of powers is enshrined in positive law.

In verifying the constitutionality of bylaws, the Constitutional Court employs the principle of the separation of powers alongside other constitutional norms. However, the said principle has its own specifics stemming from its nature, scope, and the issues being examined. Thus, this study holds on the assumption that these specifics allows the court contribute to the arranging the state power and, consequently, to the functioning of the system. This assumption arises from the court's adherence to the mechanical theory of the Constitution, defining the document as a set of functions it can perform in terms of political and social organization through its internal mechanical structure.[8] By adopting a permeable concept of the division of powers, the court can reinforce the idea that the law is incapable of governing and restricting political power.[9] On the other hand, by adopting an impermeable concept, the court may position itself as the guardian of the Constitution maker, the sole entity capable of ensuring provisions that deviate

[7] Régis Fraisse, L'article 16 de la Déclaration, clef de voûte des droits et libertés (2014) 44 Les nouveaux cahiers du Conseil constitutionnel 9-21.

[8] Apostolos Papatolias, Conception mécaniste et conception normative de la Constitution (Bruylant 2000) 528.

[9] Louis Favoreu, La politique saisie par le droit (Economica 1988) 153.

from the principle of the separation of powers through putting in place the mechanisms of cooperation or interdependence. Surely, the Constitutional Court is not the only body that can influence the organization of power and functioning of the system; this concerns all institutional players.[10] However, the principle of the separation of powers provides the Constitutional Court with a privileged tool to fulfill this task.

The second assumption underlying the present research is that there is a connection between the principle of the separation of powers and the guarantee of rights. This view is widely shared in academic literature,[11] however the scholars does not always agree with the nature of the connection. Some authors emphasize complementarity,[12] while others point to the differences or at least contradictions between the separation of powers and the guarantee of rights.[13] Therefore, examining the Constitutional Court's case law with regards to the principle of the separation of powers will help trace the above-mentioned connection and define its nature.

Finally, this research is based on a third assumption arguing that there is a significant distinction between the separation of political power, on the one hand, and the separation of political and judicial powers, on the other hand. In the first case, the focus is exclusively on the institutions and the organization of power. The second refers the judge and, indirectly, the litigant, and so is essentially linked to the guarantee of rights. This assumption is primarily supported by the observation widespread among legal scholars. Most authors, like B. Mathieu, believe that "division between judicial and political powers has become the matrix of modern political systems, at least in the Western model."[14] The division of political powers, where it still remains effective, plays only a minor role. This assumption is primarily supported by the practice of the French Constitutional Court, an analysis of which shows that the Constitutional Council applies the principle of the separation of powers differently, depending on whether it concerns the separation of "political powers" or the separation of political and judicial powers.

The study of the Constitutional Court's case law demonstrates that, when it comes to the application of the principle of the separation of powers exclusively towards political authorities, the Court refers an impermeable or a "separatist" approach.[15] In other

[10] Jacques Meunier, 'Les décisions du Conseil constitutionnel et le jeupolitique' (2003) 105 Pouvoirs 29-40.

[11] Anne-Marie Le Pourhiet, 'La limitation du pouvoir politique: la garantie des droits subjectifs face à ladémocratie politique' (2015) 102 Revue française de droit constitutionnel 277-286.

[12] Dominique Rousseau, 'Le droit constitutionnel continue: institutions, garantie des droits et utopie' (2014) 6 Revue du droit public 1517-1533.

[13] Patrick Wachsamnn, 'La séparation des pouvoirs contre les libertés?' (2009) 12 Actualité juridique droit administratif 617-619.

[14] Bertrand Mathieu, Justice et politique: la déchirure? (LGDJ lextenso éditions 2015) 9, 45-46.

[15] Oliver Beaud, Le Conseil constitutionnel et le traitement du Président de la République: une hérésie

words, when addressing the independence of political bodies from one another or the preservation of their functional integrity, the Court applies an impermeable concept of the separation of powers. At the same time, acting as the guardian of the Constitution, the Court unequivocally holds that the Constitution is the only instance authorized to allow deviations and exceptions from the above-said principle. Thus, except for the cases where the Constitution explicitly provides for some degree of permeability (the cases when the Court examines the provision of organic or functional separation of political powers), the Court consistently judges in favor of impermeable conception of the separation of powers. This is a systematic judicial practice of the Constitutional Court, which is guided by a dogmatic approach to the separation of political powers; and with this, the Court elevates the concept of the separation of political powers to a high indisputable principle. This analysis does not address the application of the principle of the separation of powers in the cases involving the relationship between political authorities and judiciary.

II. SEPARATION OF POWERS: THE NOTION, CONCEPT AND DEFINITION

Studying the separation of powers requires distinguishing between the notion and the concept. In the dictionary of foreign terms, a "concept" encompasses a higher degree of abstraction than "notion",[16] serving as a kind of substrate/foundation. The notion refers to the theoretical application of the concept and, as such, is subject to variability, whereas the concept is unique. In the context of the separation of powers, before addressing the concept (2), it is necessary to first examine the notion, or rather notions (1) in order to come up with the definition of "separation of powers" (3) according to the requirements of the present study.

1. NOTIONS OF THE SEPARATION OF POWERS

The notion of the separation of powers varies among authors. Montesquieu's original idea was developed in his *The Spirit of the Law (*Chapter VI, Book XI). The author argues that by default, no free states exist; therefore, political liberty can be found under the following two conditions: a) a moderate nature of the state and b) absence of abuse of power. The first condition is met by the mere absence of despotic rule. On the other hand, whereas (as states Montesquieu) a man invested with power is prone to abuse it,[17]

constitutionnelle (Jus Politicum 2013) 11.

[16] Dictionary of Foreign Terms <http://www.nplg.gov.ge/gwdict/index.php?a=term&d=3&t=20862> [last accessed on 29 April 2024].

[17] Charles Louis Montesquie, The Spirit of Law (The Caucasus Institute for Peace, Democracy and Development 1994) 180-181 (in Georgian).

the second condition of creating a specific mechanism comes in, allowing "a power to be a check to a power." Drawing from the English constitution of his time, Baron de la Brède developed a theory of the separation of powers[18], where he divided state power into three branches and proposed a network of functional interaction among different state bodies. Hence, Montesquieu's system is a complex framework of interlinked institutions - the executive branch should be able to restrain the legislative branch, and despite it does not refer the latter, the legislative branch retains the right "to inspect how the laws it has passed are enforced."[19] The reason behind this asymmetry is complex and disputable, however important for author's way of thinking. Montesquieu views the legislative power differently from executive power, arguing that the latter "has by nature its own limits"[20]; so do not require restraint while the legislative power is unlimited and requires restriction. However, within the legislative branch, connections are created that make two parts mutually dependent: "one check another by the mutual privilege of rejecting"; and "they both are restrained by the executive power, as the executive body itself is by the legislative." [21]

Thus, the outcome is as follows: "These three powers should create peace and tranquility. But as they are compelled to move due to the necessary motion of things, they are forced to act in concert." [22] The bodies "can do nothing against each other and nothing without each other." [23] In other words, the system described by Montesquieu consists of three bodies that represent distinct and independent powers. However, this division, which they embody, is only organic and personal. By their function and substance, these three powers are interconnected and can restrain one another. The result is an interdependence of bodies strong enough to ensure moderate governance, yet balanced enough to avoid endangering political liberty. Hence, the following two scenarios are possible to unfold: the degree of interaction among the bodies could create a deadlock, almost inevitably resulting in one body or an external separate entity seizing power that is against the established institutional structure. Alternatively, as Montesquieu suggests, the "necessary motion of things" may propel this institutional and interdependent structure forward. In other words, the mechanism may fail, but if it works, the result will be constructive.

The original idea of the separation of powers was laid down in *The Spirit of the Law*, yet soon was reinterpreted by doctrine, resulting in elaborating alternative notions

[18] ibid, 181-193.
[19] ibid.
[20] ibid.
[21] ibid.
[22] ibid, 190.
[23] Charles Eisenmann, L'Esprit des lois et la séparation des pouvoirs, in Mélanges Carré de Malberg (Sirey 1933) 187.

without damaging the original theory.[24] There were Montesquieu's contemporaries,[25] who, when revisiting his works, discovered alternative ideas regarding the separation of powers. These include the British notion[26] of the "balance of powers," rooted in Bodin's writings,[27] or the "theory of checks and balances" developed by the authors of American Constitution.[28] Variations of Montesquieu's original theory also emerged such as "strict/rigid separation of powers", "flexible separation of powers", and "non-fusion of powers".[29] Other new interpretations of the original notion appeared later; applying the separation of powers not only to three main branches of state power but to the majorities and opposition,[30] central and local governments,[31] and constituent and constituted powers.[32]

All above-mentioned doctrinal developments view the separation of powers as a descriptive concept. The vast diversity of doctrines therefore brings certain confusion, necessitating to shift to a higher level of abstraction in order to fully comprehend the essence of the concept discussed.

2. THE CONCEPT OF SEPARATION OF POWERS

To emphasize the "substrate" nature of separation of powers and thus understand the concept, one must first contextualize the motion that gave rise to Montesquieu's original idea. Then, it is necessary to examine the various notions of the separation of powers, which must be carrying common features as they offer different usage of the same concept.

The foundations of Montesquieu's theory can be found in the works of some authors predating Baron de la Brède by centuries. After all, "The separation of powers and balance among constitutional functions are modern ideas that can rarely be found before 18th century. However, as we can explore the history for tracing the continuity of a political idea despite the risk of criticism from historians claiming that there two identical epochs don't exist, one may also examine whether the same concept could

[24] Mathieu, supra note 3, 22.

[25] Benjamin Constant, Fragments d'un ouvrage abandonné sur la possibilité d'une constitution républicaine dans un grand pays (Aubier 1991) 506.

[26] Mauro Barberis, 'Le futur passé de la séparation des pouvoirs' (2012) 143 Pouvoirs 6-7.

[27] Jean Bodin, Les Six Livres de la République 1576.

[28] Kenneth Janda at al, Amecian Democracy, the US Govermnet and Political Process (JSI publishing 1995) 55 (in Georgian).

[29] Mathieu, supra note 3, 23.

[30] Eric Thiers, 'La majorité contrôlée par l'opposition: pierre philosophale de la nouvelle répartition despouvoirs?' (2012) 143 Pouvoirs 61-72.

[31] Jean-Pierre Dubois, 'Une révolution territoriale silencieuse: vers une nouvelle séparation des pouvoirs' (2002) 281 Esprit 122-136.

[32] Emmanuel Siéyès, Qu'est-ce que le Tiers-Etat? (Ed. Paléo 2012) 134.

manifest itself differently in earlier era." [33] Montesquieu's concept of the separation of powers fits easily within a broader motion aimed at restricting power and combating arbitrariness, which coincided with the appearance of the notion of power, the highest point of advancement of which, both qualitatively and quantitatively, is its separation.

Moreover, it seems possible to identify certain features, which are common to all notions of the separation of powers and use them to first construct a concept, and formulate its definition. Regardless of the author, the notion of the separation of powers always has certain "constants": First, it always involves a division of bodies - or groups of bodies - identified as power carriers. Second, it should be ensured that these bodies – or groups of bodies, are arranged to balance one another, implementing various authorities - or sets of authorities - in such a way that "power shall stop power."

Thus, the concept of the separation of powers can be understood as the method of restricting power by dividing its carriers and distributing various powers among them, ensuring that "power stops power" and, guaranteeing the civil liberty as a result. M. Troper seems to perceive the concept of the separation of powers from the negative perspective, arguing that "no single body should accumulate all powers regardless of how those powers are distributed." [34]

3. DEFINITION OF THE SEPARATION OF POWERS

Proceeding from the concept of separation of powers it is possible to define the term "separation of powers" as well as a set of other terms falling under the same concept. The separation of powers is a principle designed to put a restrain on power, identify groups of bodies that hold power, and distribute the portfolios of responsibilities or privileges among them.

This definition is, of course, minimalistic yet it brings some advantages. First, it avoids favoring any of the doctrinal interpretations of the concept. Whereas this study is focused on examining the concept through the prism of positive law, it is preferable to read this analysis with an open mind, without *a priori* accepting any standpoint. This raises the issue of autonomy of the Constitutional Court concerning various doctrinal positions. In general, case law and academic discourse address two different aspects - the separation of powers as a norm, and the separation of powers as a theory. However, when faced with the task of interpretation of the principle of separation of powers, the Constitutional Court might find itself under the influence of the one or more doctrinal perspectives. Moreover, when the Constitutional Court's comments on the legal

[33] Patrick Auvret, La séparation des pouvoirs dans l'Antiquité (mémoiredact 1978) 50.

[34] Michel Troper, "L'évolution de la notion de séparation des pouvoirs" in Francis Hamon et Jacques Lelièvre (dir.), L'héritage politique de la Révolution française (Presses universitaires de Lille 1998) 101.

practice, these two types of discourses may converge or conflict. Hence, the influence of legal doctrine on the Court's legal practice cannot be excluded. On the other hand, the Court seems to develop its practice on the separation of powers independently from the doctrine: firstly, the court sometimes maintains the approach of the separation of powers; and secondly, the convergence of discourses of doctrinal and judicial practice is not necessarily linked to the influence of doctrine on constitutional judge. Lastly, the proposed "minimalistic" definition helps us explain why the notion of "separation of powers" appears in the constitutions of various countries without necessarily pointing to the same organizational framework of power.

III. APPLYING SEPARATIST DOCTRINE FOR PROTECTING THE LEGISLATIVE FUNCTIONS EFFECTIVELY

P. Avril argues that General de Gaulle back in 1958 used the notion of the separation of powers as "a mask used by those conveying the message which is different from what they do explicitly state."[35] The author criticizes the use of a flexible notion of the separation of powers to justify the concept of unifying political powers, by stating that the separation of power is a theory that is "ideally imprecise when it comes to its preferable understanding",[36] which is used for political purposes the most often. In this sense, the initial choice of the constituent power is decisive. Although the logic of the separation of powers leads to the principle that this division of power should be impermeable (as confirmed by the Article 4, paragraph 3 of the 1995 Georgian Constitution), the Constitution therewith provides for certain adjustments to enable the governments "act in coordinated way." Depending on the political adjustments made to the separation of powers, the constituent power is likely to favor one of the two main political powers, either executive or legislative.

The choice made by a constitution-maker with regard to the separation of powers and possible subsequent deviations is crucial for defining the nature and functioning mode of the government. According to J.-P. Camby: "The separation of powers is […] the subject of the Republic's primary agreements, and one might wonder what role the Constitutional Court can play in this process per se, given that this institution is neither the supreme nor the federal court, and its creation contradicts the French constitutional tradition based on the myth of the absolute sovereignty of the law."[37] Indeed, when

[35] Pierre Avril, "La séparation des pouvoirs et la Ve République: le paradoxe de 1958", in Alain Pariente (dir.), La séparation des pouvoirs, théorie contestée et pratique renouvelée (Dalloz 2006) 80.

[36] Perrine Preuvot, L'articulation des pouvoirs sous la Vème République: vers de nouveaux équilibres? (contribution au 8ème Congrès mondial de droit constitutionnel de Mexico des 6, 7, 8, 9 et 10 décembre 2010) 5 <http://www.juridicas.unam.mx/wccl/fr/g14.htm> [last accessed on 29 April 2024].

[37] Jean-Pierre Camby, 'Le Conseil constitutionnel et la régulationdes pouvoirs publics' (1997) 177 Administration 28.

deciding whether the provisions submitted to it comply with the principle of separation of powers, the Constitutional Court must refer to the institutional architecture and balance provided for in the Constitution. The concept of the separation of powers adopted by the court is therefore crucial.

The separatist doctrine in fact compels the Constitutional Court to adopt an impermeable concept of the division of powers in order to maintain the separation of functions provided for by the Constitution. A so-called negative incompetence of the legislator is an old concept first introduced by Laferrière to describe the situations where "an authority, instead of extending its competences, remains below them and refuses to act, declaring him/herself incapable to perform." [38]

By its Judgment[39] of 28 December 2017, the Constitutional Court of Georgia deemed a negative incompetence of the legislator as unconstitutional. Since then, the Court believes that any legislative provision, with regard to which the legislative body has not exhausted its authority within the framework of the Constitution, should be subject to scrutiny, particularly when it affects a constitutionally guaranteed right or freedom. This approach aligns, at least in principle, with the doctrine of the separation of powers, as a non-exhaustion of legislature's competences allows authorities, acting on the basis of the bylaws, interfere with the legislative domain. Once adopting this opinion, the court decided to refer to the separatist doctrine when defining a negative legislative incompetence in its case law (1.). It should be stated, however, that the negative legislative incompetence is not a violation of the separation of powers in itself; but rather creates the conditions under which such violations may occur. Hence, the reference to the separatist doctrine in this context seems to be utilized to its maximum extent, for the reasons that are not unusual to the interests of the Constitutional Court (2).

1. APPLYING SEPARATIST DOCTRINE TO THE NEGATIVE LEGISLATIVE INCOMPETENCE

The criticism of negative legislative incompetence stems from interpretation of the constitution from the perspective of the separation doctrine (1.1.), which is broadly reflected in the Constitutional Court's case law (1.2.).

[38] Georges Bergougnous, 'L'incompétence négative vue du Parlement' (2015) 46 Les Nouveaux Cahiers du Conseil Constitutionnel 41.

[39] Judgement of the Constitutional Court of Georgia on case N2/7/667 "JSC Telenet v. Parliament of Georgia", 28 December 2017. Paragraphs II-55-59.

1.1. INTERPRETING CONSTITUTION THROUGH THE SEPARATIST DOCTRINE

By denouncing negative legislative incompetence, the Constitutional Court calls the legislative authority to fully exercise the functions assigned to it by the Constitution. In other words, when the legislative authority intervenes in the areas assigned by the Constitution to the Law, the former should terminate its authority.

A judicial policy aimed at denouncing any demonstration of negative incompetence is not surprising. On the one hand, it is predictable from a legal standpoint as it aligns with the spirit of the Constitution. "The reservation to restrict the right based on the law naturally implies that the legislative body (the parliament of Georgia) can not only limit the right but in individual cases also delegate the settlement of the issue to another state body." However, the applicable practice of the Constitutional Court of Georgia has already introduced certain conditions "under which the delegation of authority is prohibited." [40] Thus, it can be concluded that any delegation of legislative functions to the executive branch, unless carried out according to the procedure prescribed by the constitution, shall be deemed unconstitutional. Hence, as stated above, the judgment of the Court isn't surprising as it complies with a traditional principle of reserved legislative competences, which ultimately rest on legislature.[41] Finally, this position aligns with the Constitutional Court's judicial practice of the separation of powers, from the perspective of the separatist doctrine, even if the court does not explicitly refer to these grounds. Indeed, the doctrine assumes that a political authority cannot waive or transfer its competence to another political authority; meaning that each political authority must fully exercise the competences assigned to it. Thus, the division of functions retains its full meaning and serves as a principle, the deviation from which is allowed only through constitutionally established procedures. For example, in its Judgment of February 11, 2021, the Constitutional Court deemed the delegation of authority to the executive body as compliant with the Constitution. The Court concluded that the Law of Georgia "on Public Health" manifests with sufficient clarity the will of the legislative body, specifying the criteria, which the executive body should follow in its decisions: "During Pandemic times, introducing temporary rules (other than those established by other bylaws) such as the rule regulating the movement of people and associated with the property and public gatherings, is not an issue of primary importance, requiring a decision of the parliament. Although it is an effective mechanism to ensure adapting to rapidly changing environment and normalization of extraordinary circumstances, and therefore, delegating these authorities to the government of Georgia is justified by the

[40] Judgment of the Constitutional Court of Georgia on case N1/7/1275 "Alexander Mdzinarashvili v Georgian National Commission on Communications", 2 August 2019. Paragraphs II-29, 33.

[41] Jerome Trémeau, La réserve de loi: compétence législative et Constitution (Economica 1999) 301.

need of providing a timely and effective response to the threats caused by Pandemic."[42]

Moreover, the condemnation of negative incompetence seems consistent with the logic of judicial strategy. As C.-M. Pimentel notes, "a competent court will have a direct interest in expanding the scope of authorities of the subject being under its constitutional control in order to proportionally increase its own powers as well." [43]

1.2. APPLYING SEPARATIST DOCTRINE IN JUDICIAL PRACTICE

The Constitutional Court may denounce a provision on the grounds that it manifests a legislator's negative incompetence, with the ultimate aim of safeguarding the domain of law. "This indeed serves as a guide for the Constitutional Court's actions, as evidenced by the articulation of the principle of negative incompetence, which may vary in formulation depending on its basis but not in its objective." It is the legislature, who must "adopt clearly formulated and precise provisions to protect legal subjects from unconstitutional interpretations or the risk of arbitrariness that might result in administrative or judicial bodies to issue rules that the Constitution reserved exclusively for the Law. [44] This does not extended to the cases, when non-compliance with these rules (referred to by the French Constitutional Council as inaction or neglect) is punishable." [45]

According to distinction proposed by P. Rappi[46], the negative legislative incompetence denounced by the Constitutional Court can be explicit, where the legislative authority exempts the state body from the competences assigned to the latter, or implicit, where a legislative provision does not exhaust the competence of the legislature without resorting to a non-legislative body. In the first case, a legislative provision is considered constitutional provided that the reference made in the bylaw to the executive body is reasonably limited by the legislature.

The judgement of the Constitutional Court of Georgia dated 2 August 2019 is an example to this.[47] The Court reviewed a provision of the regulation approved by Resolution No. 3 of the National Communications Commission of Georgia titled "the Regulation on

[42] Judgement of the Constitutional Court of Georgia on case N1/1/1505, 1515, 1516, 1529 "Paata Diasamidze, George Chitidze, Eduard Marikashvili and Lika Sajaia v the Parliament of Georgia and Government of Georgia", 11 February 2021. Paragraph II-60.

[43] Carlos-Miguel Pimentel, "De l'Etat de droit à l'Etat de jurisprudence? Le juge de l'habilitation et la séparation despouvoirs", in Alain Pariente (dir.), La séparation des pouvoirs, Théorie contestée et pratique renouvelée (Dalloz 2007) 21.

[44] Conseil constitutionnel N2005-512DC du 21 avril 2005, Loid'orientation et de programme pour l'avenir de l'école, J.O. du 24 avril 2005, 7173, Rec.p. 72, cons.9.

[45] Bergougnous, supra note 38, 47.

[46] Patricia Rrapi, L'accessibilité et l'intelligibilité de la loien droit constitutionnel. Etude du discours sur la "qualité de la loi" (Dalloz 2014) 176.

[47] See supra note 40, I-3.

the Provision of Services and Protection of Consumer Rights in the Field of Electronic Communications," imposing obligation on the internet domain provider to block a website to prevent the dissemination of prohibited content, take appropriate measures to remove such content from the network and prevent transmission of messages containing such content. The Constitutional Court stated that "the formal constitutional requirement on regulating certain matters be regulated by law is reserved to the Parliament of Georgia. Specifically, the Constitution of Georgia explicitly specifies those issues, the authority of regulation of which falls exclusively within the competence of the Parliament of Georgia."[48] As reads the Judgement: "The Parliament of Georgia has a general authority to regulate social relations and introduce binding rules of social conduct."

The task of regulation of the issues of fundamental importance calls for a governmental architecture, in the framework of which the binding rules of conduct are enforced by the different arms of government, which in its turn, makes the constitutional mechanism of checks and balances effective.[49] The Court further stated that "in the present case, the Parliament is the legitimate body authorized to elaborate a unified state policy as well as establish constitutional standards for interference with this right." Simultaneously, these standards have a universal nature; they do not require adaptation to changing circumstances or frequent modification, and the permissible limits of restriction of the right are inherently linked to introducing the strict constitutional standards, that can, in their turn, be modified through a transparent legislative procedure conducted at the legislative level. [50]

By offering this analysis, the Constitutional Court seeks to ensure that when legislative body delegates the authority to define procedures for implementing legislative provisions to the state body entitled to issuing relevant bylaws, it does not therewith, grant to the latter the discretionary powers of defining the fundamental rules or principles established by the legislative authority. According to the Constitution, the legislative authority is the body tasked with establishing the fundamental rules and principles in the fields specified in the Constitution. Consequently, in all such cases, the authority to intervene through bylaws is limited to the secondary competence of the state body, aimed at determining the methods for enforcing these rules.

In the second instance, when the negative incompetence is manifested implicitly, the court ensures the full exercise of the competence of the legislative body. The Judgement of the Constitutional Court of Georgia of 28 December 2017 is the example of this.[51] The provision under review pertained to the general rule for calculating property tax for enterprises/organizations, as established by Article 202, paragraph 1 of the Tax

[48] ibid, II-24.
[49] See supra note 40, II-27.
[50] ibid, II-37.
[51] See supra note 39.

Code of Georgia, according to which, the tax is calculated based on the book value of taxable property. The plaintiff argued that "under the contested norm, the property tax is not calculated in accordance with rule established by law but rather at the discretion of the tax authority, thus making a tax burden of the taxpayer unpredictable. That is because the legislature establishes two different methods for tax calculation, depending on the discretionary authority of the tax authority."[52] This delegation principle cannot be deemed constitutional. Hence, the Court upheld the plaintiff's argument and judged that "the discretionary power of the disputed norm is absolute in nature, the differential treatment resulted by it is not backed by any reasonable criteria, and so the disputed norm allows for discriminatory treatment […] Therefore, it violates the right protected under Article 14 of the Constitution of Georgia."[53] As the example shows, the will to limit the arbitrariness of the executive body compelled the court to denounce the provision containing negative incompetence.

Since recent times, the court's concern regarding the quality of the law has also led to denouncing of implicit negative incompetence. Eg.: in its Judgment of 15 December, 2023, the Constitutional Court stated that "Foreseeability and accessibility of law are essential prerequisites for imposing constitutional liability and ensure protection of person against arbitrariness of executive body […] A legal norm must be clear, unambiguous and specific enough in terms of substance as well as the subject, purpose, and scope of regulation […] A law imposing liability that fails to meet the requirements of foreseeability and accessibility […] shall be deemed unconstitutional." [54]

Thus, the doctrine of separation, to the extent that it obliges the court to denounce any provision allowing intervention of the executive authority, acting on the basis of the bylaw with legislative functions leads not only to protection of the legislative function and its carrier but further advancement of the quality of the law.

Driven by the need for a foreseeable interpretation of the Constitution against the backdrop of separatist doctrine, the Constitutional Court is compelled to denounce legislature's negative incompetence, regardless of the form in which it manifests itself. Although this fits harmoniously into the Court's judicial practice concerning the functional aspect of the principle of separation of political powers, the prohibition established by the latter carries a certain specificity compared to other controversial hypotheses falling into this category.

[52] ibid, I-6.

[53] See supra note 39, II-59.

[54] Judgement of the Constitutional Court of Georgia on case N3/5/1502, 150 "Zaur Shermazanashvili and Tornike Artkmeladze v. the President of Georgia and the Government of Georgia", 15 December 2023. Paragraph II-131.

2. APPLYING SEPARATIST DOCTRINE TO ANALYZE THE SPECIFICS OF NEGATIVE LEGISLATIVE INCOMPETENCE

Despite none of the legislative provisions containing negative incompetence directly violates the principle of the separation of powers, such potential nevertheless does exist. By turning to the authority acting on the basis of the bylaw or failing to exhaust its competence, the legislature does not directly breach the principle of the separation of powers; however, by creating the opportunity for activating the bylaw causes the violation of the above principle. In other words, the principle of separation of powers is not breached by the legislature's inaction but by the potential consequences of this inaction. It is only at the second stage, that the authority acting on the basis of the bylaw tasked with interfering with the legislature in order to compensate for the legislative gaps, may violate the principle of separation of powers. This indirect nature of violation is exactly what explains the fact that the constitutional court does not directly refer to the principle of the separation of powers for denouncing the negative incompetence of the legislator.

By denouncing the negative legislative incompetence, the Constitutional Court intervenes before any breach of the principle of the separation of functions between the legislative body and the body acting on the basis of the bylaw, occurs. The Court penalizes only the legislature's negative incompetence to prevent a violation of the principle of separation of powers, which happens only when the authority actin on the basis of the bylaw exploits the gaps left by the legislator, thereby assuming positive incompetence. Consequently, when negative legislative incompetence arises in the legal system (whether because it is not denounced by the Constitutional Court or because it has not been submitted for its review) it is often the general courts, who through the administrative proceedings define and penalize the fact of violations of the separation between the legislative and subsequent legal/normative functions. The judgment of the Supreme Court of Georgia is an example of the above-mentioned, which denounced the obvious fact of negative incompetence; however, limited itself with annulling the administrative act on the grounds of incompetence, without referring to the argument of violation of the principle of separation of powers. As stated by the Chamber of Cassation of the Supreme Court: "An unjustified restriction of the private interests of G.S. based on the Resolution of the Tbilisi Municipality Council dated 30 December, 2014 is confirmed by the failure to demonstrate the priority of protecting public interests through such a restriction. Hence, the disputed normative act violates not only the requirements of the Law of Georgia on "Basics for Spatial Planning and City Construction" but also the criteria for restricting property rights established by Article 21 of the Constitution of Georgia, under the condition of the presence of a necessary public need." [55]

[55] Judgement of the Chamber of Cassation of the Supreme Court of Georgia on case Nbs-1233 (k-18) 18 March 2020.

This particularity leads to the another one. Generally, the principle of separation of powers is understood as a tool to protect one branch of power from the actions of another. However, an indirect nature of the refusal arisen due to the negative legislative incompetence, modifies the scheme to certain extent. Indeed, by denouncing the negative incompetence, the Constitutional Court does not protect the legislative authority from the interference of executive branch, as the latter cannot act until a legislative provision enters into force. Instead, by protecting the legislative body, the court protects the latter from itself.[56] As G. Bergouniou notes, negative legislative incompetence is not the only instance, where the Constitutional Court protects the legislative branch from itself.[57] Consequently, the field of domain of legislative action is not maximal but minimal, it is "a some kind of impenetrable field from which the legislative branch cannot be removed even with its consent."[58] On the other hand, the particularity of the negative incompetence is easily explained by the specifics of the Constitutional Court. Indeed, the Court cannot judge that a bylaw violates the principle of the separation of powers, interfering with the legislative authority granted to the latter by the Constitution. Therefore, it has developed a mechanism to combat, albeit indirectly, the interference of executive authority into the legislative functions of the parliament.

Moreover, the Constitutional Court's policy regarding the negative legislative incompetence rejects the idea that the principle of separation of powers has become ineffective in today's political phenomena of majority rule. Denouncing negative incompetence enables the court to restrain the supremacy of the majority by ensuring that decisions in the major fields of the law shall be made in the framework of the parliament. Consequently, the political minority shall be able to engage in discussions and present the arguments, which would not happen had the court allowed these powers to shift to the executive branch. Thus, the principle of separation of powers remains an effective tool for dividing responsibilities, even in parliamentary systems.

Despite its unique features, negative legislative incompetence is fully integrated into the Constitutional Court's judicial practice. This is because, like all those cases, where the Constitution does not permit deviations, it is assessed by the court through the lens of the separatist doctrine, ensuring that any legislative provision undermining the separation of functions is deemed unconstitutional.

[56] Guillaume Drago, 'Le Conseil constitutionnel, la compétence du législateur et le désordre normatif'(2006) 1 Revue du droit public 45.

[57] Georges Bergougnous, 'Le Conseil constitutionnel et le législateur' (2013) 1 Nouveaux Cahiers du Conseil Constitutionnel 5.

[58] Thierry Renoux, 'Le principe de légalité en droit constitutionnel français' (1992) 31 L.P.A. 21.

IV. CONCLUSION

Whereas the Constitution of Georgia does not provide for adjustment or deviation from the principle of functional division of political powers, the Constitutional Court of Georgia rigorously adheres to the separatist doctrine. On the one hand, this enables the Court to protect the executive branch of the government from direct or indirect interference from the parliament. On the other hand, the Constitutional Court favors a "separatist" interpretation of the principle of division of powers in order to preserve the integrity of legislative function. Thus, the court denounced all manifestations of negative legislative incompetence that would allow am executive authorities acting on the basis of legal normative act (bylaw) to encroach upon legislative functions.

Consequently, the Constitutional Court's judicial practice with regard to the functional division of powers is characterized by application of the separatist doctrine and the court's commitment to ensure the genuine independence and full functional autonomy of political bodies. In cases when the Constitution explicitly provides for adjustments or deviations from adhering to the principle of division of powers, or when it is dictated by its own interests, the court does omit or simply refuses to apply the separatist doctrine altogether.

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INDIRECT EVIDENCE – A CONSTITUTIONAL-LEGAL BASIS FOR CONVICTION?

ABSTRACT

The practice of Georgia's general courts in applying a "beyond reasonable doubt" standard being necessary for convicting a defendant is inconsistent. Whereas until recently, at least two direct pieces of evidence were required to convict a person, in its recent decisions, the Supreme Court of Georgia has changed this approach to some extent, allowing guilty verdicts to be based on indirect evidence as well.

As a result, the above-mentioned change in the court practice allows convicting a person based on indirect evidence that could raise concerns, including those regarding with compliance with the Constitution. In its precedent-setting judgment N1/1/548 of January 22, 2015 *Citizen of Georgia Zurab Mikadze v. the Parliament of Georgia*, the Constitutional Court of Georgia declared unconstitutional the normative content of the articles of the Criminal Procedure Code of Georgia, allowing for indictment and conviction of a person based on hearsay testimony (being the most common form of indirect evidence).

The article examines the practice of general courts of Georgia with a particular focus on the recent interpretations made by the Supreme Court of Georgia, their potential impact on the parties involved in criminal proceedings, and their compatibility with the right to a fair trial and the presumption of innocence, as safeguarded by the Constitution of Georgia and international legal instruments. These issues are examined through the perspective of the legal doctrines and practices adopted by national courts, as well as those established by the European Court of Human Rights and the courts of the United States.

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I. INTRODUCTION

In a democratic state based on the principles of rule of law and social justice, where the full realization and adequate protection of universally recognized human rights and freedoms must remain a high priority, the special attention should be paid to the measures taken by the state against individuals.[1] Among those, the national criminal policy should be a subject to the most rigorous study, which is deemed successful only when used as *ultima ratio*.[2] Taking into account all potential consequences of convicting a person for committing criminal offense including the imposition of penalty (particularly when it implies imprisonment), social isolation, criminal record and stigmatization - it is essential that the conviction of an individual should be conducted strictly according to all relevant standards.

The Constitution of Georgia allows for the conviction against an individual only on the basis of incontrovertible evidence.[3] The Criminal Procedure Code of Georgia further elaborates on this constitutional provision, stipulating that a guilty verdict must be based solely on a body of coherent, clear, and convincing evidence that establishes the defendant's guilt beyond reasonable doubt.[4] It should be noted that the national legislation does not specify the exact type, number, or combination of evidence required for achieving this standard. Furthermore, the Criminal Procedure Code does not explicitly distinguish between direct and indirect evidence. Consequently, the evaluation, classification, admissibility, acceptance/rejection of evidence as well as its sufficiency for reaching the guilty verdict is entrusted to the discretion of judicial bodies. This creates the risk that an individual's legal standing will depend on the personal convictions of a judge.

Undoubtedly, combating crime effectively, identifying offenders, and ensuring the administration of justice fall into the scope of significant public interests.[5] However,

[1] Judgment of the Constitutional Court of Georgia on case N1/3/421,422 "Citizens of Georgia Giorgi Kipiani and Avtandil Ungiadze v. the Parliament of Georgia", 10 November 2009. Paragraph II-1; Judgment of the Constitutional Court of Georgia on case N3/1/531 "Citizens of Israel Tamaz Janashvili, Nana Janashvili, Irma Janashvili, and Citizens of Georgia Giorgi Tsakadze and Vakhtang Loria v. the Parliament of Georgia", 5 November 2013. Paragraph II-1; Judgment of the Constitutional Court of Georgia on case N1/3/534 "Citizen of Georgia Tristan Mamagulashvili v. the Parliament of Georgia", 11 June 2013. Paragraph II-3; and Judgment of the Second Board of the Constitutional Court of Georgia on case N2/1/536 "Citizens of Georgia Levan Asatiani, Irakli Vacharadze, Levan Berianidze, Beka Buchashvili, and Gocha Gabodze v. Minister of Labour, Health and Social Affairs of Georgia", 4 February 2014. Paragraph II-53.

[2] Judgment of the First Board of the Constitutional Court of Georgia on case N1/4/592 "Citizens of Georgia Beka Tsikarishvili v. the Parliament of Georgia", 24 October 2015. Paragraph II-37.

[3] Article 31, paragraph 7, the Constitution of Georgia. 24 August 1995. Official Gazette of the Parliament of Georgia, 31-33, 24.08.1995.

[4] Article 3, paragraph 13, article 13, paragraph 2, article 82, paragraph 3, article 259, paragraph 3, the Criminal Procedure Code of Georgia, 9 October 2009. Official Gazette of the Parliament of Georgia, 31, 03.11.2009.

[5] Judgment of the Plenum of the Constitutional Court of Georgia on case N3/5/1341,1660 "Constitutional

these legitimate interests are confronted by an individual's private interests such as the right to a fair trial and presumption of innocence.[6] When the public and private values are in conflict, it is essential to harmonize and reasonably balance between them.[7] Beyond introducing a legislative leverage, the development of consistent judicial practices by general courts is crucial to prevent conviction based on insufficient and/or unreliable evidence.

This article analyzes the general court's practice on sufficiency of the evidence required for convicting a person as well as the guarantees provided by national legislation, which protect individuals from unjust and unsubstantiated guilty verdicts. The article sequentially examines the concept of evidence and its evaluation; distinguishing features between direct and indirect evidence; the essence of the evidentiary standard "beyond reasonable doubt" as well as the requirements established by the right to a fair trial and the presumption of innocence. Additionally, the risks associated with the judicial assessment of individual pieces of evidence are studied in order to identify problems and find respective solutions.

For the purpose of conducting comprehensive research and providing a thorough assessment of current legal institutions, the article employs dogmatic-legal, comparative-legal, and analytical research methods.

II. ESSENCE AND IMPORTANCE OF EVIDENCE IN CRIMINAL PROCEEDINGS

In 2009, with the adoption of the new Criminal Procedure Code, the Parliament of Georgia renounced the inquisitorial model of proceedings, replacing it with an adversarial system. One of the purposes of this major change was to ensure and adversarial court process based on the principle of equality of arms between the parties.[8] The transition to the adversarial model has amplified the significance of evidence in

Submissions of Tetritskaro District Court on the constitutionality of the first sentence of Article 200 (6) of the Criminal Procedure Code of Georgia", 24 June 2022. Paragraph II-24; Judgement of the Constitutional Court of Georgia on case N2/2/1276 "Giorgi Keburia v. the Parliament of Georgia", 25 December 2020. Paragraph II-44.

[6] Judgment of the European Court of Human Rights on case N9487/19 "Mamaladze v. Georgia", 3 November 2022. Paragraph 105.

[7] Judgment 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-45; Judgment of the European Court of Human Rights on case N37359/09 "Hämäläinen v. Finland", [GC] 16 July 2014. Paragraph 65; Judgment of the European Court of Human Rights on case N32555/96 "Roche v. The United Kingdom", [GC] 19 October 2005. Paragraph 157.

[8] Explanatory Note to the Draft Law on the Criminal Procedure Code of Georgia, Section a.b. Objectives of the Draft Law, 04-04-2006, Registration N07-2/218/6; Report of the Commissioner for Human Rights of the Council of Europe Mr. Thomas Hammarberg, following his visit to Georgia on April 18-24, 2011, 5.

criminal proceedings, as the core of this principle lies in granting the parties the ability to present their version of the past events, submit supporting arguments and evidence as well as challenge and refute the evidence presented by the opposing party.[9]

A comprehensive legal definition of evidence is provided in Article 3, paragraph 23 of the Criminal Procedure Code of Georgia, according to which: "Evidence is an information […] submitted to the court in the manner prescribed by law, based on which the parties confirm or deny facts, make their legal evaluation, perform duties, protect their rights and legitimate interests, while the court determines whether there is a fact or action for which criminal proceedings have been initiated, whether this action has been committed by a certain person and whether or not that person is guilty. The court as well study the circumstances, which make an impact on the nature and degree of the defendant's responsibility, and reflect on the defendant's character […]"[10] The Constitutional Court of Georgia explained that "in the process of administering justice in criminal cases, evidence constitutes a source of information that can confirm or deny the fact of committing crime by the accused person."[11] "Evidence is the information obtained from the sources as defined by the Criminal Procedure Code and in the manner prescribed by the Code, with regard to the factual circumstances of an act, its illegality, culpability, the commission of the act, mitigating factors and aggravating circumstances, and, where applicable, the nature and extent of the harm caused.[12]

In practice, disputes have emerged regarding the question as to which facts or information obtained by the parties is appropriate for the status of evidence. For example, the Supreme Court of Georgia disagreed with the reasoning of the Kutaisi Court of Appeals, which, by referring Article 3, paragraph 23 of the Criminal Procedure Code considered as evidence only those materials on the criminal case, which were officially submitted to the court. The Supreme Court explained that various factual data or other materials on the case get a legal status of evidence before their formal submission to court. The Supreme Court based its conclusion on the following two arguments: 1. Provisions of different norms[13] of the Criminal Procedure Code indicate the option of availability of

[9] Judgement of the Constitutional Court of Georgia on case N2/13/1234,1235 "Citizens of Georgia Roin Mikeladze and Giorgi Burjanadze v. the Parliament of Georgia", 14 December 2018. Paragraph II-75; Judgement of the Plenum of the Constitutional Court of Georgia on case N3/1/574 "Citizen of Georgia Giorgi Ugulava v. the Parliament of Georgia", 23 May 2014. Paragraph II-75; K.F. Gutsenko, L.V. Golovko, B.A. Filimonov, Criminal Proceedings in Western States (Meridiani Publishing 2007) 13.

[10] Article 3, paragraph 23 of the Criminal Procedure Code of Georgia, 9 October 2009. Official Gazette, 31, 03.11.2009.

[11] Judgment of the Constitutional Court of Georgia on case N1/1/548 "Zurab Mikadze v. the Parliament of Georgia", 22 January 2015. Paragraph II-5.

[12] Zaza Meishvili and Omar Jorbenadze, Commentary on the Criminal Procedure Code of Georgia (as of December 31, 2006) (Sezani Publishing 2007) 276 (in Georgian).

[13] Article 3, paragraph 25, article 33, paragraph 6n, article 38, paragraph 7, article 39, article 83, paragraph 8, article 169, paragraph 1, and article 169, paragraph 3g of the Criminal Procedure Code of Georgia, 9

evidence during the investigation phase of the case (prior to its submission to the court); 2. In certain cases, the proceedings and final decisions on the case may be completed before the court hearing.

Examples to the above-mentioned include the ruling to close investigation and/or not to initiate and discontinue criminal prosecution, on applying diversion or recognizing a person as a victim or successor of victim's rights. The Court of Cassation states that the ruling made during the investigation phase should be substantiated and it should clearly specify the evidence on which the ruling is based. Consequently, the Supreme Court has come up with a broader interpretation of evidence, encompassing information and materials obtained by a party prior to their submission to the court.[14] This approach is acceptable since a narrow interpretation of the status of evidence would, in many instances, be unjustifiably detrimental to the issuance of rulings by the Supreme Court, before hearing the case.

Evidence in criminal proceedings is essential and plays a decisive role in reaching a verdict.[15] It forms an "objective foundation" upon which the court bases its final decision regarding a person's guilt or innocence.[16]

III. DISTINCTION BETWEEN DIRECT AND INDIRECT EVIDENCE

The applicable Criminal Procedure Code provides an exhaustive list of admissible evidence, establishing that any evidence not explicitly defined within the Code cannot be recognized in criminal proceedings, in accordance with the principle of *numerus clausus*.[17] Evidence may exist in the form of testimony, material evidence and/or document,[18] but their content and material form vary (e.g., photographs, computer files, audio/video recordings, traces, objects, items).[19]

Although there is no unified stance regarding the classification of different pieces of evidence,[20] they can still be grouped by the acquisition methods, sources, origin,

October 2009. Official Gazette, 31, 03.11.2009.

[14] Judgment of the Criminal Chamber of the Supreme Court of Georgia on case N221-20, 28 May 2020. Paragraphs 8-9.

[15] See supra note 11, paragraph II-23.

[16] Giorgi Tumanishvili, Criminal Procedure: General Overview (World of Lawyers Publishing 2014) 200 (in Georgian).

[17] ibid, 206.

[18] A judicial notice (res judicata) should be taken into account as well, accepted by the court as the evidence without further examination. Article 73, Criminal Procedure Code of Georgia, 9 October 2009. Official Gazette, 31, 03.11.2009.

[19] Judgment of the Constitutional Court of Georgia on case N2/2/579 "Maya Robakidze v. the Parliament of Georgia" 31 July 2015. Paragraph II-10.

[20] Group of authors, Criminal Procedure of Georgia, General Part (3rd edition, Meridiani Publishing 2015) 258-261 (in Georgian).

relevance, and connection of the evidence to the subject of proof. These categories include incriminating and exculpatory, personal and material, primary and derivative, as well as direct and indirect evidence.[21] The applicable Criminal Procedure Code does not classify evidence or explicitly distinguish between direct and indirect evidence. Consequently, when discussing this issue, theoretical perspectives and practical interpretations are particularly important.

According to procedural literature, the distinction between direct and indirect evidence is determined by their relationship to the subject of proof. Specifically, evidence whose origin directly and explicitly indicates the circumstances relevant to the subject of proof, confirming or denying essential facts or any of their elements - such as the accused's participation in a criminal act - is considered as direct evidence. Examples of direct evidence include the testimony of the victim, the testimony of an eyewitness to the crime, or surveillance footage clearly showing the accused discharged a firearm at the crime victim. In contrast, indirect evidence does not directly and explicitly relate to the subject of proof or its elements; it does not clarify significant factual circumstances.

However, when combined with other evidence and examined in the context of the case, indirect evidence can lead to important conclusions regarding essential case-related circumstances.[22] An example of indirect evidence is a forensic medical report, which can establish the existence, severity, and location of injuries but cannot determine who inflicted them, when, or under what circumstances the injuries occurred. Such a report cannot prove that a specific individual caused the injuries to the victim.[23] Similarly, the Supreme Court of Georgia classified as indirect evidence the discovery of stolen cattle at the home of the accused's father-in-law. The court clarified that neither this evidence nor any other evidence in the case directly established the essential elements of theft (Article 177 of the Criminal Code of Georgia), specifically the circumstances under which the cattle were misappropriated or by whom.[24]

Direct and indirect evidence is interpreted similarly in the United States legal system. According to U.S. legal doctrine and case law, direct evidence is defined as the evidence based on personal knowledge or observation, which, if confirmed, establishes a fact

[21] Jemal Gakhokidze, Mikheil Mamniashvili and Irakli Gabisonia, Criminal Procedure of Georgia (General Part) (World of Lawyers Publishing 2013) 84 (in Georgian).

[22] Lavrenti Maghlakelidze and Giorgi Tumanishvili, "Significance of Indirect Evidence in Georgian and International Criminal Proceedings" (2017) 1 (53) 17 Justice and Law 32 (in Georgian); Group of Authors, Revaz Gogshelidze (ed.), Criminal Procedure, Separate Institutions of the General Part (2nd edition Law Publishing 2009) 399 (in Georgian); Group of authors, supra note 21, 259-261.

[23] Ruling of the Criminal Chamber of the Supreme Court of Georgia on case N1043ap-22, 10 November 2022. Paragraph 9; Ruling of the Criminal Chamber of the Supreme Court of Georgia on case N105ap-22, 27 June 2022. Paragraph 5.11; Ruling of the Criminal Chamber of the Supreme Court of Georgia on case N493ap-21, 8 November 2021. Paragraph 10; Ruling of the Criminal Chamber of the Supreme Court of Georgia on case N287ap-20, 27 September 2021. Paragraph 10.

[24] Uniform Court Practice on Criminal Cases of the Supreme Court of Georgia (second half of 2014 - 2016) Department for the Study and Generalization of Court Practice (2018) 108 (in Georgian).

without the need for presumption or inference.[25] Direct evidence confirms the existence or absence of facts essential to the case.[26] For example, in a murder case, the testimony of a witness who saw the defendant stab the victim with a knife would constitute direct evidence. Circumstantial evidence, sometimes referred to as indirect evidence, is evidence that establishes a connection to the primary fact through intermediary facts. It is termed circumstantial/indirect because it relies on inferences drawn from connections between facts.[27] An example of indirect evidence is the testimony of a police officer who apprehended an individual carrying a bag containing money marked with identifiable stains.[28] Notably, the International Criminal Court (ICC) similarly defines and underscores the importance of indirect evidence, recognizing that in complex cases (such as genocide), prosecution is almost impossible based solely on direct evidence.[29]

The above-mentioned demonstrates a critical importance of accurate differentiation, and proper classification of direct and indirect evidence. The connection between evidence and the subject of proof directly influences the determination of essential elements of a crime, thereby affecting the judgment of guilt or innocence. This is closely linked to the presumption of innocence, implying that no person be deemed guilty until every element of the crime is proven by a sufficient and convincing body of evidence.[30] Ultimately, this reflects on the right to a fair trial, which mandates that an individual be convicted solely based on reliable and adequate evidence. The core of the right to a fair trial is to ensure that an entire criminal process against an individual accused of committing a crime is conducted in fair manner and is equipped with all appropriate guarantees.[31] This fundamental right inherently requires that no person be convicted without clear and sufficient evidence.[32]

[25] Henry Campbell Black, M.A., Black's Law Dictionary, Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern (West Publishing 1968) 546.

[26] Yancey v. State, 65 So. 3d 452, 2009; Ramos v. State, 478 SW 2d 102, 1972; Frank Brown v. State, 72 S.W.2d 269, 1934; Lee Beason v. The State, 67 S.W. 96, 1902.

[27] People v. Smith, 177 Cal.App.4th 1478, 2009; People v. Rivera, 109 Cal.App.4th 1241,135 Cal.Rptr.2d 682, 2003.

[28] Jefferson L. Ingram, Criminal Evidence (10th edition, Routledge 2009) 25.

[29] Judgment of the International Criminal Court ICC-02/05-01/09-73 "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir", 3 February 2010. Paragraph 33; Situation of the International Criminal Court in the Democratic Republic of Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06, 14 March 2012. Paragraph 57.

[30] Article 5, paragraph 3 of the Criminal Procedure Code of Georgia provides for the same guarantee: "any doubt arising during the assessment of evidence that cannot be confirmed in accordance with the law shall be resolved in favor of the defendant (convict)."

[31] Judgment of the European Court of Human Rights N926/05 "Taxquet v. Belgium", [GC] 16 November 2010. Paragraph 84; Judgment of the European Court of Human Rights N9154/10 "Schatschaschwili v. Germany", [GC] 15 December 2015. Paragraph 101; Judgment of the European Court of Human Rights N 50541/08, 50571/08, 50573/08, 40351/09 "Ibrahim and Others v. The United Kingdom", [GC] 13 September 2016. Paragraph 250; Judgment of the European Court of Human Rights N29714/18 "Pirtskhalava and Tsaadze v. Georgia", 23 March 2023. Paragraphs 50-54.

[32] Ruling of the Criminal Chamber of the Supreme Court of Georgia on case N1090ap-22, 25 January 2023.

IV. RULE FOR EVALUATION OF EVIDENCE

The evaluation of evidence permeates all stages of criminal proceedings.[33] According to the principle of direct and oral examination of evidence, only evidence that has been directly and orally examined by the parties during trial is admissible.[34] This same guarantee is enshrined in Article 6 of the ECHR, which stipulates that, as a rule, any evidence against the accused must be presented and examined in his/her presence or in the presence of the defense counsel (with some exceptions).[35]

In addition to the general principle of direct and oral examination, all evidence presented by the parties is assessed according to the same mandatory standard; namely, the following three criteria are assessed collectively: relevance of evidence towards to criminal case, its reliability (credibility), and admissibility (legality).[36] The principle of free evaluation of evidence applies in criminal proceedings, according to which no piece of evidence has a predetermined weight, and the significance assigned to it by one subject involved in the process is not binding for the other one. Key criteria guiding the court's evaluation of individual pieces of evidence include addressing the following questions: whether the evidence is related to the subject of proof in the case; whether the evidence accurately reflects the facts essential to the case; the credibility of the source from which the evidence was obtained; overall relevance and reliability of the evidence.[37]

It is important to note that evidentiary law does not establish a rigid hierarchy of evidence or predetermined criteria for defining such a hierarchy. The weight of evidence increases depending on how essential or significant the fact it addresses is to the subject of proof and how accurately and convincingly it affirms or denies it.[38] A clear example of this can be found in the judgment of the ECtHR on the case *Merabishvili v. Georgia*, where the Court deemed the applicant's account of his alleged removal from prison credible. This conclusion was based on the applicant's ability to recall the sequence of events, the timing, the individuals involved, and distinguishing details associated with his late-night removal from prison […].[39]

[33] Judgment of the Constitutional Court of Georgia on case N1/1/650,699 "Citizens of Georgia Nadia Khurtsidze and Dimitri Lomize v. the Parliament of Georgia", 27 January 2017. Paragraph II-41.

[34] Article 14, Criminal Procedure Code of Georgia, 9 October 2009. Official Gazette, 31, 03.11.2009.

[35] Council of Europe, Guide on Article 6 of the European Convention on Human Rights, Right to a Fair Trial (criminal limb) (2022) 94.

[36] Article 82, paragraph 1, Criminal Procedure Code of Georgia, 9 October 2009. Official Gazette, 31, 03.11.2009.

[37] Ruling of the Criminal Chamber of the Supreme Court of Georgia on case N626ap.-17, 29 March 2018. Paragraph 3.

[38] Group of authors, Commentary on the Criminal Procedure Code of Georgia, 1 October 2015 (American Bar Association 2015) 288, 295 (in Georgian).

[39] Judgment of the European Court of Human Rights N72508/13 "Merabishvili v. Georgia", 14 June 2016. Paragraph 104.

Consistent and convincing recounting of events by a witness is also actively used as a criterion for assessing the reliability of testimony in the practice of the Supreme Court of Georgia.[40] Thus, the evidentiary strength of evidence varies depending on the factual circumstances of each individual criminal case. As for the authority evaluating evidence, the responsibility of its full assessment rests solely with the court.[41] In addition, a distinction must be drawn between the judge's criteria for evaluating evidence during the pre-trial and substantive stages of case hearings. During the pre-trial stage, the judge's evaluation is limited to determining the admissibility of evidence, assessed superficially and from a formal perspective.[42] In contrast, during the substantive hearing, the evidence undergoes comprehensive examination.[43] As a general rule, the judge presiding over the substantive hearing is not authorized to rule on the admissibility of evidence, as this falls under the jurisdiction of the pre-trial judge. However, this does not mean that the substantive judge is bound by the pre-trial judge's decision; instead, he/she assesses all evidence during the deliberation process, and only after this comprehensive review issues a procedural decision; determining, while doing so, which evidence to accept and which to reject.[44] In all cases, the evaluation of the credibility of evidence is the responsibility of the court reviewing the criminal case, based on a full and comprehensive examination of the circumstances.[45] The law entrusts the judge with a decisive role in the evaluation of evidence.

The European Convention on Human Rights (hereinafter – the ECHR) does not establish a specific rule for admissibility and evaluation of evidence. According to the practice of the European Court for Human Rights (hereinafter – the ECtHR), such matters primarily fall under the scope of regulation of national legislation.[46] The ECtHR's role in evaluating evidence is subsidiary to that of national courts, and within the scope of its jurisdiction, it does not assume the fact-finding functions of a trial court.[47] Thus, the ECtHR is not responsible for judging on the admissibility of concrete type of evidence, even if it was obtained unlawfully under national law, nor does it adjudicate on the guilt

[40] Ruling of the Criminal Chamber of the Supreme Court of Georgia on case N896ap-22, 16 December 2022. Paragraph 5.5; Ruling of the Criminal Chamber of the Supreme Court of Georgia on case N521ap-22, 19 October 2022. Paragraph 4.7.

[41] Group of authors, supra, note 38, 288.

[42] Gakhokidze, Mamniashvili and Gabisonia, supra note 21, 263.

[43] Ketevan Chomakhashvili et al., Evidence in Criminal Proceedings (Open Society Georgia Foundation 2016) 131 (in Georgian).

[44] Ruling of the Tbilisi Court of Appeals on case N1g/1614-16, 20 October 2016.

[45] Ruling of the Supreme Court of Georgia on case N468ap-22, 1 November 2022. Paragraph 20.

[46] Judgment of the European Court of Human Rights N19867/12 "Moreira Ferreira v. Portugal" (no. 2), [GC] 11 July 2017. Paragraph 83.

[47] Judgment of the European Court of Human Rights N27602/95 "Ülkü Ekinci v. Turkey", 16 July 2022. Paragraph 142; Judgment of the European Court of Human Rights N28883/95 "McKerr v. The United Kingdom", 4 April 2000.

or innocence of the applicant.[48] The central issue the ECtHR evaluates, in relation to the complaints filed under Article 6 of the Convention, is whether the proceedings were fair in general, and whether the rights of the defense were respected. When assessing the fairness of proceedings, the ECtHR considers several factors, including whether the applicant had the opportunity to challenge the authenticity of evidence and object to its use. The quality of the evidence, the circumstances of its collection, and whether these circumstances raise doubts about the authenticity and reliability of the evidence, are also examined.

According to the general standard established in case law, when evidence is sufficiently compelling and there is no significant risk of it being considered unreliable, presenting additional evidence is less necessary. The high public interest towards investigating and punishing specific crimes is also taken into account, when assessing the fairness of proceedings. Namely, the public interest must be balanced with the private interest, necessitating that evidence against the accused is obtained lawfully. [49]

An example of this is the so-called Rostomashvili Group cases, in which the applicants' primary complaint concerned their conviction based on "planted" evidence (in some cases, drugs or firearms), alleging a violation of Article 6 of the Convention.[50] In these cases, the ECtHR applied the principles established by its case law and assessed not the admissibility of the contested evidence in isolation but the overall fairness of the proceedings. Accordingly, when an applicant brings a claim before the ECtHR alleging a violation of the right to a fair trial, the Court examines the overall fairness of the proceedings based on the aforementioned criteria, rather than focusing solely on the admissibility of specific piece of evidence.

A second issue arises when the ECtHR evaluates the evidence to determine the validity of a complaint. Specifically, when submitting a complaint to the ECtHR, the applicant must attach the documents (evidence) relevant to proving a violation of the Convention,

[48] Judgment of the European Court of Human Rights N7215/10 "Prade v. Germany", 3 March 2016. Paragraph 33.

[49] Judgment of the European Court of Human Rights N4378/02 "Bykov v. Russia" [GC], 10 March 2009. Paragraph 90; Judgment of the European Court of Human Rights N44787/98 "P.G. and J.H. v. the United Kingdom", 25 September 2001. Paragraph 76; Judgment of the European Court of Human Rights N5935/02 "Heglas v. the Czech Republic", 1 March 2007. Paragraphs 89-92.

[50] Judgment of the European Court of Human Rights N21074/09 "Bakradze v. Georgia", 10 December 2020; Judgment of the European Court of Human Rights N6739/11 "Bokhonko v. Georgia", 22 January 2021; Judgment of the European Court of Human Rights N57255/10 "Kalandia v. Georgia", 22 April 2021; Judgment of the European Court of Human Rights N36416/06 "Kobiashvili v. Georgia", 14 June 2019; Judgment of the European Court of Human Rights N30364/09 "Megrelishvili v. Georgia", 7 May 2020; Judgment of the European Court of Human Rights N43854/12 "Shubitidze v. Georgia", 17 June 2021; Judgment of the European Court of Human Rights N41674/10 "Tlashadze and Kakashvili v. Georgia", 25 March 2021; Judgment of the European Court of Human Rights N42371/08 "Tortladze v. Georgia", 18 June 2021.

such as protocols, witness statements, medical records, etc.[51] In other words, the applicant must demonstrate to the ECtHR that his/her rights, guaranteed by the Convention, have indeed been violated. The types of evidence required vary depending on the nature of the complaint. In other words, the principle of *affirmanti incumbit probatio* (the burden of proof lies with the claimant) is not absolute. In exceptional cases, for example, when an individual is under the control of the police or similar state authorities and the issue entirely or partially falls within the exclusive competence of the state, the burden of proof lies with the state. The state must provide a satisfactory and convincing explanation, supported by adequate evidence, to counter the version of events presented by the victim.[52]

As a general rule, the ECtHR requires that claims submitted before it be substantiated with sufficient evidence. When assessing this evidence, the Court applies the "beyond reasonable doubt" standard. However, it emphasizes that such proof may derive from sufficiently strong, clear, and consistent conclusions or similar compelling presumptions.[53] The ECtHR explicitly notes that this standard is not equivalent to that used in national legal systems, and the Court's aim has never been to replicate the national standard applied by domestic legal systems.[54]

The ECtHR's case law contains numerous instances where the Court has not found a violation of a specific article of the Convention due to insufficient evidence. For example, in the recent judgment in *Machalikashvili and Others v. Georgia*, the ECtHR judged that the evidence presented in the case was insufficient to establish a violation of the substantive aspect of Article 2 (right to life) of the Convention. For the same reason (the lack of sufficient evidence), the Court declared the complaint under the substantive aspect of Article 3 inadmissible for examination on the merits.[55]

The standards established by national legislation and the ECtHR practice confirm that the probative value/weight of evidence depends on how essential and critical the fact it addresses is to the case, and how convincingly it affirms or denies that fact. When applying this reasoning to direct and indirect evidence, their definitions indicate that direct evidence, by its nature, relates directly to the subject of proof and its constituent

[51] European Court for Human Rights, Notes for filling in the application form (2022) 12 <https://echr.coe.int/Documents/Application_Notes_KAT.pdf> (in Georgian) [last accessed on 15 April 2023].

[52] Judgment of the European Court of Human Rights N23380/09 "Bouyid v. Belgium" [GC], 28 September 2015. Paragraphs 83-84.

[53] Council on Europe, "Guide on Article 3 of the European Convention on Human Rights, Prohibition of torture" (2022) 12.

[54] Judgment of the European Court of Human Rights N39630/09 "El-Masri v. The Former Yugoslav Republic of Macedonia" [GC], 13 December 2012. Paragraph 151.

[55] Judgment of the European Court of Human Rights N32245/19 "Machalikashvili and Others v. Georgia", 19 January 2023. Paragraphs. 106, 113; Judgment of the European Court of Human Rights N15762/10 "Cadiroğlu v. Turkey", 3 September 2013. Paragraph 27.

elements. Consequently, as a general rule, direct evidence carries greater probative value. For example, in a murder case, the testimony of an eyewitness who saw the accused fire a weapon at the victim (direct evidence) carries greater weight than the discovery of a firearm at the accused's residence during a search (indirect evidence). However, neither direct nor indirect evidence holds predetermined weight. Cases vary, and contrary outcomes are not excluded by this analysis.[56] Nonetheless, it is undisputed that the more compelling and credible the evidence, the less need there is to corroborate it with additional evidence.

V. ESSENCE AND ROLE OF THE "BEYOND REASONABLE DOUBT" STANDARD

The "beyond reasonable doubt" standard represents the highest evidentiary threshold, playing a vital role in criminal proceedings. Its significance can be analyzed from various interconnected perspectives. As a procedural safeguard, its primary aim is to uphold the principles of the rule of law, including protecting individuals from state arbitrariness and preserving human dignity during legal processes.[57]

According to the Constitutional Court of Georgia, the "beyond reasonable doubt" standard ensures the protection of the universally recognized presumption of innocence (*in dubio pro reo*), significantly reduces the risk of unjust and unfounded convictions, helps prevent errors in the administration of justice, and fosters public trust in the judiciary by ruling out criminal liability based on doubt or speculation. The "beyond reasonable doubt" test serves as a safeguard for members of a free and democratic society who value personal liberty and actively advocate for the protection of human rights. For such individuals, it is essential to believe, and have legal assurance, that the state will not convict a person unless the highest degree of certainty regarding his/her guilt is achieved through a fair trial. Additionally, this evidentiary standard serves as a guiding criterion for courts in resolving evidentiary conflicts, properly weighing evidence, and ruling in favor of the accused whenever reasonable doubt arises.[58] Notably, since the court verdicts concern past events, reconstructing the situation or proving the defendant's guilt with absolute, mathematical certainty is not required.

The same approach is reflected in the practice of the Supreme Court of Georgia when assessing the reliability and relevance of witness testimony. The Court has clarified that demanding a witness to recall and recount every detail with complete accuracy,

[56] See opposite example, supra note 38, 295.

[57] Group of Authors, Commentary on the Constitution of Georgia, Chapter II, Citizenship of Georgia. Basic Human Rights and Freedoms (Petit Publishing 2013) 485 (in Georgian).

[58] See supra note 11, paragraphs II-41-45.

regardless of the passage of time, is unreasonable and impractical.[59] Given that reaching a guilty verdict necessitates the elimination of reasonable doubt, rather than all possible doubt, the critical question becomes: what qualifies as reasonable doubt?

A reasonable doubt is the one grounded in common sense, logic, reasoning, experience, or scientific research, which would arise in the mind of an ordinarily prudent person upon careful consideration of all evidence. Such doubt may stem from the presence, insufficiency, or content of the evidence. A doubt is not considered reasonable if it is based solely on speculation, probability, conjecture and/or intuition.[60] Evidence that meets the "beyond reasonable doubt" standard must be so convincing that a rational person can rely on it and act upon it. Thus, the court is obliged to dispel any reasonable doubt concerning essential matters of the case and, most importantly, regarding the defendant's guilt. Moreover, Article 31, paragraph 7 of the Constitution of Georgia explicitly and unequivocally establishes that only incontrovertible evidence can serve as the basis for convicting a person. "The constitutional standard of "incontrovertibility" not only prescribes inadmissibility of doubtful evidence (meaning exclusion of suspicion on falsification or loss of essential characteristic) but also requires that significant facts or circumstances be confirmed solely through reliable and duly verified sources."[61] The burden of proving the defendant's guilt beyond reasonable doubt lies with the prosecution, as mandated by both the Georgian Constitution and procedural legislation. This principle is further reinforced by the ECHR, and consistently upheld by the ECtHR's case law, according to which, no individual may be found guilty if any reasonable doubt remains regarding his/her guilt.[62]

In the United States, criminal convictions require the highest standard of proof - "beyond a reasonable doubt", which applies to each element of the alleged offense. This evidentiary test is directly linked to the Fifth Amendment of the U.S. Constitution, which guarantees, among other rights, the right to a fair trial, reinforces the privilege against self-incrimination, and compels the prosecution to present evidence that proves the defendant's guilt beyond a reasonable doubt.[63] It is important to emphasize that the focus here is made not on any doubt but specifically on "reasonable doubt'. The "beyond reasonable doubt" standard plays a crucial role in reinforcing public confidence

[59] Ruling of the Criminal Chamber of the Supreme Court of Georgia on case N626ap.-17, 29 March 2018. Paragraph 9.

[60] Guidelines on the Structure, Reasoning, and Stylistic Clarity of Criminal Rulings (The Supreme Court of Georgia publishing 2015) 51 (in Georgian).

[61] See supra note 11, paragraph II-7.

[62] Judgment of the European Court of Human Rights N10590/83 "Barbera, Messegue and Jabardo v. Spain", 6 December 1988. Paragraph 77; Judgment of the European Court of Human Rights N58442/00 "Lavents v. Latvia", 28 November 2002. Paragraph 125; Judgment of the European Court of Human Rights N35450/04 "Melich and Beck v. the Czech Republic", 24 July 2008. Paragraph 49.

[63] The Constitution of the United States of America, Fifth Amendment.

in the criminal justice system and safeguarding the presumption of innocence for the accused.[64] Additionally, while not all jurisdictions require judges to provide juries with a detailed explanation of the "beyond reasonable doubt" standard, where necessary, judges must clearly instruct juries on the concept of this evidentiary threshold. This explanation must ensure that jurors do not convict the defendant if the prosecution fails to present sufficient evidence.[65] The understanding of the "beyond reasonable doubt" standard in Georgian national legislation aligns closely with that of U.S. law, which is explained by the fact that Georgian criminal proceedings are based on the Anglo-American legal system.

1. SUFFICIENCY OF EVIDENCE REQUIRED FOR REACHING A GUILTY VERDICT

As noted above, criminal procedural law does not prescribe the exact number or type of evidence necessary for convicting a defendant. This lack of specification is justified by the principles of free evaluation of evidence, the adversarial model, and the avoidance of rigid formalistic proof requirements. In any case, the constitutional and legislative goal is clear - the conviction of a defendant must rest solely on clear, convincing, consistent, and "beyond reasonable doubt" evidence.

Evidence is deemed consistent when its individual components are mutually supportive, free from material contradictions, and do not generate reasonable doubt.[66] As for sufficiency, there is no quantitative threshold established – meaning that there is no predefined number of pieces of evidence required to convict a person. Sufficiency implies accumulation of enough evidence to establish all circumstances of the crime that will allow the court make a well-founded decision during the trial and deliberation process.

2. JUDICIAL PRACTICE IN THE GEORGIAN GENERAL COURTS

The judicial practice in the General Courts of Georgia reveals that national courts generally require the prosecution to present at least two pieces of direct evidence to convict a defendant. One illustrative example (along with many others) is the Judgment of the Tbilisi City Court Criminal Chamber (Case No. 1/493-13), in which the court, referencing Article 82 of the Criminal Procedure Code of Georgia, provided the following clarification: "A combination of corroborating evidence that eliminates

[64] In re Winship, 397 U.S. 358, 1970; Clark v. Arizona, 548 U.S. 735, 2006; Ring v. Arizona, 536 U.S. 584, 2002.

[65] Sandstorm v. Montana, 442 U.S. 510, 523, 1979; Arizona v. Fulminante, 499 U.S. 279, 291, 1991.

[66] See supra note 62, 52.

reasonable doubt requires at least two pieces of direct evidence that are fully consistent with one another and collectively establish all elements of the crime."[67] A similar interpretation was made by the Tbilisi City Court in Case No. 1/5400-14, where it stated: "The beyond reasonable doubt standard necessitates at least two pieces of direct evidence (each addressing separate elements of the crime), which would convince a neutral and reasonable person of the defendant's commission of the alleged act."[68] The same position was upheld by the Zugdidi District Court in its Judgment of February 8, 2022. This court required, in line with the high standard of proof, the presence of at least two pieces of direct evidence to convict a person. After being appealed at both the appellate and cassation levels, the judgment was upheld, indicating that higher courts agreed with the reasoning of the trial court. Specifically, the Criminal Chamber of the Supreme Court of Georgia held that a single piece of direct evidence presented by the prosecution was insufficient to secure a conviction, thereby affirming the acquittal of the defendant.[69] This case was not an isolated one, as the Supreme Court has consistently required at least two pieces of direct evidence to secure a guilty verdict. In cases where a single piece of direct evidence was presented, the Supreme Court did not consider it sufficient for conviction.[70]

Although the Supreme Court does not explicitly classify evidence as direct or indirect, the reasoning in certain case(s) implies such a distinction. For example, in Case No. 784ap-21, involving domestic violence, the Court of Cassation noted that the case lacked at least two pieces of direct evidence to confirm that the victim did indeed experience physical pain.[71] Hence, the court did not consider as direct evidence either of the following: information provided to the investigation by the ambulance doctor; a restraining order issued against the defendant; and the record of the restraining order; and so affirmed the acquittal.[72] At first glance, the Supreme Court requires at least two pieces of direct evidence for each element of the alleged offense to secure a conviction, that suggests that not only is a combination of pieces of indirect evidence insufficient, but even a single piece of direct evidence fails to meet the standard.

[67] Ruling of the Criminal Chamber of Tbilisi City Court on case N1/493-13, 1 August 2013.

[68] Ruling of the Criminal Chamber of Tbilisi City Court on case N1/5400-14, 2 March 2015.

[69] Ruling of the Criminal Chamber of the Supreme Court of Georgia on case N599ap-22, 29 September 2022; Ruling of the Criminal Chamber of the Supreme Court of Georgia on case N1199ap-22, 18 January 2023.

[70] Ruling of the Criminal Chamber of the Supreme Court of Georgia on case N251ap-16, 26 July 2016; Ruling of the Criminal Chamber of the Supreme Court of Georgia on case N475ap-18, 17 January 2019.

[71] The experience of physical pain that did not result in an outcome provided for by Articles 117, 118 and 120 of the Code constitutes 'an unlawful consequence', which is one of the elements of the objective composition of the offense of domestic violence stipulated by Article 126[1] of the Criminal Code of Georgia. Mzia Lekveishvili, Gocha Mamulashvili and Nona Todua, Private Part of Criminal Law (Book I) (7th edition, Meridiani Publishing 2019) 170 (in Georgian).

[72] Ruling of the Criminal Chamber of the Supreme Court of Georgia on case N784ap-21, 3 December 2021; Ruling of the Criminal Chamber of the Supreme Court of Georgia on case N47ap-23, 23 March 2023.

However, more recent rulings show the Supreme Court moving away from the rigid two-direct-evidence standard, particularly in the cases of domestic violence. In Case No. 784ap-21, the court explicitly stated that the applicable evidentiary standard for conviction does not vary based on the category of crime. Yet, in Case No. 1323ap-22, the court aligned its interpretation of the "beyond reasonable doubt" standard with that of the ECtHR[73], and due to the absence of the victim's testimony (direct evidence) and referring the indirect evidence available, overturned the acquittal issued by the appellate court, replacing it with guilty verdict.[74]

The cases involving domestic violence are not the only instances where the Supreme Court did not mandate the presence of at least two pieces of direct evidence to reach a guilty verdict. In ruling No. 541ap-22, the Court of Cassation stated: "[...] The applicable legislation does not specify the type or number of evidences required for issuing a guilty verdict. Moreover, it does not mandate that a conviction must be based solely on direct incriminating evidence [...]".[75] In this above-mentioned case, the subject of proof - the defendant's commission of robbery by threatening to use violence dangerous to life and health, and demanding the transfer of money (with the intent of unlawful appropriation of another person's movable property) - was confirmed by a single piece of direct evidence: the victim's testimony. Other evidence, such as witness statements and surveillance footage from the perimeter of the crime scene corroborated only peripheral facts, including the defendant's presence at the scene and a physical argument between the victim and the defendant. The court stated that the prosecution's inability to obtain additional evidence was hindered by the defendant's subsequent actions. Ultimately, the court issued a guilty verdict based on the combination of one direct and several indirect pieces of evidence. A similar interpretation was provided in Ruling No. 951ap-21, where the Supreme Court dismissed the defense's argument that a final verdict must rely solely on direct evidence, therefore regarding a combination of direct and indirect evidence as sufficient to establish guilt.[76]

[73] The European Court of Human Rights applies the "beyond reasonable doubt" standard in the assessment of evidence and argues that this standard must arise from sufficiently strong, clear and consistent inference or presumption of similar incontrovertible fact. Judgment of the European Court of Human Rights N27602/95 "Ülkü Ekinci v. Turkey", 16 July 2002. Paragraph 142; Judgment of the European Court of Human Rights N19634/07 "Dvalishvili v. Georgia", 18 March 2013. Paragraph 18.

[74] Ruling of the Criminal Chamber of the Supreme Court of Georgia on case N1323ap-22, 28 February 2023.

[75] Ruling of the Criminal Chamber of the Supreme Court of Georgia on case N541ap-22, 9 August 2022. Paragraph 20.

[76] Ruling of the Criminal Chamber of the Supreme Court of Georgia on case N951ap-21, 18 May 2022. Paragraphs 27-28.

VI. IDENTIFYING PROBLEMS AND FINDING SOLUTIONS

Imposing criminal liability in accordance with appropriate standards is intrinsically linked to the main principle of the state based on the rule of law, with its essential components - presumption of innocence of an individual and his right to a fair trial. In its turn, the right to a fair trial encompasses multiple procedural guarantees aimed at ensuring lawful and just judgement made on the case.[77] The presumption of innocence applies throughout the entirety of legal proceedings. It serves as a guiding principle in criminal justice, requiring that all individuals be treated as innocent until proven guilty by a court of law through a proper legal process.[78] The Constitution of Georgia and the Criminal Procedure Code establish that the appropriate evidentiary standard for convicting a defendant is a proof beyond reasonable doubt, grounded in incontrovertible evidence. While the nature and purpose of these guarantees have been addressed in previous chapters, the focus now shifts to practical challenges associated with their implementation.

The practice of general courts of Georgia, which consistently required at least two pieces of direct evidence to convict a person, raises several concerns. Firstly, it must be reiterated that the sufficiency of evidence is not measured quantitatively. This is justified, as it is impractical to demand minimum two direct pieces of evidence in all criminal cases; making impossible to account for the unique circumstances and nuances of each individual case. Moreover, such a standard could undermine the principles of adversarial proceedings and equality of arms; since knowing that presenting two direct pieces of evidence by the prosecution could *a priori* lead to a conviction, the legal process risks becoming purely formal, thereby eroding the defense's ability to effectively exercise its rights. Consequently, limiting the evidentiary threshold for convictions to a specific number of evidences contradicts the principles of applicable criminal procedure.

The role of the Georgian Court in consolidating this practice is particularly important, as it serves the highest and final instance Court of Cassation administering justice nationwide; while the legal assessment (interpretation of the legal norm) provided by the Grand Chamber of the Supreme Court are binding for all lower-instance courts.[79] This highlights the importance of the Supreme Court developing a uniform practice regarding the evidentiary standard required for convictions, to ensure that it is properly

[77] Dissenting Opinion of Eva Gotsiridze, Justice of the Constitutional Court of Georgia on the plenum record N3/11/1620 of November 4, 2022 on case "Lasha Janashia and Paata Danelia v. the Parliament of Georgia". Paragraph 5.

[78] Judgement of the Constitutional Court of Georgia on case N3/2/416 "Public Defender of Georgia v. the Parliament of Georgia", 11 July 2011. Paragraph II-62.

[79] Articles 14 and 17, Organic Law of Georgia on General Courts, 4 December 2009. Official Gazette, 41, 8.12.2009.

understood and adequately enforced.[80] Commonly, "the general courts, within their competence, reach the final judgements concerning the normative content of the law, its practical application, and enforcement. Accordingly, the judicial interpretation given by the general courts is very important for determining the real meaning of the law."[81] And yet, the practice of the Supreme Court of Georgia is marked with obvious inconsistencies regarding the issues of higher significance, being directly associated with legal standing of a person, determining his/her procedural status and the question of guilt or innocence. The analysis of a number of court judgments given above clearly shows that in one case the Supreme Court issued and/or upheld the acquittal verdict due to absence of at least two pieces of direct evidence; while in another instance, it withdrew from this standard, stating that the law does not mandate convictions based solely on direct evidence. Notably, these contradictory approaches are reflected in the ruling(s) issued by the court in the same year.

These inconsistencies revealed in the practice of the Supreme Court is problematic for several reasons. Firstly, the Supreme Court interprets the "beyond reasonable doubt" standard similarly to the ECtHR. However, the ECtHR explicitly states that, on the one hand, this standard is applied when evaluating evidence presented before the Court, and on the other hand, it has the independent, convention-based meaning, which should not be equated with the standard existing in the domestic legal systems of Convention signatory countries, including Georgia. In other words, a direct transposition of the ECtHR's "beyond reasonable doubt" standard into the national law is unjustified, as evidenced by the ECtHR's own rulings.

Furthermore, the Supreme Court's position remains ambiguous regarding what exactly is deemed admissible. By stating: "The applicable legislation […] does not mandate that conviction to be based solely on direct evidence," the Court leaves open the question of whether a single piece of direct evidence combined with indirect evidence suffice, or whether a conviction can rest entirely on indirect evidence alone. While the legislature does not explicitly mandate that a conviction must rest on direct evidence, indirect evidence or both combined, this should not either way be interpreted as validating convictions based solely on indirect evidence in all cases. Drawing a parallel to Article 76 of the Criminal Procedure Code of Georgia, prior to the Constitutional Court ruling of 2015, it can be concluded that this provision did not provide for any guidance and/or prohibition of using indirect evidence for issuing a guilty verdict. The procedural law merely outlined (and continuous to do so at present) the prerequisites for admissibility and consideration of such evidence during the trial, which means that according to that

[80] Judgement of the Constitutional Court of Georgia on case N2/7/779 "Davit Malania v. the Parliament of Georgia", 19 October 2018. Paragraph II-44.

[81] Judgement of the Constitutional Court of Georgia on case N1/2/552 "Liberty Bank v. the Parliament of Georgia", 4 March 2015. Paragraph II-16.

version of the law, if indirect evidence met the criteria set by Article 76, paragraphs 2 and 3 of the Criminal Procedure Code and was deemed admissible during the substantive hearing phase, it could serve as the grounds for a guilty verdict.

These cases can be found in the practice of the general courts. For instance, the Supreme Court of Georgia overrode a lower court's conviction and replaced it with an acquittal precisely because the original conviction was based solely on hearsay testimony from a witness, with no other direct evidence corroborating the defendant's involvement in the alleged crime (stabbing).[82]

It is important to recognize that in certain cases, indirect testimony can confirm the facts relevant to the case and by this, have a meaning of a direct evidence. The Constitutional Court of Georgia does not reject this argument, noting that the indirect testimony, as a type of evidence, may directly indicate the defendant's commission of the crime or serve as "supporting" evidence confirming peripheral or intermediate facts. For example, during a trial, a witness may testify before the judge that the victim came to him/her on the day of the incident and described how his/her spouse had slapped him/her repeatedly in the face. In this scenario, the witness provides hearsay testimony based on the victim's account; however, since it directly pertains to the subject of proof (the composition of domestic violence secured under Article 126[1] of the Criminal Code of Georgia) it serves as a direct evidence by its nature. Despite this, the Constitutional Court ruled that hearsay testimony, even when corroborated by other evidence, cannot constitutionally serve as the basis for a conviction. The court's rationale centered on the inherent nature of indirect (hearsay) testimony, its limited reliability, and its inconsistency with the constitutional principle of incontrovertibility.

A certain form of indirect evidence is a testimony of a police officer, based on the information provided by an informant.[83] The Constitutional Court clarified that the use of indirect testimony to issue a guilty verdict "may be permissible only in exceptional cases, under clearly defined legal provisions and with adequate constitutional safeguards, and not by the general rule outlined in the applicable Criminal Procedure Code."[84] Whereas the Criminal Procedure Code has not been amended regarding this matter, the use of hearsay testimony of a witness to secure a conviction remains inadmissible, regardless of whether this testimony is considered direct or indirect evidence.

Another critical factor to consider is that judges evaluate evidence based on their inner conviction and the legal requirements established by legislation. This means that the assessment of evidence, as well as its (in)admissibility, partially depends on the

[82] Ruling of the Criminal Chamber of the Supreme Court of Georgia on case N14ap-15, 30 June 2015.

[83] Judgment of the Constitutional Court of Georgia on case N2/2/1276 "Giorgi Keburia v. the Parliament of Georgia", 25 December 2020. Paragraph II-44.

[84] See supra note 11, paragraph II-52.

subjective judgment of the judge. Although judges are expected to act in good faith, impartially, and based on their internal belief, this alone cannot provide sufficient safeguards against errors or potential abuse of authority.[85] For instance, Article 82 of the Criminal Procedure Code outlines three criteria for evaluating evidence, but it is the judge who determines whether the evidence meets these criteria. Judges also classify evidence as direct or indirect and assess its sufficiency. To minimize the risk of a defendant's legal standing being influenced by the personal views of individual judges, the establishment of general courts' uniform judicial practice regarding the totality of evidence is essential.

While we agree with the Supreme Court of Georgia that defining the sufficiency of evidence by a quantitative measure is unjustified, the significance of direct evidence in criminal proceedings must also not be overlooked. According to guiding principles, direct evidence should form the primary foundation for the trial court's decision, and the focus should remain on such evidence.[86] Based on the principle of free evaluation of evidence, direct evidence does not carry predetermined weight and it must be assessed with the same (if not greater) scrutiny as other evidence in the case. However, basing a conviction solely on indirect evidence may, in most cases, leave lingering doubts about the defendant's innocence in the eyes of the public, since the latter does not directly relate to the subject of proof but corroborates peripheral events instead.

In any case, it is imperative for general courts to develop a uniform judicial practice that would clearly define the concept of the totality of evidence required by the "beyond reasonable doubt" standard. This should prevent its divergent interpretations by the court as on the other side of the scale lie the fundamental human rights.

VII. CONCLUSION

The issues addressed in this article are highly intricate and demand careful consideration by the general courts of Georgia. To safeguard the universally recognized right to a fair trial along with its procedural guarantees - most notably, the presumption of innocence, enshrined in the Constitution of Georgia and international legal instruments - it is essential to imperative to establish a coherent and consistent judicial approach. Such an approach would aim to provide a firm guarantee of the constitutional-legal principle that convictions must be based solely on incontrovertible evidence. Once again, this does not suggest the need for a rigid formula to secure a guilty verdict in every criminal case but rather, underscores the importance of determining whether a conviction based exclusively on indirect evidence is legally and procedurally acceptable, and if so, defining the safeguards to balance the risks inherent in such cases.

[85] See supra note 11, paragraph II-11.
[86] See supra note 62, 52.

OVERVIEW OF JUDGMENTS OF THE CONSTITUTIONAL COURT OF GEORGIA

ABSTRACT

The Journal of Constitutional Law continues to provide readers with an overview of the recent case law of the Constitutional Court of Georgia. For the current issue, four landmark judgments of the Constitutional Court have been selected for publication. The editorial board of the journal hopes that this overview of the Court's practice will enhance the level of legal debates concerning the Court's activities.

I. "SAMSON TAMARIANI, MALKHAZ MACHALIKASHVILI, AND MERAB MIKELADZE V. THE PARLIAMENT OF GEORGIA"

On July 27, 2023, the First Board of the Constitutional Court of Georgia issued a judgment in the case *Samson Tamariani, Malkhaz Machalikashvili, and Merab Mikeladze v. The Parliament of Georgia* and upheld the constitutional complaints N1355 and N1389.[1]

In the case under review, the disputed provisions of the Criminal Procedure Code of Georgia did not allow the victim to appeal the judgment of a superior prosecutor to the court. This included, on the one hand, a refusal to provide the victim with information about the progress of the investigation, citing investigative interests, and on the other hand, the prosecutor's decision to terminate the investigation and/or criminal prosecution, and/or a refusal to initiate criminal prosecution. This applied unless it was a particularly serious crime or a crime, which fell within the jurisdiction of the State Inspector's Service.

According to the complainant, the victim should be involved in the investigative process from the initial stage as having information about the progress of the investigation enables them to monitor the prosecutor's decisions from the outset and protect their interests from potential arbitrariness. The complainants argued that, based on the disputed provision, the victim was deprived of the opportunity to challenge the superior prosecutor's refusal to provide information before a neutral body, which violated the right to a fair trial guaranteed by Article 31, paragraph 1 of the Constitution of Georgia.

[1] Judgment of the Constitutional Court of Georgia on case N1/5/1355, 1389 "Samson Tamariani, Malkhaz Machalikashvili, and Merab Mikeladze v. the Parliament of Georgia", 27 July 2023.

As for the provisions that did not allow for the possibility of appealing a superior prosecutor's decision to refuse to initiate criminal prosecution or to terminate the investigation and/or criminal prosecution in cases classified as less serious or serious crimes, the complainants argued that the disputed provisions, combined with restriction of the right of access to a court, did also unjustifiably differentiate victims based on the category of the crime – violating the right to equality before the law enshrined in Article 11, paragraph 1 of the Constitution of Georgia. According to the complainants, the absence of a mechanism for judicial oversight in cases of serious or less serious crimes increased the risks of abuse of authority by the prosecutor. Under the existing legal framework, the prosecutor was allowed to arbitrarily qualify actions under different criminal categories.

According to the respondent, the victim's need to access the materials of the criminal case arises solely for general awareness and involvement, given their limited role in the criminal process and restricted enjoyment of the right to a fair trial. At the same time, the prosecutor's refusal to disclose information is not a conclusive act but an interim decision that can be reviewed by a superior prosecutor. Furthermore, the respondent explained that prior to the pretrial hearing, the victim is provided with all materials of the criminal case, and there isn't any exception to this rule. Consequently, the respondent argued that the temporary non-disclosure of information based on the disputed provision did not restrict the rights of the victim.

In discussing the absence of the possibility to appeal a prosecutor's decision not to initiate or to terminate criminal prosecution and/or an ongoing investigation in cases of crime classified as less serious or serious, the respondent argued that victims do not have an elevated interest in challenging such decisions. This is evidenced by the statistically very few cases where victims have sought to protect their rights in court in cases of particularly serious crimes. Additionally, the respondent pointed out that the law explicitly defines the specific grounds for refusing to initiate or for terminating criminal prosecution and investigation, which significantly reduces the risk of abuse of discretionary authority by the prosecutor. Consequently, the need to mitigate such risks through judicial appeal is minimized. Furthermore, allowing appeals for all categories of crimes in general courts would lead to the initiation of groundless complaints, significantly overloading the judicial system and threatening the legitimate goal of timely and effective justice.

The Constitutional Court first noted that, on account of allowing refusal to provide the victim with information about the progress of the investigation without judicial oversight, and prohibiting the appeal of a superior prosecutor's decision to terminate the investigation and/or criminal prosecution or to refuse to initiate criminal prosecution in relation to specific crimes, the disputed provisions restricted the victim's right of access to the court in the light of their legitimate interest in protection, and thus

required a relevant legal constitutional justification on the grounds of the principle of proportionality.

The Constitutional Court noted that the legitimate aim of the disputed provisions was to ensure procedural efficiency and to avoid the artificial overburdening of the courts, which, in turn, facilitated the provision of timely and effective justice. At the same time, the Court explained that prohibiting victims from appealing certain decisions of a superior prosecutor to the court constituted an appropriate and necessary means of achieving the stated legitimate aim.

At the stage of examining narrow proportionality, and as a result of balancing conflicting interests, the Constitutional Court determined that the disputed provisions, by prohibiting the right to appeal the decisions of a superior prosecutor in court, violated the fair balance between the protection of private and public interests. Specifically, in both cases the victim had an elevated interest in appealing the prosecutor's decision to the court, which would outweigh the interest in preventing the overburdening of the judiciary. The Constitutional Court explained that the right to appeal prosecutor decisions, having a significant impact on the victim's interests, serves, in addition to protecting the victim's rights, to prevent possible omissions or arbitrariness by relevant state authorities and correct such omissions made; while, on the other hand, contributes to increasing public trust in these state institutions.

Accordingly, the Constitutional Court concluded that the disputed provisions violated the requirements of Article 31, paragraph 1 of the Constitution of Georgia.

In addition, the Constitutional Court found a violation of the principle of equality of arms in relation to the disputed provisions that prohibited victims, in cases of less serious or serious crimes, from appealing the decision of a superior prosecutor regarding the termination of an investigation and/or criminal prosecution or the refusal to initiate criminal prosecution.

The Constitutional Court noted that the regulatory framework established by the disputed provisions resulted in differential treatment of substantially equal subjects based on the category of the crime. This was unjustified since a person's interest in exercising judicial control over a prosecutor's decision is equally significant for victims of crimes of any severity. Furthermore, the Court reasoned that the differential treatment was of high intensity, as the disputed provisions significantly excluded substantially equal individuals from the right of access to the court.

The Constitutional Court explained that, although the goal of the differentiation - preventing overburdening of the judiciary - served an important public good, the interests of the differentiated individuals to protect their rights through judicial oversight outweighed this legitimate aim. Therefore, the disputed provisions, in the view of the Constitutional Court, also violated the requirements established by Article 11, paragraph 1 of the Constitution of Georgia.

II. "MERAB MURADASHVILI AND THE PUBLIC DEFENDER OF GEORGIA V. THE PARLIAMENT OF GEORGIA AND THE MINISTER OF INTERNAL AFFAIRS OF GEORGIA"

On June 1, 2023, the First Board of the Constitutional Court of Georgia issued a judgment in the case *Merab Muradashvili and the Public Defender of Georgia v. The Parliament of Georgia and the Minister of Internal Affairs of Georgia* (Constitutional Complaints N1591 and N1605).[2] The Constitutional Complaint N1591 challenged provisions that set the mandatory retirement age for firefighters-rescuers at 55 and established this age limit as grounds for their dismissal. The Constitutional Complaint N1605 contested regulations that set the mandatory retirement age for officers of the Main Division of Perimeter Security of the Penitentiary Department at 60. The complainants requested the disputed provisions be declared unconstitutional, arguing that they violated the right to equality before the law, guaranteed by Article 11, paragraph 1 of the Constitution of Georgia.

According to the complainant party, reaching the age established by the disputed provisions did not *a priori* imply a decline in an individual's abilities to the extent that they could no longer perform the functions assigned to firefighters-rescuers and/or officers of the Penitentiary Department's Perimeter Security Division. The complainant party argued that the blanket nature of the disputed provisions failed to take into account the nature of the functions assigned to specific categories of individuals, the specifics of the work to be performed, the individual physical and mental capacities of persons who had reached the legally defined age, etc. Furthermore, the complainant party emphasized that applicable legislation already provided for periodic assessment of firefighters-rescuers' level of preparedness; therefore, subjecting those officers who have reached the legally defined age to individual physical assessment would not result in additional unreasonable administrative costs. Based on all of the above, the complainant party argued that the disputed provisions violated the right to equality before the law.

The respondent stated that firefighters-rescuers and officers of the Penitentiary Department's Perimeter Security Division require a high level of physical fitness and health condition to fully perform assigned functions, which, in most cases, individuals aged 55 and 60 no longer possess. Nonetheless, the respondent acknowledged the Constitutional Complaint N1605 and stated that there should be a mechanism to extend the tenure of individuals in similar circumstances as the complainant. Furthermore, the respondent noted that the contested regulations aimed to ensure the effective and uninterrupted functioning of the Emergency Management Service, which, in turn, serves

[2] Judgment of the Constitutional Court of Georgia on case N1/3/1591, 1605 "Merab Muradashvili and the Public Defender of Georgia v. The Parliament of Georgia and the Minister of Internal Affairs of Georgia", 1 June 2023.

to protect public safety. The respondent also emphasized that the restrictions set by the disputed provisions were intended to uphold the principle of generational rotation. Additionally, the respondent argued that the restrictions for firefighters-rescuers were not of a blanket nature and that, upon reaching the statutorily defined age, the possibility of extending service tenure based on individual medical examinations was allowed under the law.

The Constitutional Court first evaluated the constitutionality of the mandatory retirement age for firefighters-rescuers. The Court determined that ensuring the effective and uninterrupted operation of the Emergency Management Service as well as upholding the principle of generational rotation are public goods, for which the legislature is authorized to establish differential treatment based on age concerning the right to hold public office. At the same time, based on an analysis of the relevant legislation, the Constitutional Court concluded that it is possible to assess the individual abilities required for fulfilling the functions assigned to firefighters-rescuer and to decide on their continued tenure based on such assessments. Consequently, the Constitutional Court did not consider the blanket prohibition established by the disputed regulation to be an effective means of achieving the legitimate goal of ensuring the smooth and effective functioning of the Emergency Management Service.

The Constitutional Court independently assessed the constitutionality of the disputed regulations in light of the legitimate goal of ensuring the principle of generational rotation. The Court stated that in circumstances where the number of staff positions in public service is predetermined and fixed, the dismissal of individuals upon reaching the defined retirement age facilitates the creation of vacancies for the respective positions and provides opportunities for hiring new personnel. The Constitutional Court further clarified that the principle of fair distribution of positions among generations requires the dismissal of individuals from their positions upon reaching the prescribed retirement age without the need for any individual assessment. In this regard, the Court deemed such a measure both appropriate and necessary to achieve the goals of the principle of generational rotation. Furthermore, the Court held that the disputed provisions, in compliance with the principle of proportionality, effectively ensured the legitimate interest of fair distribution of job positions across generations. The Court emphasized that considering the functions assigned to the Emergency Management Service and its role in ensuring public safety, it is essential for this service to undergo regular staff rotation, which is most effectively achieved through the establishment of an age limit. Based on all of the above, the Constitutional Court rejected the Constitutional Complaint N1591.

Within the framework of the Constitutional Complaint N1605, the Constitutional Court assessed the constitutionality of the disputed provisions solely in relation to the legitimate aim of ensuring the effective and uninterrupted functioning of the penitentiary service.

The Constitutional Court stated that the full execution of the duties of the officer in the Main Division of Perimeter Security of the Penitentiary Department is significantly linked to the individual's physical fitness and health. At the same time, based on the respondent's arguments and an analysis of the relevant legislation, the Court concluded that it is possible to assess the abilities required to perform the functions assigned to these officers individually and to decide on their continued tenure based on such assessments. Consequently, the Constitutional Court upheld the Constitutional Complaint N1605 and declared the blanket prohibition established by the disputed regulation unconstitutional in relation to Article 11, paragraph 1 of the Constitution of Georgia.

III. ""LLC IKHTIOSI", ZAZA PATARIDZE, NIKOLOZ BERIASHVILI, SHALVA ONIANI, VAKHTANG KOBESHAVIDZE, AND MANANA KHARKHELI V. THE PARLIAMENT OF GEORGIA"

On April 11, 2023, the Second Board of the Constitutional Court of Georgia issued a judgment in the case "*LLC Ikhtiosi", Zaza Pataridze, Nikoloz Beriashvili, Shalva Oniani, Vakhtang Kobeshavidze, and Manana Kharkheli v. The Parliament of Georgia* (Constitutional Complaints N1421, N1448, and N1451)[3]. The case challenged provisions of the Civil Procedure Code of Georgia that, on the one hand, required judgments reached by the first-instance court on disputes arising from contracts to be enforced immediately if such enforcement was expressly stipulated in the contract. On the other hand, these provisions ruled out the possibility for the court to require the reversal of the execution of such judgments in case of annulment of the court judgment. Additionally, the court was granted the authority to deliberate the issue of immediate enforcement of a decision without an oral hearing if the matter was not discussed during the same session in which the judgment was rendered. The complainant party requested that these disputed provisions be declared unconstitutional in respect of Article 31, paragraph 1 of the Constitution of Georgia.

According to the complainant party, the disputed provision made the execution of procedural actions and the enforcement of the court judgment subject to the agreement of the parties. The complainants argued that the right to a fair trial includes the consideration of a case by all three judicial instances and the rendering of an enforceable judgment. Allowing the immediate enforcement of the first-instance court judgment (based on the parties' agreement) restricted the right to effectively appeal the latter, thereby violating the requirements of a fair trial. The complainants also referred to the fact that the disputed provision, in case of the immediate enforcement of the judgment,

[3] Judgment of the Constitutional Court of Georgia on case N2/3/1421,1448,1451 ""LLC Ikhtiosi", Zaza Pataridze, Nikoloz Beriashvili, Shalva Oniani, Vakhtang Kobeshavidze, and Manana Kharkheli v. The Parliament of Georgia", 11 April 2023.

did not take into account the interests of the respondent or other private parties, and as a result, deprived the judge of the ability to apply a proportionality assessment test. Furthermore, the complainant party stated that in disputes arising from contracts, the basis for turning a first-instance court judgment into an immediately enforceable one did not have a formal nature, therefore requiring further examination in each specific case. Hence, the complainants argued that reaching such judgments without an oral hearing also violated the right to a fair trial.

According to the respondent, the Parliament of Georgia, the parties' right to agree, in the framework of the contract, on the immediate enforcement of the judgment was empowering in nature. The respondent also stated that the purpose of the disputed provision was both to ensure the swift restoration of violated rights and the effective administration of justice, as well as to uphold the principles of private autonomy and party disposition. The respondent argued that the disputed provisions did not deprive the party of their right to the guarantees of a fair trial, as the Civil Procedure Code of Georgia provided the opportunity to appeal a judgment on immediate enforcement, as well as for to suspend, postpone, or annul such enforcement by the court of appeals. Furthermore, the respondent noted that a party against whom immediate enforcement was applied had the opportunity to seek compensation for damages or the reversal of resulting outcomes if the higher court issued a judgment in their favor.

Regarding the resolution of the issue without an oral hearing, the respondent stated that the disputed provision served the principle of procedural efficiency. Moreover, when deliberating on the issue, the court was not required to assess the factual circumstances. If necessary, however, the court of appeals was able to review the matter of immediate enforcement through an oral hearing.

The Constitutional Court clarified that the execution of court judgments is a direct requirement of the Constitution. Swift enforcement of court judgments ensures that justice is executed timely and effectively. Simultaneously, the Constitution guarantees the right to appeal judgments, the purpose of which is to annul the legally inconsistent judgments rather than postpone the legal effect of the legally compliant judgments. According to the Constitutional Court, the right to appeal ensures that a first-instance court judgment does not create irreversible consequences that cannot be rectified even by a judgment of the appellate court.

The Constitutional Court determined that the disputed provision created a genuine possibility of enforcing a first-instance court judgment before the appellate court had the opportunity to assess whether such enforcement had led to irreversible consequences. In certain cases, this undermined and/or significantly diminished the effectiveness of subsequent appellate review and decision-making. Hence, the Constitutional Court concluded that there was a risk of the appeal mechanism being reduced to a mere legislative formality, devoid of any real or tangible effect.

Regarding the immediate enforcement of judgment as a contractual term, the Constitutional Court explained that a party remains a subject of the right to a fair trial (as well as other rights), regardless of the decisions they make or the intentions they express. Furthermore, the Constitution of Georgia guarantees effective access to the judiciary. Under these circumstances, the effectiveness of the court hearing the case cannot depend on the agreement between two private parties. Consequently, the Constitutional Court concluded that any condition that restricts effective access to the courts (including appellate courts) can be assessed in relation to the right to a fair trial itself.

When discussing the legitimate aim of the disputed provision, the Constitutional Court noted that the timely restoration of the violated right within a short timeframe does indeed constitute a legitimate aim that may justify certain limitations on the right to a fair trial. In contrast, according to the Constitutional Court, despite the significance of the principle of private autonomy in civil legal relations, it cannot serve as a sufficient standalone basis for restricting the right to a fair trial.

When assessing the proportionality of the restriction, the Constitutional Court explained that the disputed provision established a blanket rule for the immediate enforcement of decisions. Specifically, the judge of the first-instance court was obligated to declare the judgment immediately enforceable, even when they believed that the harm to the respondent's interests resulting from such enforcement outweighed the protected interests of the plaintiff. The Court noted that the legislature had the opportunity to achieve a better balance between the benefits restricted by the disputed provision and the protected interests. This could have been done by granting the first-instance court the authority to make judgments based on a consideration of the conflicting interests.

At the same time, the Constitutional Court emphasized that granting such authority to the court would not be sufficient to ensure the effectiveness of the right to appeal. The Court explained that it is essential for the legislature to establish a legal system that guarantees the effective appeal of first-instance court judgments. To achieve this, the legislature must create mechanisms that provide the appellate court with effective oversight of the enforcement of first-instance court judgments in order to ensure the effectiveness of its own rulings. In this regard, the Constitutional Court noted that, to achieve a fair balance, it is important that the first-instance court's judgment not be enforced until the appellate court has assessed the impact of immediate enforcement on the effectiveness of its judgment and considered the application of interim measures.

According to the Constitutional Court's assessment, to ensure a balance between the interests of the parties, the legislature can establish a special procedure/timeframes within which a party, if desired, may submit a motion alongside their appeal to suspend the enforcement of a judgment or to implement other measures to prevent irreversible

consequences. In such cases, the first-instance court's judgments would become enforceable only after the appellate court has resolved the issue.

Based on the above, the Constitutional Court concluded that the disputed provision violated the right to a fair trial protected under Article 31, paragraph 1 of the Constitution of Georgia. In order to allow the Parliament of Georgia the opportunity to address the issue in compliance with the requirements of the Constitution, the Court postponed the invalidation of the disputed provision until October 1, 2023.

Regarding the resolution of the issue of immediate enforcement without an oral hearing, the Constitutional Court assessed whether the court reviewing the case examined factual circumstances and how significant the right or legal interest restricted by the disputed provision was. Based on an analysis of the matters that could arise during the consideration of such cases in general courts, the Court determined that resolving the issue under the disputed provision requires the thorough examination of factual circumstances in the case and, in some instances, the identification or evaluation of new factual elements. To ascertain objective truth, it is crucial to hear and reconcile the positions of the parties. Additionally, the Constitutional Court emphasized that the matter regulated by the disputed provision involves a particular legal interest of the party, as it ensures that no legal measures are imposed that would substantially harm their rights. Taking this into account, the Constitutional Court concluded that the individual's interest in having the issue of immediate enforcement addressed through an oral hearing significantly outweighs the interest in procedural efficiency and timely justice of the other party in civil proceedings.

The Constitutional Court further noted that, in certain cases, the party against whom the first-instance judgment is ruled to be immediately enforced may not have an interest in an oral hearing. Taking this into account, the Court clarified that discussions regarding when the necessity of conducting the issue through an oral hearing may be excluded would become relevant only if the court, in each specific case, examines the will of the party involved.

In addition, the Constitutional Court emphasized that a mechanism to balance the restriction of the plaintiff's rights cannot simply rely on the court's authority to hold a hearing to decide upon the immediate enforcement of a judgment. Regardless of the type or complexity of the legal relationship in question, the court must always have an adequate legal mechanism that allows for the clarification of the party's position and the assessment of the circumstances/evidence presented by them.

Based on all of the above, the Constitutional Court declared unconstitutional, in relation to Article 31, paragraph 1 of the Constitution of Georgia, the normative content of the disputed provision, which permits the issue of immediate enforcement, as provided for in Article 268, paragraph 11 of the same Code, to be considered and resolved without an oral hearing.

IV. "EKATERINE PIPIA V. THE PARLIAMENT OF GEORGIA AND THE MINISTER OF EDUCATION AND SCIENCE OF GEORGI"

On November 10, 2023, the Second Board of the Constitutional Court of Georgia issued a judgment in the case *Ekaterine Pipia v. The Parliament of Georgia and the Minister of Education and Science of Georgia* (Constitutional Complaint N1528)[4]. The case challenged provisions that excluded the recognition of higher education completed entirely through a distance-learning format abroad, except in cases where the use of the distance-learning format was necessitated by efforts to prevent the spread of a pandemic or to address its consequences.

The complainant argued that the quality of education is determined not by its format but by how well the specific educational program is tailored to the needs of the student. According to the complainant, while there may indeed be an interest in certain educational programs requiring in-person learning for specific components, the complete exclusion of recognizing education obtained through a distance-learning mode unjustifiably restricted the constitutional right to education and the freedom to choose its form.

According to the respondent's argument, the disputed regulation served the legitimate interest of controlling the quality of education, since recognizing education obtained through a distance-learning format abroad posed the risk that applicants could enroll in foreign higher education programs and subsequently transfer to Georgian educational institutions through the mobility mechanism, bypassing the unified national exams. Furthermore, in the context of distance learning, it was difficult to adequately monitor students' attendance and assess their knowledge at the exams. Additionally, the respondent emphasized that it was impossible to properly master the practical components of an educational program in a distance-learning format.

The Court explained that the right to education, as enshrined in the Constitution of Georgia, recognizes the possibility of obtaining education in various forms and excludes the state's authority to establish a completely uniform educational system. However, this does not preclude the state's authority to take appropriate measures to ensure the control over the quality of education.

When discussing the restriction arising from the disputed provisions, the Court noted that education obtained abroad produces legal effects only after it is recognized by the state. Specifically, in order to continue education at higher level or hold certain positions, the recognition of education obtained abroad by the state is mandatory. Consequently, since the disputed regulation excluded the recognition of education obtained through a distance-learning mode, it was evident that the right to education was being restricted.

[4] Judgment of the Constitutional Court of Georgia on case N2/7/1528 "Ekaterine Pipia v. The Parliament of Georgia and the Minister of Education and Science of Georgia", 10 November 2023.

Subsequently, the Constitutional Court assessed the compliance of the disputed provision with the requirements of the principle of proportionality. The Court considered the state's control over education quality as a general legitimate aim of the restriction. Regarding the specific risk of applicants avoiding the unified national exams, the Court pointed out that if the state's legitimate interest was to prevent such avoidance, this goal could be achieved through alternative measures, such as imposing restrictions on mobility from foreign distance-learning higher education programs. Thus, the complete exclusion of recognition for distance education obtained abroad was not deemed a necessary means to achieve the stated aim.

Regarding the monitoring of a student's attendance in lectures during distance learning, the Court noted that modern technologies allow for significant control over the attendance process. For instance, prohibiting the deactivation of a webcam during a lecture ensures that the student listens to the lecture with a probability comparable to that of an in-person learning process. Consequently, the Court did not find the disputed regulation to have a logical connection to the stated legitimate interest.

The Court deliberated on the mechanisms for supervising students during exams in distance-learning setting and noted that technological advancement provides significant possibilities in this regard as well. However, exams conducted according to the so-called closed book principle cannot be monitored in distance-learning conditions to the same extent as in-person exams. Nevertheless, the Court emphasized that certain higher education programs do not require the closed book exams at all, as there is no such necessity given the level and discipline of the specific educational program. Therefore, the disputed provisions, in this respect as well, did not constitute a necessary means for achieving the stated goal.

Regarding the impossibility of mastering the practical components of an educational program in a distance-learning format, the Court stated that, generally, the mastery of practical components is more effective in in-person learning conditions. This is due to the nature of practical components, which often require direct and immediate contact between the student and the course instructor and/or the relevant facilities. However, the degree of interest in mastering practical components varies significantly depending on the focus and level of the educational program. Some educational programs do not include mandatory practical components at all. Consequently, in such cases, the Court was also not convinced of the necessity of the existing restriction.

The Court also noted that if the state perceives a risk that certain educational institutions may fail to take the necessary measures to mitigate the challenges associated with distance learning, it has the authority to recognize only higher education obtained from accredited educational institutions in countries where the quality of education is not in doubt.

Taking all the above into consideration, the Constitutional Court concluded that the normative content of the disputed provisions, which excluded the recognition of higher education obtained entirely through a distance-learning format abroad, unjustifiably restricted the right to education and the freedom to choose its format, as protected under Article 27, paragraph 1 of the Constitution of Georgia.

Furthermore, the Constitutional Court indicated that the immediate invalidation of the disputed provisions upon the announcement of the Court's judgment would obligate the state to recognize higher education obtained entirely through distance learning abroad by any individual. This, in turn, could undermine the legitimate interest in maintaining quality control in education. Therefore, the Court deemed it appropriate to declare the disputed provisions invalid as of July 1, 2024, thereby allowing the Parliament of Georgia and the Minister of Education and Science of Georgia a reasonable period to regulate the matter in accordance with the requirements of the Constitution of Georgia.